IN THE SUPREME COURT OF FLORIDA

BLAINE ROSS,

Appellant,

v.

Case No. SC07-2368
L.T. No. 2004-CF-106

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR MANATEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

BILL MCCOLLUM
ATTORNEY GENERAL

CAROL M. DITTMAR
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Blaine Ross called 911 at about 1:20 pm on January 7, 2004, to report discovering the bodies of his parents, Richard and Kathleen Ross (37/2540; 39/2757). Ross had spent the night of January 6, 2004, at the home of his girlfriend, 16-year old Erin Dodds (39/2749-50). Ross was 21 years old, and lived at his parents' home but did not stay there often (38/2737; 41/3069). Erin and Ross were waiting outside in the driveway when law enforcement arrived in response to the 911 call (37/2542; 39/2757). Erin was crying and visibly upset, but Ross was unemotional (37/2544-45; 38/2736, 2742). Ross pointed to the house and said, "they're in there" (37/2545).

Richard and Kathleen were in the bed in a master bedroom (37/2551). There was an extraordinary amount of blood in the bedroom (37/2550; 38/2618). Drawers were pulled out of the dresser, and clothes and hats were on the floor; however, the clothes were still stacked and folded, leading officers to believe that the scene had been staged to look like a burglary (38/2633; 40/2948-50, 2994-95). Officers walked through the rest of the house, but did not observe anything remarkable (37/2549; 38/2613).

There were no signs of forced entry (38/2648). The front door was locked, but a sliding glass door from the kitchen out

to a lanai was open about a foot; the screen for this door was closed but unlocked (37/2578; 38/2596). There were two gates in the fence to go into the backyard; both were closed, one was locked and one was unlocked (37/2575, 2578).

In the garage, there were two baseball equipment bags, stacked one on top of the other (38/2599; 40/2955). The bat compartment in the top bag was unzipped and empty, but the bottom bag had a bat zipped inside the same compartment (38/2599-2600). There was an empty pack of Marlboro cigarettes and a disposable lighter on top of the top bag (40/2955). There was also a drinking cup from Checkers, with liquid in it, on the counter next to the door (40/2951, 2955).

Ross's fingerprints were found on the Checkers cup; on the cigarette lighter; and on the kitchen slider door, outside on the glass and inside, on the frame near the handle (38/2602, 2727-29; 40/2975-77).

The medical examiner testified that both victims died of blunt force trauma to the head (39/2829, 2838). Mr. Ross had been sleeping face down when he was stuck in the back of the head with an object such as a baseball bat (39/2817, 2849). He was struck at least two times, possibly more; either blow would have been fatal (39/2829, 2839). Mrs. Ross had also been asleep and moved little, if at all, with her injuries (39/2818, 2849).

She had been sleeping face up, and was struck at least four times, likely more, with the same type of weapon (39/2818, 2834, 2839). The injuries to both victims would have required a severe amount of force (39/2838). Both victims had ropes that had been placed around their necks after the head injuries had been inflicted (39/2814-17, 2819). A reasonable time frame for the deaths would be 3:00 am to 5:00 am on January 7 (39/2853).

Blood spatter analysis of the scene corroborated that Mr. Ross was struck a minimum of two times with a linear object such as a bat; that Mrs. Ross was struck a minimum of five times with the same type of weapon; that Mr. Ross did not move during the attack, but Mrs. Ross moved slightly; and that the ropes were placed around the victims' necks following the head injuries (40/3009-50).

About a week prior to the murders, Kathleen Ross had accused Ross of stealing her ATM card out of her purse (41/3074-76). Although he initially denied it, Ross later admitted that he had taken the card, and returned it to his mother (41/3076-77). The records from Kathleen's bank account demonstrate that between December 25, 2003, and January 6, 2004, there were ATM withdrawals made to the account totaling $1401.50 (40/3055-56). On January 6, 2004, Kathleen and Ross signed a contract, stating that Kathleen had loaned Ross $1400, which would be paid back as

soon as possible, and that Ross would not ask for any more money or for Kathleen's Sam's Club card (Ex.26A; 38/2726; 41/3078-79).

A few days before her murder, Kathleen Ross had taken a brown paper bag containing her jewelry and jewelry box and placed it in the attic at her mother's villa, located about five minutes away from the Ross home (38/2664-67). Kathleen's ATM and Sam's Club cards were usually kept in her wallet in her purse, which was missing from the scene (41/3072-74, 3080). A checkbook, a wallet, and a set of keys were discovered inside the pillowcase of the pillow Richard Ross was sleeping on at the time of his murder (38/2645).

Ross was unemployed, but had bragged to friends about having money prior to January 7 (41/3167). In Dec., 2003, Ross told Erin that he had gotten an inheritance when his godmother had died on Dec. 22, 2003, and left him $100,000 (39/2750). On Dec. 25, he showed her a bank receipt with an account balance of $107,000 (39/2751, 2788). Around January 7, he told a friend, Paul Hamilton, that his grandmother had died and left him $120,000 that he'd used to buy his parents' house (39/2914-15).

Ross knew that Kathleen Ross, who had recently retired, was scheduled to begin classes at Manatee Community College on January 7, 2004 (38/2740; 39/2754-55). Ross and Erin had planned to go to Cape Coral, Florida, on January 7, to see some

of Erin's friends and to purchase marijuana (39/2752, 2758). In anticipation of that trip, Erin had washed Ross's clothes the evening of January 6 (39/2753). When Erin went to bed about 10:30 or 11:00 pm on January 6, Ross did not go with her (39/2753). When she woke up around 9:30 or 10 am on January 7, Ross was in bed with her (39/2754). Erin's mom, Teri, had seen Erin and Ross in bed together when she got up about 6:30 or 6:45 am on January 7 (39/2862).

On January 7, Ross and Erin went to the GTE Federal Credit Union, where Kathleen Ross had a bank account (39/2753-54). Erin waited in the car while Ross tried to use the ATM machine,[1] but he did not get any money, and went inside to talk to a bank employee (39/2754). The bank officer, Barbara Curtis, testified that Ross came in on January 7, handed her an ATM card, and told her that it was for an account his mother had opened for him when he was younger (39/2926).[2] Ross told her his mother had changed the PIN number for the card several days earlier, but he did not know the new number (39/2926). Curtis looked up the

[1] Neither Erin nor Ross's sister, Kim, could recall Ross previously having his mother's ATM card with her permission (39/2799; 41/3085).

[2] Another bank official testified that Blaine Ross had had an account with both his parents on it at the same credit union, but that the account had been closed in November, 2002 (40/3053). Ross and his parents would all have had to provide notarized signatures in order to close the account (40/3054).

account and noted that Kathleen Ross was the only person authorized to use it, so she refused to provide the PIN number (39/2926-28). Ross was "persistent," and told her that his mother was out of town, he needed money, and needed to know the new PIN (39/2927-28). When she still refused to provide the information he wanted, Ross took the card and left (39/2928). The credit union is no more than five minutes from the Manatee Community College campus, and is fifteen to twenty minutes from the Sam's Club located on State Road 70 (39/2928-29).

After Erin and Ross left the credit union, they went back to Erin's house, where Ross tried to call his mother at home (39/2779). Erin heard Ross leave at least two messages at the Ross house, telling his mother she changed the PIN number and didn't tell him (39/2779). They went and got some food at Checkers, went by Sam's Club and got gas with a card Erin had never seen him use before, went by a Circle K where Ross tried again, unsuccessfully, to use the ATM card, and then went to the Ross home (39/2755-56, 2780). Ross opened the garage door and they went in the house; Erin went back to Ross's bedroom, where she didn't notice anything unusual, and Ross went toward his parents' room (39/2756). In a minute, Ross came back to Erin and said he thought his parents were dead (39/2757). Ross

grabbed a phone and they went outside and called the police (39/2757).

Manatee County Deputy Lillian Tuman asked Ross at the scene about his activities that day (38/2735-36). Ross told her that he and Erin were planning to go to Cape Coral; they had eaten at Checkers and then gone to the Ross home because there had been a problem with his bank account, and he needed to talk to his parents about it (38/2737). He told her that he lived at the house, but didn't stay there often (38/2737). They got there about 1:10 or 1:15 pm, and noticed that the exterior garage lights were on, and his father's car was in the driveway although his father usually left for work about 4:00 or 5:00 am (38/2738). He told her his parents were getting a divorce, but that they were still close (38/2738). He had used his garage door opener and had entered the house through the garage (38/2739). He thought it was odd that his mother's Jeep was in the garage, because she was supposed to start classes at Manatee Community College that day (38/2740). After finding his parents' bodies, he got Erin and a phone and went outside to call 911; the 911 operator told him that he needed to go back inside and check for a pulse, so he went in and felt his father's wrist, going back outside when he did not find a pulse (38/2740). He asked her if hair, fibers and fingerprints would

be collected, and wanted to make sure she knew that he stayed there sometimes (38/2740).

Manatee County Detective William Waldron arrived on the scene about 1:30 pm (41/3158-59). Ross wanted Waldron to tell the media to leave (41/3160). After talking to some neighbors, Waldron returned to where Ross was crouched in between the vehicles in the driveway (41/3160). Ross asked if they could go somewhere to get away from the media, and Waldron suggested that they go to his office at the sheriff's Criminal Investigative Division [CID] in Palmetto, where they could talk; Ross agreed (41/3160). On the way there, Waldron was making small talk, but not talking about the case (41/3162). Going over a bridge from Bradenton to Palmetto, Ross asked if Waldron was taking him to jail (41/3162). Waldron advised Ross where his office was located (41/3162). Waldron and Ross both smoked a cigarette before going upstairs to the CID (41/3162).

Waldron offered Ross a snack and showed him where to find the restroom (41/3162-63). They sat at a big table in a large conference room (41/3163). Waldron audiotaped the interview, which began at 2:49 pm and ended at 3:25 pm (41/3164, 3193). The tape was admitted as State's Exhibit 40A and published for

the jury (41/3166-93).[3] Waldron's first question asked Ross how he had spent that day, "start with this morning when you first got up, where you were at up to the point when you came home to your parents' house" (41/3166). Ross described his day:

> A. Okay. I woke up. I don't know an exact time when I woke up. I sat around, did some laundry because we were going to Cape Coral today. I called my mom to talk to her.
>
> We -- Erin and I left for a friend's house, Jeff. I don't know his last name or any information on him. We stopped by there, talked to him for 30 minutes. We went to Checkers, found some food. Went to Sam's Club, got gas. And I came home.

(41/3166). Ross told Waldron that Erin was not his girlfriend, just a good friend; they were not intimate (41/3167). Ross said that when he and Erin got to his house, he told Erin to go into his room and wait for him, that he was going to talk to his parents because his mom had loaned him $300 to go to Cape Coral, because he didn't have a job (41/3168-69). He volunteered that he had signed a contract, he had paid her back, so she was letting him borrow her ATM card to withdraw her money and her Sam's Club card so he could get gas to go to Cape Coral (41/3169). But when he had tried to use the ATM card that morning, she had changed the code without telling him, so he wanted to ask her the new code (41/3169-70). He had tried

[3] The jury was provided transcripts to use as a guide; as the court instructed, at the agreement of the parties, the tape was edited to eliminate irrelevant information (41/3165).

calling his mom from Erin's house, and then thought maybe she would get out of school or come home for lunch, so he decided to go home and try to catch her there, but he wanted to call first before driving out there (41/3170).

When he got home and saw his father's car and his mother's Jeep, he figured they were inside, talking (41/3172). When he went inside, he was surprised that the blinds were closed and it was dark, because the doors and blinds are usually open (41/3172). He told Erin to go to his room, and headed for his parents' room, when he noticed the drawers were pulled out, and he knew that something was wrong (41/3172-73). His parents were in bed with the sheets pulled up, as if they were asleep, and clothes and hats are thrown all around the room (41/3173). Ross said he was pretty sure his mom's jewelry was gone, but he didn't search through anything because he couldn't stay in the room (41/3174).

When asked why he thought her jewelry was gone, he said the whole house had been ransacked; his bedroom had been ransacked and another room where he kept things had computer games that had been pulled off the shelf onto the floor (41/3174). When asked if he had seen anything else unusual, if any windows had been broken, he said the sliding door was open; but then said that was not unusual, because they usually leave it open for the

cats to go in and out (41/3174-75). He didn't check the front door or for any broken windows (41/3175). He didn't check for any type of entry, but when he first went in, you can see pretty much the whole house and he noticed the slider door was open (41/3175).[4] He said he knew his family's routine, and as soon as he saw the cars and the drapes closed, he knew something was wrong; then he saw stuff thrown around (41/3175-76).

When asked if any other rooms in the house were disturbed, he said he didn't check the kitchen, but both the bedrooms he uses had been disturbed (41/1376). He commented that they had a big screen TV, and "I noticed that my computer was still there, so I -- I -- I assumed that someone was -- jewelry or something like that, you know. That's just what I'm thinking. I don't know. I don't want to incriminate myself, but" (41/1376). He went on to say he thought someone robbed them, but he didn't have proof, he hadn't searched (41/1376). Waldron asked why he thought that would incriminate him, and Ross responded that it sounded incriminating to him (41/1376). He was asked about and described the blood he had seen in his parents' room, and was asked about and discussed some guns his father kept in the house (41/1377-78). He was asked the last time he'd seen his parents,

[4] Ross continued to insist that he could see this door in later interviews (43/3389-90); actually, you can't see the kitchen sliding door from the hallway (41/3071; 44/3534-39).

and said he did not recall the last he'd seen his dad, because his dad worked and was on call a lot (41/1378-79). But he had talked to his mother yesterday, he left after it got dark but was there about 6:30, 7:00 (41/1379). Waldron asked when mom had given him the credit cards, and Ross said it was a lot earlier in the day; he thinks she had gone to the bank and withdrawn money so she could have some money, because his limit is $100, and she had given him a little cash, like $40 at that time and her ATM card and Sam's Club card (41/1379).

Waldron asked what kind of mood Mrs. Ross had been in yesterday, and Ross said she had been in a very good mood, she had retired but she was very active and very excited about starting school (41/1380). She needed another job because she was losing the second income due to the divorce (41/1380). Ross said that he had not seen his father for at least a week (41/1381). He had asked his dad about dad's girlfriends and where dad was staying, but his dad would not tell him these things (41/1381). But his dad came home at least once a week; he'd last seen his dad when Ross's sister was home, but she had left three days ago (41/1381). His sister, Kimberly Sanford or Stanford, is married and lives in Gainesville (41/1381-82). They mostly communicate by email because she is a teacher and working on her Master's degree, and stays very busy (41/1382).

Ross said he was close to his mom, but he and his father were both bull-headed and argued a lot (41/1383). But still he and his dad had a good relationship, he loved his dad and thought his dad loved him (41/1383). He learned about the divorce a couple of months ago, but had not asked much about it (41/1383). He thought his mom got the house and his dad would live somewhere else, but he really hadn't asked about it (41/1381). He didn't know if his dad had been cheating the whole time, but his dad had been in an affair about five years ago; it was hard to know because his dad was not home much due to his work schedule (41/1385). Dad had been a nuclear medicine technician for about 20 years and his mom had worked for GTE for 30 years before her recent retirement; they had lived in the house about 15 years (41/1385). They'd had some problems with some people in the neighborhood, but it was pretty peaceful (41/1386).

Waldron asked Ross what he thought had happened, and Ross said he didn't know of any enemies, they were really good people, so the first thing he would think would be a robbery (41/1386). He didn't understand why they didn't take a car, but his mom had some nice jewelry that's probably gone now (41/1387).

Following this interview, Waldron and Ross went downstairs and outside to smoke (41/1393). At that time, Ross told Waldron that Erin was his girlfriend and they were sexually active; he also told Waldron that he had been drinking beer, smoking marijuana, and taking Xanax over the past several days, and his memory was unclear as a result (41/1394-95). Waldron told him that Waldron was not concerned about other crimes; he just needed Ross to be truthful so they could fully investigate what had happened (41/1395-96).

Waldron conducted another interview with Ross that started at 7:41 pm (41/1397). By this time, Waldron had talked to other officers working on the case, and had participated in interviews of Erin Dodds and her mother, Teri (41/3198). The 7:41 pm interview ended at 8:27 pm, and was also audiotaped and played for the jury (41/3199; 42/3203-37).[5] Ross was asked to explain discrepancies between his earlier statements and other information officers had obtained (42/4203-37). From early in the interview, Ross made statements inconsistent with statements from his first interview, such as saying his mother was loaning him $1300 to go to Cape Coral, and that's why she gave him her ATM card, even though he could only take out $300 at a time with

[5] Again, transcripts were provided to the jury and the tape was edited to eliminate irrelevant information (41/3199).

the card (42/4205-06). He also said that the day before the murders, he "ate Xandie bars,"[6] and "they mess with your memory" (42/4208).

When told that Erin had indicated that he had a trust fund or something, Ross tells Waldron that his Aunt Edie is his godmother, and he would get her money when she died, like his grandmother, he would get her car when she died (42/4223). He said his mom gives him a little of it, but she doesn't give him full access because "whenever I have gotten money, I have gone and spent it on drugs" (42/4223). He spoke about having used his own ATM card, which his mother kept hidden in her filing cabinet; Waldron asked, "[b]ut you just had the card recently; right?" and Ross responded, "Right. I gave it back to my mom because I withdrew $1,100 and I -- I buy drugs with it" (42/4225). Ross said he took that money out "in the past two weeks;" he took money out "[e]very day. $300 limit or like a $1,000 cap a month. And I already hit my thousand dollars and that's why I borrowed money from my mom." (42/4225).

At a cigarette break following this interview, Ross told Waldron that his mother had cashed in her pension and a 401k, and was to receive $450,000; she had already received a lump sum payment over $100,000 (42/3238). Mike Young, who had also been

[6] A "Xandie bar" is slang for Xanax (42/4208).

with Ross the evening of Jan. 6, was interviewed at CID (42/3241). At another break before the next interview session, Waldron and Ross discussed where Ross would sleep that night, since his house and car were crime scenes; Ross indicated that he would call Teri Dodds to see if he could stay with her (42/3242).

Two more interviews were conducted: from 11:53 pm on Jan. 7 through 1:10 am on Jan. 8, and 1:22 am to 2:36 am Jan. 8 (42/3246-3349). Ross was told that his story did not add up, that none of the witnesses were providing a consistent time frame (42/3247-49). Ross admitted that the trip to Cape Coral included a plan to buy marijuana, in the hopes of selling it for a profit, and part of the $1300 was going for this; Ross insisted his mother knew he was going to be using this money to buy drugs (42/3247, 3279, 3285-89). Again, Ross was asked to explain the numerous inconsistent statements he had made (42/3246-3349). Over the course of these sessions, Ross acknowledged that Waldron was accusing him of killing his parents, and he continued to deny it (42/3272, 3281, 3294, 3320, 3330, 3346). Ross and Waldron continued to discuss Ross needing a place to sleep that night (42/3280, 3344-48).

Following that interview, Waldron drove Ross to the Dodds' house (43/3358). On the ride home, or maybe during the last

cigarette break, Ross told Waldron that he would try to stay sober to clear his mind so that he could remember things more clearly (25/585).

Waldron did not speak to Ross again on Jan. 8, but he received four telephone messages from Ross, providing additional information and indicating that he had questions and wanted to speak with Waldron (4/746). He learned that the black pants which Det. Lewis had collected from the Dodds' house had tested presumptively positive for blood, and were being sent to FDLE for DNA testing (20/88-93; 42/3238; 43/3359). During the interview, before telling Ross about the blood, he was advised that FDLE had confirmed that the blood was human (26/940-41); 27/1078; 43/3430).

On Jan. 9, Waldron tried, unsuccessfully, to call Ross at the number Ross had left in his messages (23/591). He learned that Ross and his sister were coming to meet with the victim's advocate that worked in the same building, and told the advocate to let him know when they were there (23/591). After Ross was finished meeting with the advocate, Ross and Waldron met in a CID interview room equipped with a videocamera (23/592; 43/3359-

60). The admission of this interview, which was recorded and played for the jury (43/3362-3516),[7] is the subject of Issue I.

Initially Ross and Waldron discuss the investigation, and media accounts that Ross questioned (43/3362-81). At approximately 3:37 pm, Waldron begins questioning, and Ross describes his activities on Jan. 6 and 7 (43/3381-3403). Ross admits that he had previously lied about having a trust fund, and other matters (43/3403-04). Waldron lets Ross know that he is bothered by all the lies, and by the fact Ross has lied to many people about coming into an inheritance (43/3406-07). About 5:30 pm, Waldron tells Ross that they found blood on the black pants he'd been wearing, the pants they got from Erin's house, and that the blood on the pants tied Ross to the crime scene (43/3430). Waldron told Ross he had been seen wearing the pants on Tuesday, and Ross admits he was wearing the pants Tuesday (43/3435-36).

Around 6:07, Waldron leaves the room and Ross's sister, Kim, comes in to speak with him (43/3453-59). She pulls the chair closer and Ross tells her he's scared, the police have him thinking that maybe he did this (43/3453-57). She tells Ross that he should admit it if he did this, but he shouldn't let the

[7] No transcripts were provided, so that the jury could focus on the videotape; the jury was again instructed there had been some editing of irrelevant information (43/3355, 3361-62).

police talk him into believing that he did something he did not do (43/3458).

Waldron returns and tells Kim that he needs to speak with Ross (43/3459). Waldron offers Ross some water or a restroom break, but Ross asks only to smoke a cigarette, which Waldron then supplies; this is about 6:24 (43/3462). Ross tells Waldron he can't tell Waldron whether he had done this, because he couldn't remember (43/3463-75). About 7:23 pm, Waldron tells Ross he has learned some things, and needs to go over some procedures (43/3476-77). Ross asks if he is being arrested, and Waldron tells him no, they are just talking (43/3477). Waldron reads Ross his Miranda rights, and Ross agrees to waive his rights, signing a written waiver (43/3477-79).

About ten minutes or so after Ross executed the waiver, Waldron suggests a scenario where Ross killed his parents in a rage, and staged a burglary when he realized what he'd done (43/3492-93). Ross nods his head and says he needs help; that Waldron was right about some things (43/3493-94). Ross tells Waldron that he had just "woken up" standing at the foot of his parents bed, holding the bat, realizing what he had done (43/3494, 3497). He decided to make it look like a robbery (43/3497). He took his mother's purse and jewelry, wiped himself down with a rag, and threw the purse, the rag, a blue

shirt he was wearing, some vinyl gloves he wore, and the baseball bat off the Green bridge (43/3497-3508). However, he continued to deny that he had taken his mother's ATM or Sam's Club card, and maintained that she had given him the cards on Jan. 6 (43/3499). The interview ends at 8:57 (43/3516).

Ross was arrested after this interview (44/3522). A couple days later, Kim left a message for Waldron that Ross wanted to speak to him (44/3523). Waldron went to the Manatee County Jail on Jan. 12 to speak with Ross again (43/3523). A seven minute taped excerpt of this interview was admitted and played for the jury; Ross offers to provide information about drug dealers in Bradenton in exchange for better conditions at the jail; he also reaffirms his prior statements that he had thrown the bat and other items off the Green bridge (44/3526-31). The admission of this statement is challenged in Issue II.

After his arrest, Ross wrote letters to Erin and to his sister, Kim (39/2760; 41/3081). In a letter to Erin, written when they believed she was pregnant, he admits that he had previously taken life (Ex.28; 39/2761). In another letter, he wrote, "I think I'm fucked," and that his only defense was a plea of temporary insanity; he wished this had never happened (Ex.29; 39/2762-65). His letter to Kim expressed remorse; he felt that he had ruined her life, too, and was sorry for what

happened to mom and dad, among many others; he hoped she would forgive him (Ex.27; 41/3081-82).

DNA testing on Ross's black pants, taken from Erin's room, revealed three spots of blood consisting of mixed profiles, and one spot with a profile matching Kathleen Ross (41/3103, 3109-10, 3114-17). With the mixed profiles, which were two separate individuals and not one offspring, one spot had a profile for the major contributor matching Kathleen, and Richard could not be excluded as the minor contributor (41/3109-10, 3117-18). The other two had profiles matching Richard as the major contributor, and with Kathleen unable to be excluded as the minor contributor (41/3114-15). The frequency statistics for these matches ranged in the trillions and quadrillions (41/3113-16). The admission of FDLE analyst Patricia Bencivenga as to the frequency with which these profiles would be found is challenged in Issue III.

The theory of defense was that there was no credible evidence of Ross's guilt (37/2532-39; 46/3804-62). The defense focused on the confession, presenting expert testimony to support the defense argument that the confession was coerced and unreliable, alleging the police convinced Ross that he had committed a crime he had not committed (45/3699-3727). The defense presented other witnesses, including neighbors that

discussed other suspicious incidents around the time of the murders, and crime scene technicians, to support this claim of innocence (45/3636-84).

Ross was convicted of two counts of first degree murder and one count of robbery, as charged (7/1277-78; 46/3932). The penalty phase was held on May 1-3, 2007 (47-49). The State presented victim impact testimony (47/3995-4006), and Dr. Eikman, a radiologist, who testified that Ross's PET scan was normal (47/3974-91).

The defense presented 22 witnesses. Family witnesses included Ross's paternal grandparents, Joe Ross (48/4252-57) and Mrs. Ross (48/4257-63); maternal uncle, Ed Martin (48/4264-71) and his wife Jan (48/4271-76); paternal uncle, Michael Ross (48/4277-82); maternal grandmother, Anna Marie Martin (48/4285-89); maternal aunt, Pat Matejousky (48/4290-98); and sister, Kim Sanford (49/4336-69). Other witnesses included people that had worked with Blaine while he was in jail (David Dumas, 47/4007-16; Don McGowan, 47/4014-16; and Robert Marino, 47/4017-31); friends and former girlfriends who described Ross as nice, helpful, and considerate, but having a history of experimenting with a number of illegal drugs and having declined in recent years due to drug use (Wayne Wilner, 47/4032-37; Sarah Patterson, 47/4046-54; Brittany Sommer, 47/4055-62; Dorothy

DeWitt, 47/4063-65; Samantha Coppola, 47/4067-85; Kim Glenn, 47/4086-97; Holly Glenn, 47/4098-4111); and former teachers Noah France (47/4112-26) and Marian Darley (48/4299-4301). Mental mitigation evidence was presented through Dr. Michael Maher (48/4127-67) and Dr. Frank Wood (48/4170-4243).

The jury recommended a sentence of death for each victim by a vote of eight to four (7/1287; 49/4418). A Spencer hearing was conducted on June 8, 2007 (49/4425-69), and sentence was pronounced in open court on November 16, 2007 (49/4470-4501). The trial court followed the jury recommendation, finding two aggravating factors (prior violent felony conviction, based on contemporary murder convictions) and during the course of a robbery (merged with pecuniary gain) (8/1382-87).

In mitigation, the court found three statutory mitigating factors: no significant criminal history (little weight), under extreme mental or emotional disturbance (proven only as to drug use, moderate weight), substantial impairment of capacity to appreciate criminality of his conduct or conform his conduct to the requirements of the law (proven only as to drug use, moderate weight) (8/1388-94). The court rejected age (21 years old) as a statutory mitigator (8/1394-6). The court also weighed seven non-statutory mitigating factors: history of substance abuse (moderate weight), history of mental and

emotional problems (little weight), adjusts well to structured environment and behaved well in jail and in court (little weight), positive characteristics (moderate weight), confessed and cooperated with law enforcement (little weight), remorse (little weight), and ability to form loving and positive relationships with others (moderate weight) (8/1396-99).

SUMMARY OF THE ARGUMENT

The trial court properly denied Ross's motion to suppress his statements to Det. William Waldron. The court below properly found, after an extensive evidentiary hearing, that Ross was not in custody prior to being read his Miranda rights on January 9, 2004. The court properly determined that Ross voluntarily waived his rights at that time and did not invoke his right to silence until shortly before the end of the interview. The court also properly found that Det. Waldron did not employ the improper question-first strategy rejected in Missouri v. Siebert, 542 U.S. 600 (2004), and that Ross's statements were not coerced or involuntary.

Ross's claim of a Seibert/Elstad violation with regard to the statements taken by Det. Waldron at the jail on Jan. 12 is similarly without merit. The court below properly found that Ross initiated the contact with Waldron, and that his statements following a voluntary waiver of Miranda rights were admissible.

The trial court did not err in permitting DNA expert Patricia Bencivenga to testify to the statistical probability of finding the DNA profiles obtained in this case. Bencivenga demonstrated sufficient knowledge of the database utilized and the mathematical calculations involved in determining the statistical frequencies to be qualified as an expert.

The court below properly denied Ross's motion for judgment of acquittal, as jury verdicts for murder and robbery are supported by competent, substantial evidence. There was abundant evidence of financial motive to support the convictions, as well as the pecuniary gain aggravating factor. Premeditation was also well established in this case, where the sleeping victims were struck repeatedly on the head with a baseball bat.

The death penalty is proportionally warranted when this case is compared to other cases in which the death penalty has been imposed and upheld.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE VIDEOTAPED CONFESSION OBTAINED BY DETECTIVE WALDRON.

Ross first challenges the trial court's denial of his motion to suppress statements he made to law enforcement on January 9, 2004. In reviewing the denial of a motion to suppress statements, this Court must accord a presumption of correctness to the trial court's determination of historical facts, but independently review mixed questions of law and fact to determine the constitutional issues presented. Fitzpatrick v. State, 900 So. 2d 495, 510 (Fla. 2005); Nelson v. State, 850 So. 2d 514, 521 (Fla. 2003). The presumption of correctness requires this Court to interpret all reasonable inferences and deductions from the evidence in a manner most favorable to sustaining the trial court's ruling. Rolling v. State, 695 So. 2d 278, 292 (Fla. 1997).

The record reflects that Ross was interviewed by Manatee Sheriff's Det. William Waldron on several occasions, following the discovery of the bodies on January 7, 2004. When Waldron initially responded to the scene, Ross asked if they could go somewhere to get away from the media (22/390-91). Waldron suggested they go to his office at the Criminal Investigation

Division in Palmetto, and Ross agreed (22/391). Ross spent approximately the next twelve hours at CID; four audiotaped interviews were conducted during this time: (1) from 2:49 pm to 3:25 pm [36 minutes]; (2) 7:41 pm to 8:27 pm [46 minutes]; (3) 11:53 pm to 1:10 am [one hour, 17 minutes]; and (4) 1:22 am to 2:36 am [one hour, 14 minutes], for a total of three hours, 53 minutes (4/715). Waldron also spoke to Ross off-tape on occasion in between these times, when Waldron would escort Ross out of the building for cigarette breaks (22/420,427).

Shortly after the last interview concluded at 2:36 on the morning of January 8, 2004, Waldron drove Ross to the Dodds' residence, where Ross had received permission to spend the night (23/585-86). Waldron did not have any further contact with Ross on January 8, but Ross left Waldron several phone messages (4/746; 23/586-90). In the afternoon on January 9, Ross's sister drove him to CID, where Ross and his sister were meeting with a victim's advocate (4/748; 23/591). Following that meeting, Waldron met with Ross again, answering questions that Ross had about the investigation (4/748; 22/592; 23/604-624).

Waldron's interview began about 3:35 pm (24/624).[8] About 7:23 pm, Waldron advised Ross of his constitutional rights, and

[8] The prosecutor noted that Waldron announces the time throughout the interview according to Waldron's watch, which is approximately two minutes ahead of the time displayed on the

Ross signed a written waiver of his rights (4/756; 25/741-45). Following the Miranda warnings, the interview continued and shortly thereafter, Ross admitted that he remembered being at his house after dropping Mikey off; he had "woken up" standing in front of his parents' bed, but he had not killed them on purpose (25/760). The interview concluded about 8:52 pm, and Ross was subsequently arrested (4/762; 25/788,791).

The court below held an extensive hearing on the motions to suppress Ross's statements to Waldron.[9] Following the hearing, the court rendered a detailed order, concluding that (1) Ross was not in custody prior to the reading of the Miranda warnings on January 9; (2) Ross voluntarily waived his Miranda rights; (3) Ross did not thereafter invoke his rights until shortly

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videotape (24/624). In addition, the date on the video is displayed as January 10, while it was actually January 9, 2004 (24/611).

[9] The court held a consolidated hearing on Ross's various motions to suppress physical evidence (1/48-72, 99-116), to suppress his statements to law enforcement (1/73-76, 94-98), and to suppress other statements (1/90-93, see 20/4-5 [outlining motions at issue]). Testimony was taken on April 24, 2006 (20/12-145; 21/149-217); April 27, 2006 (21/225-321; 22/322-427); April 28, 2006 (23/434-599; 24/603-665); May 3, 2006 (25/669-805, 815-849); May 4, 2006 (26/855-969); June 16, 2006 (27/976-1095); August 31, 2006 (28/1102-11). On Feb. 8, 2007, the court issued an order denying Ross's motion to suppress conversations (4/657-663). On Feb. 26, 2007, the court issued an order denying Ross's various motions to suppress physical evidence (4/667-701). On March 9, 2007, the court issued an order granting in part, and denying in part, Ross's various motions to suppress his statements to law enforcement (4/714-772).

before the conclusion of the interview; and (4) Ross's statements were made voluntarily. The order fully explores all of the issues raised, and supports the court's conclusions with numerous references to, and quotes from, statements from the various interviews, as well as other testimony from the hearing and relevant case law (4/714-772).

On appeal, Ross contends that the videotape of his January 9, 2004 interview should not have been admitted, asserting that his statements were coerced and obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966).

A. Miranda issues

1. Pre-warning statements

It is well established that Miranda warnings are only required when a suspect is subjected to a custodial interrogation. Oregon v. Mathiason, 429 U.S. 492, 495 (1977); Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1997). Ross concedes that he was not in custody for Miranda purposes during the first two interview sessions on January 7. He asserts that he was in custody sometime after 11:53 pm on January 7, "as this third interview progress," (Appellant's Initial Brief, p. 4), as the interview became more pointed and he was confronted with evidence suggesting his guilt. His appellate argument, however,

focuses on the January 9 interview, where Ross claims to have been in custody "perhaps not at the very beginning," but "long before" the Miranda warnings were given (Appellant's Initial Brief, pp. 44, 52).

Custody is determined by the totality of circumstances. Connor v. State, 803 So. 2d 598, 605 (Fla. 2001). The test is whether a reasonable person in the suspect's situation would believe that his freedom of action was curtailed to a degree associated with actual arrest. California v. Beheler, 463 U.S. 1121, 1125 (1983); Schoenwetter v. State, 931 So. 2d 857, 867 (Fla. 2006); Mansfield v. State, 758 So. 2d 636, 644 (Fla. 2000); Ramirez v. State, 739 So. 2d 568, 574 (Fla. 1999). This Court has held that four factors are to be analyzed: (1) the manner in which the police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; and (4) whether the suspect is informed that he or she will is free to leave the place of questioning. Ramirez, 739 So. 2d at 574. These factors, however, "must be understood as simply pointing to components in the totality of circumstances surrounding an interrogation," and no factor can be considered in isolation; "[t]he whole context must be

considered." State v. Pitts, 936 So. 2d 1111, 1124 (Fla. 2d DCA 2006).

As noted above, the trial court in this case rendered an exhaustive order, detailing the court's findings on each interview. The court recognized and applied the Ramirez test as to each interview session, quoting extensively from the interviews as well as applicable case law (4/714-772). Notably, Ross has not identified any flaws in the court's legal or factual analysis; he merely describes the interview in his own terms, offering selective excerpts to support his claim, and hoping this Court will undertake a new analysis and reach a contrary conclusion. In fact, he only even acknowledges the trial court's order at one point in his 82-page argument on this issue, addressing cases cited by the court in concluding that a particular statement did not amount to an unequivocal request to end the interview (Appellant's Initial Brief, p. 66; see Issue I.A.3.).

Despite Ross's conclusory assertion that the January 7-8 interviews became custodial at some point into the 11:53 pm session, his brief provides no analysis of custody during that time and makes no argument that any of the statements provided prior to the January 9 interview should have been suppressed. While the State strongly disputes that Ross was in custody at

any time during the January 7-8 sessions, this brief will not otherwise address the issue of custody prior to the January 9 interview, since the earlier statements are not contested. However, the court order below applied the Ramirez test to each of the four sessions conducted before Ross left the CID in the early morning hours of January 8, and concluded that Ross was never in custody during that time (4/719-745).

The Ramirez analysis offered in Ross's brief with regard to the January 9 interview is not persuasive. Ross does not address the initial factor (how Ross was summoned for questioning) at all, but simply acknowledges that factor "favors the state's position" (Appellant's Initial Brief, p. 45). There is no dispute that Ross not only came down to the CID voluntarily with his sister on January 9, but that he was anxious to speak with Detective Waldron again about Ross's own actions in the twenty-four hours before his parents were found. Ross had left Waldron several phone messages after being dropped off in the early hours of January 8, with the last message indicating that Ross had some questions, "and then some things that have been brought up to me in the recent time." (23/588). The court below entered the following findings with regard to how Ross was summoned to the interview:

> The evidence demonstrates that Defendant was not "summoned" at all. As noted, Defendant left several messages for Waldron indicating he wanted to talk to him about additional information that he had learned. On January 9th, Waldron tried "calling him back a couple of times at his grandmother's house" and couldn't get through. He learned from the victim's advocate supervisor that Defendant and his sister were going to meet the victim's advocate, which was located in the same building as CID. He asked the victim's advocate to let him know when they arrived.
>
> Defendant was driven to the office by his sister. When they arrived, Waldron met them, took them to the victim's advocate office, and told Defendant that
>
> > when he was finished up that [he'd] like to talk to him, that [he] had gotten his messages, that he had some additional questions, that he had some information he wanted to discuss, and that once he finished [Waldron] would be more than happy to meet with him and talk to him again.
>
> After Defendant met with the victim's advocate, he met with Waldron. Defendant made it very clear that he wanted to be there to "give [the detectives] everything that [he] possibly can." The Court finds that Defendant initiated this contact with Waldron, and, knowing they "were going to question [him]," voluntarily submitted to the interview. There is no doubt that Defendant knew that he would be questioned at least as intensely as he had been questioned during the previous interviews.

(4/748-49) (footnotes omitted). Moreover, near the end of the last January 8 interview, Ross had expressed an intent to meet with Waldron again, after Ross had had an opportunity to "stay sober" and clear his mind and remember things better (23/585).

Ross's eagerness to meet with Waldron on January 9 is also noted in the trial court's findings with regard to the second Ramirez factor, the purpose, place, and manner of questioning:

Defendant was interviewed by Waldron and another detective that came in and out. Waldron told him that he was not "charging [him] with anything," and that if "[he] want[ed] to go downstairs and have a cigarette, [he] need[ed] to use the bathroom, [or] get something to drink" to let him know. The interview began with a lengthy discussion of the media's coverage of the homicides, and how the investigation was progressing. The interview progressed cordially, with Waldron responding to Defendant with short answers and follow-up questions.

The purpose of the interview was to determine what Defendant had done in the 24-hour period before discovering his parents, a fact Defendant knew when he went into the interview. In one of his earlier interviews, Defendant stated that he wanted to sober up and try to think of his activities in the 24 hours before discovering his parents, and his subsequent voice messages suggested he had more information to provide to Waldron. He also indicated to Waldron that he "ha[d] no problems coming down here talking to [him], trying to give [him] everything that [he] possibly can." Thus, when Waldron started re-questioning Defendant about what he had been doing before finding his parents, it was in accordance with what Defendant had been offering to him for two days. Indeed, Waldron specifically referred to this when he started asking questions.

After a cigarette break outside, the two began discussing Defendant's family dynamics, his parents' relationship and impending divorce, and the $107,000 bank account. Waldron accused him of lying during previous interviews, confronted him on inconsistencies in his statements, asked him to tell the truth, and asked him how his lying would make his family feel. Defendant, however, admitted to lying to the detectives in previous interviews. The detectives also made it clear to Defendant that they believed he committed the offenses, but made no threats or promises to him. Although there are portions of the interview that are confrontational and indeed pointed and accusatory, most of the interview was overtly non-confrontational and overtly conversational.

Oregon v. Mathiason, 429 U.S. 492 (1977) and *California v. Beheler*, 463 U.S. 1121 (1983) teach us

that some degree of coercion is indeed part and parcel of the interrogation process and that the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart. Whatever coercion existed in this case was not the sort that a reasonable person would perceive as restricting his freedom to depart. Indeed, the facts support the opposite conclusion. Again, prior to being read his Miranda rights, Defendant was never physically restrained or placed in handcuffs.

Knowing that he had been intensely questioned in previous interviews, and in fact had been accused of killing his parents, and then was free to leave, and was, in fact, driven "home" by Waldron, Defendant went to speak to Waldron, again "kn[owing] that [they] were going to question [him]." There is no doubt in this Court's mind that Defendant knew he would face similar questions from the detectives, but voluntarily went to the station and spoke with the detectives anyway. Defendant also knew that his sister was waiting for him, and when he asked to speak with her, Waldron brought her in to see him. Waldron also responded to all Defendant's other needs, *i.e.*, restroom breaks and refreshments.

Defendant asked Waldron twice about his status. First, Defendant asked

> A: Am I being charged, today? Am I going to be arrested...?
> Q: What do you think should happen?
> A: I don't know. I don't feel that I should be arrested. . .

Waldron specifically testified that he did not intend to arrest Defendant at that point. Second, right before Waldron read Defendant his rights, Defendant again asked if he was being arrested, to which Waldron said "Nope. At this time you and I are talking, okay," and then "[y]ou're not in handcuffs or anything like that, okay?"

The Court notes that the detectives did, indeed, accuse Defendant of killing his parents a number of times during this interview and that, at times, voices are raised. As indicated previously, however, the majority of the conversation was cordial and particularly non-accusatory. In fact, the majority of

> the interview was similar to that which had taken place two days earlier, from which Defendant had left after the interview was completed. There is nothing in this interview that overtly suggested that anything dissimilar was going to happen after this one was completed.

(4/749-52) (footnotes omitted).

Ross states that the purpose of the interview was "to obtain a confession" (Appellant's Initial Brief, p. 45-46). However, the trial court's finding that the purpose was "to determine what Defendant had done in the 24-hour period before discovering his parents, a fact Defendant knew when he went into the interview" (4/749). This is a finding of historical fact, supported by the evidence below, and therefore entitled to deference in this issue. Schoenwetter, 931 So. 2d at 866; Connor, 803 So. 2d at 608.

In addition, Ross's claim that Det. Waldron was "increasingly angry and belligerent," and in his face, berating him, is belied by a review of the videotape (Appellant's Initial Brief, p. 46; see Ex. 43A-D). In fact, when Ross's sister enters the room approximately 6:10 pm, she pulls the chair up closer to Ross, and when Waldron resumes the interview, Waldron moves the chair back again, giving Ross room rather than being in his face, backing him into a corner (25/716). Although, as the court below noted, Waldron does accuse Ross of killing his parents and, "at times, voices are raised," the court's express

finding that "the majority of the conversation was cordial and particularly non-accusatory," is clearly supported by a review of the videotape itself (4/751-52; see also 4/750 "Although there are portions of the interview that are confrontational and indeed pointed and accusatory, most of the interview was overtly non-confrontational and overtly conversational"). Again, these are findings of historical fact, supported by the videotape, and entitled to deference.

Ross also complains that Waldron frequently interrupted him, but the video reveals that often Ross was interrupting what Waldron was saying, and Waldron was often simply trying to continue the point he was making. And while Ross repeatedly notes that Waldron's firearm is visible, the video demonstrates that the gun is much more obvious to someone observing the videotape itself than it would have been to Ross, since it is on Waldron's right side (facing the camera and away from Ross).

The third Ramirez factor, the extent to which Ross was confronted with evidence of his guilt, is the factor which most supports Ross's claim of custody. The court below acknowledged that Ross was confronted with evidence of his guilt during this interview, but concluded, "[t]his fact alone, however, does not turn an otherwise non-custodial interview into a custodial one" (4/752). It is important to note that Ramirez does not consider

"whether" a suspect is confronted with evidence of guilt, but rather "the extent to which" the suspect is confronted with such evidence. Ramirez, 739 So. 2d at 574. This can only be a recognition that most interrogations will include accusations that involve outlining the basis for the questioner's suspicions.

While Ross was certainly confronted with evidence of his guilt, he was not threatened or wildly deceived about the evidence. Ross was reminded of the evidence, but also urged repeatedly to tell the truth. Ross's claim that Waldron "made up" much of the evidence he confronted Ross about is clearly refuted by the record. Ross complains about Waldron telling Ross there was a witness that saw his car in the neighborhood around 1:00 am, but that was at earlier interview, and not repeated on Jan. 9.

In addition, most of the evidence was not created by Waldron but came directly from the investigation, including Ross's own actions and statements. Waldron did not make up that there was no forcible entry. Waldron did not make up that the scene appeared to have been staged as a burglary. Waldron did not make up that the Rosses appeared to have been killed by someone known to them. Waldron did not make up that Ross had the ATM card, did not have the PIN number, and lied to the bank

officer. Waldron did not make up that Ross had lied to Erin and others about his financial situation. Waldron did not make up that Ross had previously lied to Waldron, made inconsistent statements, and was unable to reliably account for his actions in the day before the bodies were discovered. Waldron did not make up the human blood on Ross's pants.[10]

The last Ramirez factor is whether Ross was told that he was free to leave. Just before the Miranda warnings were given, Waldron indicated that he needed to go over some procedures, and Ross asked if he was being arrested; to which Waldron responded, "Nope. At this time you and I are talking, okay," and then "[y]ou're not in handcuffs or anything like that, okay?" (4/751;25/742). Although Waldron did not expressly advise Ross that he was free to leave, he also never indicated that Ross was not free to leave. Ross was not restrained or impeded in any way. Clearly, this is not a case such as Mansfield, where the detective told the suspect, "You and I are going to talk. We're not going to leave here until we get to the bottom of this." Mansfield, 758 So. 2d at 644.

[10] Ross was not necessarily "confronted" with this evidence, but it was discussed at length during the interview. The court below ruled that Ross had not been "confronted" by the evidence of the credit cards, since he already knew this information and had volunteered it to Waldron (4/737, n.88). Ross clearly admitted and often initiated discussions about these other incriminating facts as well.

Ross had, of course, been free to leave after a similar interview which ended early on January 8, and had arrived with his sister on January 9. He knew his sister was still there, presumably waiting for him, and even visited with his sister not long before the Miranda warnings were provided and waived.

Ross criticizes Waldron for failing to clarify Ross's status when Ross asked if they could go smoke a cigarette and offered to let Waldron handcuff him. To the extent that Ross relies on his own statements to suggest that *he* did not feel he was free to leave, that reliance is misplaced. The test is not a subjective one, but an objective one. Stansbury v. California, 511 U.S. 318, 322-25 (1994); Davis, 698 So. 2d at 1188 (inquiry is how a reasonable person in the suspect's position would perceive the situation). This is particularly important in the instant case. When Ross was initially being transported from the scene down to the CID, strictly as a witness and consistent with Ross's request to be taken somewhere away from the media, Ross asked Waldron, "are you taking me to jail?" (21/283). In the initial interview, Waldron was asking whether other rooms in the house had appeared to be disturbed, and Ross stated yes, but he noted the computer and TV were still there, so it seemed the perpetrators were just after jewelry or something like that. He continued, "that's just what I'm

thinking. I don't know. I don't want to incriminate myself" (22/404-405). When Waldron later asked why he thought he might incriminate himself, Ross admitted to being a very defensive person (23/465). Since Ross was suspicious of his situation long before any accusatory questioning began, his own statements suggesting he may have felt like he was not free to leave are particularly irrelevant.

Despite being a defensive person, Ross's question just before Miranda as to whether he was being arrested clearly demonstrates that even Ross did not feel that he had been arrested at that point. Thus, the totality of circumstances unerringly supports the trial court's conclusion that Ross was not in custody prior to the time Miranda warnings were given.

Ross's primary argument is that he was in custody because he was subjected to prolonged, accusatory questioning. The fact that Ross was aware that law enforcement considered him a suspect does not alone compel a finding of custody. See Yarborough v. Alvarado, 541 U.S. 652, 664-65 (2004) (finding of no custody reasonable, despite prolonged, accusatory questioning, where other factors militated against finding custody: police did not transport him to the station or require him to appear at a particular time; they did not threaten him or suggest he would be placed under arrest; his parents remained in

the lobby during the interview; detective appealed to Alvarado's interest in telling the truth and being helpful to a police officer; detective repeatedly asked Alvarado if he wanted to take a break); Thompson v. Keohane, 516 U.S. 99, 103 n. 1 (1995) (on remand, 1998 U.S. App. LEXIS 9432 (9th Cir. 1998) (unpublished opinion)) (no custody where officer accused defendant of lying, and stated "we know the who, the where, the when, the how. The thing we don't know is the why. And that's ... the thing we've got to kind of get straight here today between you and I. See I know that you did this thing. There's ... no question in my mind about that. I can see it. I can see it when I'm looking at you"). In the instant case, Ross "said several times that he wanted to help the detectives, and expressed no desire to stop talking" (4/743).

In Stansbury, the Court noted that "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." Stansbury, 511 U.S. at 325; see also State v. Pitts, 936 So. 2d 1111, 1123 (Fla. 2d DCA 2006). Particularly in this case, where Ross had previously been accused and subject to intense questioning but then released on January 8, the subsequent accusatory questioning on

January 9 does not compel a finding that Ross was in custody prior to waiving his Miranda warnings.

Based on the totality of circumstances, the trial court properly found that Ross was not in custody prior to the giving of the Miranda warnings on January 9.

2. Validity of Miranda waiver

Ross next contends that the Miranda warnings which were provided at 7:23 pm on January 9 were inadequate because Det. Waldron allegedly employed an improper two-step interrogation technique to circumvent Miranda, in violation of Missouri v. Seibert, 542 U.S. 600 (2004). The court below dispensed with this argument as follows:

> Defendant argues that the "custodial" interrogation that preceded the giving of the warnings tainted his subsequent waiver. *See Missouri v. Seibert*, 542 U.S. 600 (2004). "In *Seibert* ... the Court addressed 'a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession." *Pitts*, 936 So. 2d at 1135. "*Seibert* was decided against the backdrop of *Oregon v. Elstad*, 470 U.S. 298 ... (1985), which considered 'whether an initial failure of law enforcement officers to administer the warnings required by [Miranda], without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his Miranda rights.'" *Id.*, *quoting Elstad*, 470 U.S. at 300. "*Elstad*, 470 U.S. at 318, held 'that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after

he has been given the requisite Miranda warnings.'" *Id*.

Although the *Seibert* plurality focused on five factors, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Pitts*, 936 So. 2d at 1136. Thus, "the holding of *Seibert* should be viewed as the position taken by Justice Kennedy," *id.*:

> [t]he admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. *If the deliberate two-step strategy has been used,* postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the Miranda warning and of the Miranda waiver.

Seibert, 542 U.S. at 622 (emphasis added). The "deliberate two-step strategy" to which Justice Kennedy referred is called the "question first" method, by which the questioner interrogates in successive unwarned and warned phases. Under this method, officers in a calculated manner first obtained unwarned incriminating statements from a suspect, and then used those incriminating statements in the warned interrogation in order to undermine the midstream *Miranda* warnings. *See id*. at 609-10. *See also United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1136 (11th Cir. 2006). "The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect *has already confessed*." Id. at 611. Thus, "*Seibert* requires the suppression of a post-warning statement *only* where a deliberate two-step strategy is used and no curative measures are taken; where that strategy is not used, the admissibility of postwarning statements continue to be governed by the principles of *Elstad*," where the Court allowed a post-warning

confession even where the police had previously obtained a pre-warning confession, so long as the pre-warning confession was voluntary. *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006) (emphasis added).

As noted by the 11th Circuit in *Gonzalez-Lauzan*, both the *Elstad* and *Seibert* decisions "provide important guidance." The question is whether Defendant voluntarily waived his rights.

> In answering that question, *Elstad* relied on a presumption that a defendant's waiver is voluntary in the absence of circumstances showing otherwise. In contrast, the *Seibert* plurality looked more to whether the *Miranda* warnings given to a reasonable person in the suspect's shoes could function effectively as *Miranda* requires, and required a multifactor test to determine their effectiveness. The fifth vote in *Seibert* more narrowly concluded that midstream *Miranda* warnings did not function effectively when the officers in a calculated way first obtained warned statements, and then used them in the warned segment to undermine the midstream warnings.

Gonzalez-Lauzan, 437 F.3d at 1137 (citations omitted). "*Miranda* warnings are customarily given under circumstances allowing for real choice between talking and remaining silent." *Seibert*, 542 U.S. at 609. The question is did "the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?" *Id.*

In this case, based on the totality of the interview, this Court finds that Defendant was not in custody prior to being given his *Miranda* warnings, and therefore finds that *Seibert* does not apply. Even if it did apply, however, this case does not meet the standard.

First, Defendant did not confess prior to being read his *Miranda* rights, and thus this case does not follow the *Seibert* sequence of interrogating a suspect while in custody, eliciting a confession, informing the suspect of his *Miranda* rights, and then eliciting the same confession. *Seibert*, 542 U.S. at 615-617.

> The furthest Defendant went pre-*Miranda* was "I don't remember doing this," "from what you've told me you make me feel that I did do this. And I'm scared, because I don't remember... I don't know if I did," "I can't tell you if I did it or not, because I don't know," and "I can tell you that I didn't plan to kill my parents... I could have done this, and I could have been so angry to have done this. But... I can't put myself there. I don't remember if I was there, so I can't tell you if I did or not."
>
> Second, there is no evidence that the detectives deliberately withheld *Miranda* until Defendant confessed. Waldron was asked about when he was taught to provide *Miranda* warnings, to which he responded "[alt a point in time where a person's not going to be free, their movements are restricted and they're not just free to get up and walk out." The evidence indicates that Waldron read *Miranda* after he learned of the ski mask that contained blood that had been retrieved from Defendant's car. Indeed, Waldron specifically stated immediately before advising Defendant that "[t]here's a couple of things that I discovered, and before we go any further I want to cover this with you... Once Defendant waived his rights, Waldron immediately brought up the ski mask.

(4/752-55) (footnotes omitted). Thus, the court found that (1) Ross was not in custody prior to Miranda being given; (2) Ross did not confess prior to Miranda being given; and (3) Waldron did not deliberately withhold Miranda until Ross confessed.

Ross's argument on this sub-issue merely counters that his interpretation of the facts is different. He claims that Det. Waldron violated the Sheriff's Department policy as to when to provide Miranda, citing a General Order promulgated by Sheriff Wells instructing that Miranda should be read when questioning becomes accusatory. Of course, there is no requirement that a

confession be suppressed simply because an officer violates department policy which urges the reading of Miranda even when no custodial interrogation occurs.

Ross never addresses, or even acknowledges, the trial court's finding that he did not confess prior to hearing and waiving his Miranda rights. He does not attempt to identify any statements, pre-Miranda, which would cause him to believe that any exercise of his Miranda rights would be futile at that point. If, as Ross contends, Waldron was intentionally getting Ross to confess before Miranda in the hopes of having him repeat a valid, post-Miranda confession, then Waldron clearly jumped the gun.

It is a significant observation that Waldron did not advise Ross of his rights because Ross, having confessed, was now subject to arrest. Rather, Waldron independently received what he reasonably believed to be incriminating evidence, having learned that law enforcement had discovered a ski mask stained with blood in Ross's car.[11] The fact that Waldron had a particular reason, completely unrelated to the statements Ross had already made, to provide the Miranda warnings when he did substantially counters the Seibert argument Ross presents. In

[11] When confronted with the discovery of the ski mask, Ross provided an innocent explanation (25/747-48). The ski mask was not admitted into evidence at trial.

addition, the trial court's finding that there was no deliberate attempt to circumvent Miranda is a finding of historical fact, supported by the record below, which should be granted deference. Ross's subjective, contrary interpretation of the evidence provides no basis for the finding of a Seibert violation.

The trial court's finding that Ross was not in custody prior to waiving his Miranda rights has been fully explored. The finding that Ross did not confess prior to Miranda is not contested on appeal. The facts noted by Ross to suggest that Waldron deliberately used an improper interrogation technique -- that Waldron assumed this would be his last opportunity to question Ross and that Sheriff Wells had indicated he was counting on Waldron to "get closure," before the interview, which Wells and others observed, began -- do not support the conclusion which Ross draws regarding Waldron's intent.

Absent an officer's subjective intent to undermine the efficacy of the Miranda warnings, Seibert does not require suppression of statements obtained after Miranda rights have been waived. See Seibert, 542 U.S. at 618-22 (Kennedy, J., concurring); Davis v. State, 990 So. 2d 459, 466 (Fla. 2008) (adopting Justice Kennedy's test). As the record demonstrates

that no Seibert violation occurred in this case, no relief is warranted.

3. Invocation of Miranda rights

In addition, Ross contends that he invoked his right to remain silent after being given his Miranda warnings. Ross identifies his statements, "I don't think I can help you anymore. I don't think I have anything else to say" at approximately 7:36 pm amounted to an unequivocal request to end the interview. The trial court rejected this claim as follows:

> The Court does not agree with Defendant that he invoked his rights after Waldron read them to him. "Once warnings have been given, ... [i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74. Police, however, are under no obligation to clarify an ambiguous or equivocal assertion. "A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." *State v. Owen*, 696 So. 2d 715, 718 (Fla. 1997). *See Davis v. United States*, 512 U.S. 452 (1994). "If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation." *Id*. (defendant's statements "I'd rather not talk about it" and "I don't want to talk about it" were equivocal). After he was advised of his rights, Defendant stated "I don't – I can't tell you anything different," and "I don't *think* I can help you anymore. I don't *think* I have anything else to say." Neither of these, however, was an unambiguous assertion of his right to remain silent. *See, e.g., Kyser v. State*, 522 So. 2d 285, 286 (Fla. 1988) (noting that "I think I might need an attorney" and "I think I want to talk to a lawyer before I talk about

> that" were equivocal requests). Taken in context, it is clear that Defendant's comments meant that he was willing to talk to the detectives, but that he could not offer any different information. *See Rodriguez v. State*, 559 So. 2d 392, 393 (Fla. 3d DCA 1990) ("Yes, but I really don't have anything else to say" not an invocation of right to remain silent). Under *Owen*, the detectives had no obligation to clarify Defendant's statements, and could continue talking to him.

(4/758-59) (footnotes omitted) (emphasis in original).

As the trial court found, Ross's statements, "I don't think I can help you anymore" and "I don't think I have anything else to say," were classic equivocal comments. Ross claims that use of the word "think" did not render the statements equivocal, and that "any reasonable officer" would take the statement, absent the word "think," to be an unequivocal request to end the interview.

Actually, the statement "I really don't have anything else to say," was found insufficient to invoke a right to silence in Rodriguez v. State, 559 So. 2d 392, 393 (Fla. 3d DCA 1990); see also State v. Owen, 696 So. 2d 715, 718 (Fla. 1997) (defendant's statements, "I'd rather not talk about it" and "I don't want to talk about it" were equivocal); Walker v. State, 957 So. 2d 560, 574 (Fla. 2007) ("I think I might want to talk to an attorney" was equivocal).

The court below did find, as the State conceded, that Ross unequivocally invoked his right to silence later in the

interview, when he said, “I really don’t want to talk anymore” (4/760). The few statements made after that invocation were therefore suppressed.

The record fully supports the trial court’s rejection of Ross’s claim that his confession was subject to suppression due to any Miranda violation. No relief is warranted on this issue.

B. Voluntariness of statements

Ross’s final sub-issue as to his January 9 videotaped statements asserts that his suppression motion should have been granted because his statements were involuntary. He acknowledges that an involuntary statement can only be the product of coercive conduct on the part of the police, Colorado v. Connelley, 479 U.S. 157, 163-67 (1986), and identifies the coercive conduct in this case to be deception and manipulation employed when Det. Waldron allegedly (1) misrepresented the evidence on a number of critical matters, by telling Ross that a witness placed his car at his parents’ house at 1:00 am; that the blood on Ross’s pants tied him to the crime scene; and that witnesses had said Ross was wearing the pants on the night of the murders, and (2) used psychologically coercive techniques, including “minimization;” raising the specter of the death penalty; and accusing Ross of “dragging his friends down with him” (Appellant’s Initial Brief, pp. 68-74). The court below

properly determined that Ross's statements were not coerced but voluntary.

The court entered the following findings on the issue of voluntariness:

> Defendant argues that his confession was involuntary and coerced by law enforcement, and in support thereof states (1) the detectives knew Defendant had ingested drugs "that had a negative effect on his memory"; (2) he told the detectives that he was confused about several aspects of the time preceding the discovery of the bodies; (3) the detectives confronted him with false evidence — blood that matched the crime scene on his pants, Erin seeing him wearing those pants on the day of the homicides, and they had a witness swearing they saw his car at the Ross home; (4) the detectives intimidated him, both physically and psychologically; (5) the detectives "skillfully exploited [Defendant's] vulnerabilities and. . . insecurities," including his feelings about his father, his concern for Erin, and his perceived shortcomings about not being an independent adult. Defendant's expert, Dr. DeClue, testified at length as to this issue.
>
> Defendant relies on *State v. Sawyer*, 561 So. 2d 278 (Fla. 2d DCA 1990), in which the Second DCA found the defendant's confession to be involuntary where it was the product of enforced sleeplessness resulting from a 16-hour serial interrogation during which the defendant had no meaningful breaks, police asked him misleading questions, denied his requests to rest, refused to honor his *Miranda* rights and used the defendant's history of blackouts to undermine his reliance on his own memory. *See Brewer v. State*, 386 So. 2d 232 (Fla. 1980) (finding confession to be involuntary where police threatened the defendant with the electric chair, implying that they had power to reduce the charge against him and that his confession would lead to lesser charge).
>
> The Court does not find that the circumstances of this interview rise to the level as the interview in *Sawyer*. Not only did law enforcement tell Defendant to tell the truth, but his sister did too. In fact,

> during their 12-minute meeting, Defendant's sister specifically told him "If you did it, then say you did it. But if you didn't do it, do not let them talk you into it. There is nothing in the interviews that indicate that Defendant was coerced or intimidated into confessing to this crime. The Court has discussed at great length the salient features of the interviews and finds that the interviews, when taken as a whole, do not suggest that law enforcement engaged in coercion or intimidation.

(4/760-62).

Once again the court below properly denied the motion to suppress with regard to this issue. While Ross maintains that his confession was coerced because the police wore him down and caused him to doubt his own memory, Waldron hardly needed to "encourage [Ross] to doubt his own memory" (Appellant's Initial Brief, p. 71). Ross repeatedly told Waldron that his memory was fuzzy from his drug use, starting with the first cigarette break shortly after 3:30 on Jan. 7 (22/421), Ross concedes he was not even in custody yet at that time. Clearly, Ross's doubts about his ability to trust his own memory were not the product of any coercive conduct by Waldron.

In addition, Waldron's telling Ross that the blood on his pants matched the crime scene did not vitiate the voluntariness of Ross's statements. While Waldron only knew at the time that there was blood on the pants, as the FDLE testing revealing that it did indeed match the crime scene was not yet available,

Waldron hardly misled Ross about the evidence. Even if his representation of a match to the scene was premature, this falls far short of the type of misrepresentation that could induce an involuntary confession. Compare Fitzpatrick, 900 So. 2d at 511 (false evidence suggesting that police had satellite image of defendant with victim did not result in coerced confession); Escobar v. State, 699 So. 2d 988, 994 (Fla. 1997) (police misrepresentations do not necessarily render a confession involuntary; trial court properly rejected claim of coercion where detectives falsely stated they had obtained physical evidence).

Any doubts Ross expressed about his participation in his parents' murders were not induced by law enforcement, but arose from his own "apprehension, mental state, or lack of factual knowledge," and therefore his subsequent confession was not coerced. Wyche v. State, 987 So. 2d 23, 29 (Fla. 2008) (addressing voluntary nature of consent); Thomas v. State, 456 So. 2d 454, 458 (Fla. 1984).

The court below properly distinguished State v. Sawyer, 561 So. 2d 278 (Fla. 2d DCA 1990), finding that the circumstances of Ross's interview did not rise to the level discussed in Sawyer (4/761); Ross's continued reliance on that case is misplaced. Similarly, the other cases he cites are not factually

comparable. The issue of voluntariness must be determined from the totality of the circumstances. Fitzpatrick, 900 So. 2d at 511. The totality of the circumstances in this case demonstrate that Ross's confession was voluntary and not coerced. Thus, no relief is warranted on Ross's claim that his confession was coerced and involuntary.

C. Harmless error

Moreover, any possible error in the admission of Ross's statements to Waldron would be harmless. Ross has made his confession the centerpiece of his appeal, just the defense below centered on the unreliability of Ross's confession. However, the confession was clearly not the centerpiece of the State's case. Rather, as outlined in the Statement of the Case and Facts, the most incriminating evidence against Ross involved his own actions and comments to others. His most damaging statement was telling Barbara Curtis at the credit union that his mother had gone out of town, and he needed to know the new PIN number for the ATM.

The prosecutor's argument focused on this and other circumstantial evidence which conclusively pointed to Ross as the perpetrator of these murders. In addition, the unchallenged statements which Ross made to Waldron early on Jan. 7 are conflicting and inconsistent with the other known facts. With

the DNA on Ross's pants to confirm the obvious, the State had a solid case even without Ross's confession.

Ross's brief makes much of the fact that the jury specifically requested the videotape and equipment to defeat any suggestion of harmless error. However, just because the jury *considered* evidence, does not establish that such evidence affected the verdict, and this Court should not speculate that it did. The jury's examination of the videotape simply demonstrates that the jury carefully considered Ross's defense. Ross's expert, Dr. DeClue, and his attorney, in her closing argument, made repeated references to observations they had made with regard to the video (45/3699-3743; 46/3804-62). It is hardly surprising that the jury would want to review the video again after hearing these observations to make sure that they were not being hasty in rushing to find guilt.

As Ross has pointed out, the confession provides no basis for finding this murder was planned, and suggests that any property was only taken as an afterthought. Ross did not provide any information which law enforcement did not already know or suspect, and his statements did not lead to the retrieval of any additional physical evidence. On these facts, any possible error in the admission of his confession was

clearly harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE APPELLANT'S JANUARY 12, 2004 STATEMENTS TO DETECTIVE WALDRON.

Ross next asserts that the trial court improperly denied his motion to suppress his January 12, 2004 statements. The admissibility of these statements was also addressed at the suppression hearing (4/762-71). Once again, the trial court's factual findings are presumed correct and reviewed for competent, substantial evidentiary support; the mixed questions of law and fact are independently reviewed. Fitzpatrick, 900 So. 2d at 510; Rolling, 695 So. 2d at 292.

The testimony is undisputed that Det. Waldron spoke with Ross at the jail on January 12 after Ross's sister, Kim, advised Waldron that Ross wanted to speak with him (4/762; 44/3523). Ross wanted to offer some information about drug dealers, to see if he could make a deal to improve his situation (4/762-63). The court below granted, in part, the defense motion to suppress the Jan. 12 interview, suppressing a brief exchange after Waldron brought up the continuing search for the items Ross claimed to have thrown off the bridge (4/768-69).

Ross asserts, however, that Waldron's post-Miranda questioning admitted at trial (1) violated Missouri v. Seibert, 542 U.S. 600 (2004), by employing an improper "question-first"

strategy, and (2) was inadmissible under Oregon v. Elstad, 470 U.S. 298 (1985), as the direct product of coerced and involuntary statements made on January 9.

The court below specifically found that Ross initiated the contact with Waldron, and that his Miranda rights were voluntarily waived prior to the Jan. 12 statements which were admitted (4/766-69). The court's findings are well supported by the evidence presented at the suppression hearing. There is no evidence which supports Ross's claim that Det. Waldron intentionally elicited statements about the baseball bat used in the attack for the purpose of minimizing Ross's Miranda rights.

Ross asserts, without providing any analysis, that all of the factors for consideration in Seibert demonstrate that an improper "question-first" technique was used (Appellant's Initial Brief, p. 86). However, the pre-Miranda comments were brief, and while both the before and after Miranda statements dealt generally with the recovery of the baseball bat and purse, additional details from Ross's January 9 statements were discussed in the later interview (4/762-66).

Similarly, the suggestion that the January 12 statement should have been suppressed due to taint from the January 9 confession was properly denied. There was a clear break from the January 9 interview, in time, place, and content. In

Elstad, 470 U.S. at 310-11, the Court held that if "careful and thorough administration" of the warnings are later given, and constitutional rights are thereafter waived, any further statements may properly be used against the defendant. The facts of this case fit squarely within this principle; Ross's rights were carefully explained to him and voluntarily waived before he made the statements which were admitted into evidence. See also Davis v. State, 698 So. 2d 1182, 1187-89 (Fla. 1997) (although untaped statement, provided in the absence of Miranda warnings, should have been excluded, the second, taped statement was properly admitted).

Furthermore, any possible error would clearly be harmless. Ross did not make any additional incriminating statements in this interview, he simply reaffirmed his prior statement that he had thrown the bat and other items off of the bridge (44/3526-31). In light of the other overwhelming evidence presented, these brief statements added little to the State's case, and did not affect the jury verdict. No new trial is warranted.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT FDLE SEROLOGIST BENCIVENGA WAS QUALIFIED TO TESTIFY TO THE STATISTICAL SIGNIFICANCE OF THE DNA EVIDENCE.

Ross also disputes the admissibility of statistical evidence offered by FDLE serologist Patricia Bencivenga. Ross claims that the State failed to establish that Bencivenga was qualified to testify with regard to the statistical significance of the DNA evidence. A trial judge has broad discretion with regard to the qualification of a witness and the range of subjects on which an expert can testify, and the trial court's ruling will not be disturbed absent clear error. Penalver v. State, 926 So. 2d 1118, 1134 (Fla. 2006); Pagan v. State, 830 So. 2d 792 (Fla. 2002). As will be seen, no abuse of discretion has been shown in this issue.

It is important to recognize initially that the issue preserved for appellate review is a narrow one, involving only Bencivenga's qualifications to offer expert testimony of statistical frequencies of an identified DNA profile. Appellate consideration of this issue is often commingled with a claim that particular testimony is inadmissible under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), an issue subject to *de novo* review. Darling v. State, 808 So. 2d 145, 158 (Fla. 2002); Brim v. State, 695 So. 2d 268 (Fla. 1997). While clearly the

statistical analysis performed to determine DNA profile frequencies in a given population must satisfy Frye, there was no challenge to the reliability or admissibility of such testimony below; the only objection was directed solely at Bencivenga's qualification as an expert to provide this testimony (41/3110-11). Although Ross does not cite Frye, much of his argument disputes Bencivenga's testimony rather than her qualifications, but the reliability of her testimony was not assailed below and is not an issue for this Court's consideration. Correll v. State, 523 So. 2d 562, 567 (Fla. 1988) (inquiry into reliability only necessary upon timely objection); Hadden v. State, 690 So. 2d 573 (Fla. 1997) (trial court must make determination of reliability only upon proper objection); Kimbrough v. State, 700 So. 2d 634, 637 (Fla. 1997) (no abuse of discretion in allowing DNA evidence where there was no timely request for inquiry into its reliability); Robinson v. State, 610 So. 2d 1288, 1291 (Fla. 1992) (no error or abuse of discretion in admitting DNA test results where defendant did not produce anything that questioned the general scientific acceptance of the testing); McDonald v. State, 743 So. 2d 501, 506 (Fla. 1999) (it is only upon proper objection that the novel scientific evidence is unreliable that a trial court must make this determination).

As to the qualification issue, this Court has directly held that an expert may testify about DNA statistical frequencies where the expert can "demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources." Murray v. State, 692 So. 2d 157, 164 (Fla. 1997). The expert in Murray, Mr. Daniel Nippes, testified that the defendant's profile matched DNA recovered from the crime scene and that "91.8 percent of the population would be anticipated to have different DNA types." Nippes used a commercial testing kit and calculated his probability statistics based on a database in the Hellsmith Study Manual published by the Cetus Corporation in 1989 or 1990. Nippes admitted that he had "absolutely no knowledge" of how this database was assembled. Noting Nippes "had no insight into the assembly of the relevant database," this Court found that he was not qualified to testify to the frequency statistics. Id.

In this case, Patricia Bencivenga testified that she has worked in the forensic biology DNA section at Florida Department of Law Enforcement for eleven years (41/3096). She has a degree in microbiology and has received specialized training in forensic serology and DNA analysis, including training in vital statistics; she previously testified as an expert both in serology/DNA analysis and in the statistical analysis of DNA

results (41/3097). She has tested thousands of samples to obtain DNA profiles, analyzing multiple samples and performing statistical analysis on profiles obtained in terms of their frequency within given populations (41/3097-98).

Bencivenga testified at length about the population database she uses, noting that a database is a collection of DNA profiles that is used to compare profiles obtained to determine the frequency of a person's profile within the population (41/3098). The database used by FDLE was set up and maintained by the FBI, collected from random individuals across the United States from the University of North Texas (41/3098). Approximately 200 samples were taken from each major population group, Caucasian, African American, and Southeastern Hispanics (41/3111). She is familiar with the National Research Council guidelines for the establishment of databases, and this database was constructed in accordance with those guidelines and has been published in the Journal of Forensic Sciences and validated by peer literature (41/3099, 3111). Bencivenga can identify a frequency for an obtained DNA profile in a given population (41/3099). In addition, she has read the literature regarding the database's validation in the scientific community and been trained to manually compute the same calculations so that she

does not have to rely on the computer program for this function (41/3112).

Bencivenga conducted short tandem repeat (STR) DNA analysis on the profiles she obtained from stains on the black pants collected from Erin's room in this case (41/3100, 3103-08). She identified five samples containing DNA matching Kathleen or Richard Ross: the major contributor to sample Q-1-A was a profile matching Kathleen Ross, which occurs once in 940 trillion Caucasians, once in 33 quadrillion African Americans, and once in 4.9 quadrillion Southeastern Hispanics; Richard Ross could not be excluded as a source for the minor contributor (41/3113-14); the major contributor to samples Q-1-B and Q-1-C matched the DNA profile obtained from Richard Ross, which occurs once in 3 quadrillion Caucasians, once in 10 quadrillion African Americans, and once in 3.2 quadrillion Southeastern Hispanics; Kathleen Ross could not be excluded as a source for the minor contributor (41/3114-15); sample Q-1-D, which was suspected of being a "soak-through" from Q-1-A, revealed a DNA profile matching Kathleen Ross and occurring with the statistical frequency of one in 420,000 Caucasians, one in 1.9 million African Americans, and one in 770,000 Southeastern Hispanics (41/3115-16, 3120); and sample SW-1 was another mixed profile, with the major contributor matching Kathleen Ross with a profile

found once in 6.9 quadrillion Caucasians, once in 16 quadrillion African Americans, and once in 18 quadrillion Southeastern Hispanics; Richard Ross could not be excluded as a source of the minor contributor's profile (41/3116-17).

Bencivenga noted that there are currently 7 to 8 billion people on Earth (41/3113). She also discussed the fact that Ross's DNA would be "masked" by the DNA of his parents, and she was able to determine that the mixtures in this case contained two different profiles, and not simply one individual offspring (41/3117-18). On cross examination, she agreed that, if people are related, it can influence the values, noting that, "as part of our calculations we do instill a value to basically lower our numbers just in case there has been any relatedness that has occurred" (41/3131). Inserting this value, in accordance with National Research Council guidelines, means the testimony of frequencies in the trillions and quadrillions was more conservative, to protect the calculations in case relatedness might be present (41/3151).

Bencivenga's testimony clearly demonstrates the requisite familiarity with the FBI database used in this case to qualify her as an expert. See Murray, 692 So. 2d at 164 (observing that the expert must "demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources"). This

Court has expressly upheld similar qualifications in a number of recent cases.

In Butler v. State, 842 So. 2d 817 (Fla. 2003), this Court considered a similar claim. Butler asserted that the State's expert "was not qualified to testify to the frequency to which DNA profiles occurred in the population because she did not assist in creating the database that she used to determine the frequencies nor was she trained in statistics." This Court found that the expert's testimony was properly admitted. The expert in Butler, Dr. Jeannie Eberhardt, was an FDLE analyst at the same lab as Bencivenga (20/110,113). While Eberhardt was not trained in statistics, Bencivenga had received such training both at the University of South Florida and at FDLE (41/3097). While neither Eberhardt nor Bencivenga participated in the creation of the relevant database used, both were familiar with the samples from which the database was created. In Butler, this Court concluded, "Dr. Eberhardt's testimony did for the jurors what the expert's testimony in Murray could not -- it explained the significance of the information and the data they were given," including explaining what the statistical frequency means and breaking the probabilities down into the same three major populations of Caucasian, African-American and Southeastern Hispanic. Id., at 828-29.

A similar result was issued in Darling v. State, 808 So. 2d 145, 152-58 (Fla. 2002), which again involved an FDLE analyst who was not a statistician but was familiar with the use of statistics for these purposes and, like Bencivenga, had previously been qualified to testify both to DNA analysis and statistical interpretation of DNA results (41/3097). See also Everette v. State, 893 So. 2d 1278, 1281-82 (Fla. 2004); Hudson v. State, 844 So. 2d 762 (Fla. 5th DCA 2003); Lomax v. State, 727 So. 2d 376 (Fla. 5th DCA 1999) (rejecting a claim that the trial court erred in admitting DNA opinion evidence even though the State's expert witnesses did not personally compile the population statistics used in formulating their conclusions); Fay v. Mincey, 454 So. 2d 587, 595 (Fla. 2d DCA 1984) (observing that it is "well-established that an expert does not need a special degree or certificate in order to be qualified as an expert witness in a specialized area," but "can be qualified by his 'experience, skill and independent study of a particular field.'") (quoting Salas v. State, 246 So. 2d 621, 623 (Fla. 3d DCA 1971)).

Ross relies on Gibson v. State, 915 So. 2d 199, 201 (Fla. 4th DCA 2005), and Perdomo v. State, 829 So. 280 (Fla. 3d DCA 2002), where the appellate courts remanded for limited hearings to determine whether the trial experts were qualified to testify

to DNA population frequency statistics. In both Gibson and Perdomo, the defense had objected to the experts' qualifications, noting that the experts were not statisticians or mathematicians. In Gibson, the trial court summarily overruled the objection, and the record on appeal failed to demonstrate that the expert (Terra Sessa of the Palm Beach County Sheriff's Office Crime Lab) had sufficient knowledge of the database used in her statistical analysis; in Perdomo, the objection was overruled after the expert (Victor Alpisar of the Miami-Dade Police Crime Lab) testified that he used a database created by the Miami-Dade Police Department consisting of 1200 samples and divided into three racial and ethnic groups. Because the record in this case is more fully developed and reflects that Bencivenga possessed the necessary knowledge of the FBI database she used, these cases do not provide a basis for reversal on this issue.

In addition, Gibson and Perdomo should not be read to extend Murray beyond what this Court has recognized in Butler and Darling, at least with respect to the narrow qualification issue which Ross now presents. The district court cases support the remands by noting that records did not reveal knowledge of the database and the statistical method used, whereas Murray only requires a sufficient knowledge of the database. Compare

Gibson, 915 So. 2d at 200; Perdomo, 829 So. 2d at 284; Murray, 692 So. 2d at 164. It is not clear to what extent the Gibson and Perdomo cases may have involved an ancillary Frye claim as to the expert statistical testimony, as both cases also discuss the particular methodology used and the need for acceptance in the scientific community. Gibson, 915 So. 2d at 201-202; Perdomo, 829 So. 2d at 283-284, n.3.

Ross similarly criticizes Bencivenga's failure to identify the methodology used in this case, noting that use of the product rule cannot be assumed (Appellant's Initial Brief, p. 91). However, Bencivenga was never asked to identify the particular methodology used. The failure to answer a question that was not asked does not render an expert unqualified. A challenge to the methodology may be relevant to whether a particular scientific test is generally accepted in the scientific community to permit admission under Frye, see Brim v. State, 695 So. 2d 268 (Fla. 1997), but it is not necessary to consider the particular methodology used in order to determine the qualification of the expert, which is the issue before the Court in this claim. Ross makes no argument that Bencivenga's testimony was not admissible under Frye, and therefore her unidentified methodology is not significant to resolution of this issue. Should this Court determine that a discussion of

methodology is necessary even when no Frye objection was offered (as Perdomo appears to suggest), a limited remand could be sufficient to resolve the issue.

Ross's claim that Bencivenga "demonstrated no personal knowledge of the statistical methods used to come up with the astronomical numbers she gave the jury," (Appellant's Initial Brief, p. 91), is refuted by the record. Bencivenga testified that the numbers are generated through use of a computer program, POPSTAT, but also that she is trained to perform the same calculations by hand (41/3112). To the extent Ross is skeptical of her conclusions due to the "astronomical" nature of her statistics, Bencivenga testified that, while the database involves few individuals, the actual forensic calculations routinely approach the much higher numbers to which she testified (41/3129). Indeed, some cases report the frequency of a DNA profile measured in quintillions. See Everette; Gibson; State v. Richardson, 963 So. 2d 267, 269 (Fla. 2d DCA 2007).

Ross has failed to demonstrate any abuse of discretion in the admission of Bencivenga's testimony regarding population frequencies for the DNA profiles obtained in this case. Furthermore, any potential error in the admission of this testimony would be harmless. In addition to Ross's confession, the State presented highly incriminating testimony about Ross's

possession of his mother's ATM and Sam's Club cards, which were kept in her purse that was missing from the house, as well as the unchallenged testimony that the blood on his pants "matched" his parents' DNA. Nelson v. State, 748 So. 2d 237, 242 (Fla. 1999) (improper admission of population geneticist was harmless in light of defendant's confession and other DNA testimony); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Therefore, this Court must reject his request for a new trial on this issue.

ISSUE IV

WHETHER THE EVIDENCE IS SUFFICIENT TO PROVE (1) ROBBERY (AS A SEPARATE OFFENSE AND AS THE PREDICATE FELONY FOR FELONY-MURDER); (2) THAT THE KILLINGS WERE MOTIVATED BY FINANCIAL GAIN; AND (3) PREMEDITATION.

Ross next contends that the evidence presented below was insufficient to support his murder and robbery convictions and the robbery/financial gain aggravating factor. According to Ross, the State failed to prove the robbery/financial motive, and in fact Ross was simply angry with his parents and, after killing them in a rage, decided to steal his mother's purse as an afterthought in order to make the murders look like a robbery. Ross describes this as a circumstantial evidence case, and claims that the evidence was not inconsistent with this hypothesis of innocence, requiring that his robbery conviction be vacated and his murder conviction be reduced to second degree murder.

The standard of review for the denial of a judgment of acquittal is *de novo*. Johnston v. State, 863 So. 2d 271, 283 (Fla. 2003), cert. denied, 124 S. Ct. 1676 (2004); Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). A judgment of conviction carries a presumption of correctness, and an appellate court cannot reverse a conviction that is supported by competent, substantial evidence. Terry v. State, 668 So. 2d 954, 964 (Fla. 1996); Conahan v. State, 844

So. 2d 629, 634-635 (Fla.), cert. denied, 124 S. Ct. 240 (2003). The evidence is sufficient to sustain a conviction 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. Johnston, 863 So. 2d at 283.

Although Ross characterizes this as a circumstantial case, his confession to the murders provides direct evidence of his guilt. Woodel v. State, 804 So. 2d 316, 322 (Fla. 2001); Hardwick v. State, 521 So. 2d 1071, 1075 (Fla. 1988). Thus, the special rule that applies in cases relying exclusively on circumstantial evidence, requiring that the State present evidence inconsistent with a defendant's reasonable hypothesis of innocence, is not applicable. Meyers v. State, 704 So. 2d 1368, 1370 (Fla. 1997) ("Because confessions are direct evidence, the circumstantial evidence standard does not apply"); Conde v. State, 860 So. 2d 930, 943 (Fla. 2003), cert. denied, 124 S. Ct. 1885 (2004); Pagan, 830 So. 2d at 803 (special rule applies if State's evidence is "wholly" circumstantial); Hertz v. State, 803 So. 2d 629, 646 (Fla. 2001), cert. denied, 536 U.S. 963 (2002); Davis v. State, 90 So. 2d 629, 631 (Fla. 1956) (special rule applies where case proven "purely" on circumstantial evidence).

At any rate, the State's burden was clearly met in this case under any standard, and fully refutes the appellate theory that Ross was motivated by anger rather than money. As a review of the record demonstrates clear support for the jury verdicts, no basis for relief is presented in this issue.

The trial court's sentencing order describes the evidence of financial motivation as follows:

> In the months prior to the murders, the Defendant was minimally employed and involved in heavy drug use, including marijuana, Xanax, and cocaine. He told Det. Waldron that his routine was "to wake up and get high every day." In fact, the day Richard and Kathleen were discovered, the Defendant and Erin were planning to go to Cape Coral, with one goal being to purchase a large quantity of marijuana. The Defendant told Det. Waldron that he was planning to buy as much marijuana as he could and then resell it in Bradenton to make a profit.
>
> The Defendant had two very hard-working parents who continually provided him with financial support, including paying his rent. Kathleen would give her ATM card to the Defendant, which made Kim, the Defendant's sister, "raise [her] eyebrows." It is clear that the Defendant was uncomfortable with and sensitive about his financial situation, admitting to Det. Waldron that he did not have a job and that he often blew the money his mother had given him in the past on drugs.
>
> Although the Defendant had no money, he fabricated stories to make it look like he did. On December 24, 2003, the Defendant was having Christmas Eve dinner with Erin's family during which a comment was made about the Defendant's lack of money. The next day, Christmas day, the Defendant showed Erin and Teri a bank receipt showing a balance of $107,000. He explained to Erin that his godmother had just died and that he inherited $100,000 from her. The same day, the Defendant told his ex-girlfriend, Samantha, that his aunt had died, that he was getting an inheritance,

and that he was going to buy his parents' house. On January 7th, the Defendant saw a friend by the name of Paul Hamilton, who he had not seen in several years, at a tire shop and told him that his grandmother had died and left him $120,000 and that he used it to buy his parents' house.

More than a year before the Rosses' deaths, the Glenns, who were childhood friends of the Defendant, had become so concerned about the Defendant's drug use and behavior that they installed a security system in their home. Kathleen knew the Defendant was involved in drugs, and was extremely concerned about him. In the last month of her life, Kathleen spoke with Kim frequently about her increasing concern about the Defendant. The Defendant had become more withdrawn, and was sleeping poorly. There had been talk amongst the family of moving the Defendant to live with Kim and her husband in Gainesville in an attempt to remove him from his drug friends, get him back in school, and get him a job.

In the weeks prior to the murders, the Rosses were not only concerned about the Defendant and his lifestyle choices, but were equally concerned about their own personal property. A few days before the murders, the Defendant took Kathleen's ATM card out of her purse without her knowledge. After being confronted by Kathleen, and after initially denying it, the Defendant admitted to taking the card. Two days before her death, Kathleen changed the PIN number to her ATM card.

In addition, two or three days before her death, Kathleen placed a paper bag containing her jewelry and jewelry box in her mother's attic. One can certainly infer from this fact that Kathleen felt as though these valuables were no longer safe in her own home. Likewise, a crime scene technician found a set of keys, a checkbook and a wallet inside Richard's pillowcase, the pillowcase upon which he was sleeping when he was killed. It is logical to conclude from this fact that Richard, who did not stay at the home very often, placed those items inside the pillowcase before he went to bed on January 6th. In light of the Defendant's statements to Det. Waldron that his father hid the car keys from him and testimony from Michael Ross that Richard had told him he could not trust the Defendant, it is also logical to conclude that he

deliberately placed those items inside his pillowcase to protect them from the Defendant.

Perhaps partially in an attempt to get the Defendant on the right track and perhaps partially because she was in the process of getting a divorce and wanted to get her financial situation settled, the day before her death Kathleen had the Defendant sign a contract which provided that she *had* loaned the Defendant $1400 which would "be paid back in full as soon as possible," and that the Defendant "will never ask for Sam's Club card or any other money." Although most of contract was hand-written by the Defendant, Kathleen herself wrote into the contract that the money would be repaid "as soon as possible." Between Christmas 2003 and January 6, 2004, $1400 had been withdrawn from Kathleen's bank account. The Defendant admitted to Det. Waldron that his mother "put a cap on" the amount of money he could have.

Within hours after he murdered his parents, and the day after he signed the contract, the Defendant not only had possession of Kathleen's ATM card and Sam's Club card, but used, or at least attempted to use, both of them. Before the Defendant and Erin went to the Ross home that day, the Defendant attempted to withdraw money from Kathleen's GTE bank account with her ATM card. The Defendant was unsuccessful, as Kathleen had very recently changed the PIN number. The Defendant went inside the bank and spoke to an employee, Barbara Curtis, in her office and attempted to acquire the new PIN number from her. Despite the Defendant's "persistent" efforts, Ms. Curtis did not give him the PIN number. He left the bank and retried the card at a convenience store before he went home.

Even though it was Kathleen who confronted the Defendant on January 6th with the contract, once the Defendant arrived at the house that night with Richard there, it would have been impossible to kill Kathleen without killing Richard also. Whether he killed his parents in order to obtain the inheritance he expected to receive upon their deaths or simply to obtain his mother's bank card and the funds available therein, the Court cannot be certain. What is certain is that there was substantial proof, in many forms, that the Defendant killed his parents for pecuniary gain.

(8/1384-87) (footnotes omitted).

Ross seizes upon the trial court's uncertainty as to whether Ross was seeking to obtain an inheritance or simply to get the funds available with his mother's ATM card to suggest that the evidence of financial gain was "equivocal and speculative" (Appellant's Initial Brief, p. 95). However, the fact that the court did not identify a particular avenue for receiving the monetary benefit does not dilute the fact that Ross was seeking financial gain. It is undisputed that Ross was desperate for money; bragged about having money he did not have; and was in particular need on January 7 because of a planned trip to Cape Coral to purchase enough marijuana to sell for a profit, after his mother had made certain that he understood she would no longer give him money.

Ross also suggests that robbery was not a motive because there was no showing that he would, in fact, receive any inheritance. The fact that the perpetrator is unable to obtain any money does not preclude the finding of a robbery or the pecuniary gain aggravating factor. Franklin v. State, 965 So. 2d 79, 99-100 (Fla. 2007). This Court has never suggested that the plan for financial gain must be a sensible or successful plan.

Where a robbery is disputed as taking property in an afterthought, this Court has held that the defendant's theory

must be carefully analyzed in light of the entire circumstances. Perry v. State, 801 So. 2d 78, 89 (Fla. 2001); Beasley v. State, 774 So. 2d 649, 666 (Fla. 2000). The relevant question is whether another motive is apparent from the circumstances. In cases where robbery has been rejected as a motive, the defendants take property, but there is "no indication that the defendant wants or needs the valuables which are taken after the murder." Beasley, 774 So. 2d at 666. For example, in Mahn v. State, 714 So. 2d 391 (Fla. 1998), and Knowles v. State, 632 So. 2d 62 (Fla. 1993) the defendants took vehicles, but in both cases, the defendants were shown to have other motives. In Mahn, there was no showing that the defendant knew, prior to the murder, of the money he took, and Mahn testified that he only took the victim's car because he couldn't find the keys to his father's car. In Knowles, the defendant had "free access" to the truck he took, and could have taken it at any time without committing murder for the purpose. Conversely, in this case, the victims were killed the day after Ross's mother terminated the generous access to her bank account she'd previously granted to Ross.

The theory that Ross killed his parents in a rage and only took his mother's purse as an afterthought to mislead the police into thinking that robbery was a motive is not reasonable in

this case. Not only was Ross desperate for money he could no longer have, but his anger toward his father for having an affair and divorcing his mother provides absolutely no explanation for Kathleen's murder. Ross had known about the affair and the divorce for a long time, and there is no rational trigger for his anger with his parents in bed asleep at 3:00 a.m. The suggestion that seeing his father's car somehow set him off fails to explain why he was going home at 3:00 in the morning in the first place. See Perry, 801 So. 2d at 88, n. 10 (noting inconsistencies in defense's version of events in rejecting "afterthought" argument).

Ross's argument clearly fails to accord proper deference to the reasonable inferences to be drawn from the evidence presented. See Darling, 808 So. 2d at 155 (in moving for acquittal, defendant admits the facts in evidence, as well as every conclusion favorable to the State that the jury might fairly and reasonably infer from the evidence); Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). The jury in this case was specifically instructed, as requested by the defense, that "the taking of property after a murder, where the motive for the murder was not the taking, is not a robbery" (46/,3801-02, 3902). Thus, the jurors clearly rejected this theory of defense, as this Court must.

Ross also disputes the evidence of premeditation.[12] Of course, premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act. Spencer v. State, 645 So. 2d 377, 380-381 (Fla. 1994), cert. denied, 118 S.Ct. 213 (1997); Preston v. State, 444 So. 2d 939, 944 (Fla. 1984), cert. denied, 507 U.S. 999 (1993). The traditional factors for consideration in determining the existence of premeditation support a finding of premeditation in the instant case. Such factors include the nature of the weapon, the presence or absence of provocation, previous difficulties between the parties, the manner in which the homicide was committed, the nature and manner of the wounds, and the accused's actions before and after the homicide. Larry v. State, 104 So. 2d 352, 354 (Fla. 1958). The nature of the injuries to Richard and Kathleen Ross, from repeated blows to the head with a baseball bat, provides a substantial basis for the finding of premeditation. There is absolutely no evidence of anything that would have provoked a rage or frenzy, since the victims were asleep in bed, and no evidence of prior

[12] The prosecutor argued both premeditation and felony-murder to the jury, and the jury was instructed on both theories, returning general verdicts of guilt for both counts of first degree murder (7/1277-78; 46/3776-97, 3867-97).

difficulties between the parties as, by all accounts, Ross and his mother were very close.

This Court has consistently upheld a finding of premeditation in cases involving vicious, prolonged attacks with a deadly weapon. Perry, 801 So. 2d at 85-86 (multiple stab wounds to vital organs); Beasley, 774 So. 2d at 659-61 (multiple blows to the head with hammer). In Preston, this Court noted that "[s]uch deliberate use of this type of weapon so as to nearly decapitate the victim clearly supports a finding of premeditation." 444 So. 2d at 944. See also Kramer v. State, 619 So. 2d 274 (Fla. 1993) (blood spatter and victim injury provided substantial basis for finding of premeditation).

To the extent that Ross suggests that his anger, drug use, and impaired memory preclude a first degree murder conviction, it is important to note there was no evidence as to these facts presented below, only Ross's self-serving hearsay attempting to minimize what he has done while talking to Det. Waldron. Ross did not offer any testimony to support a conclusion that he could not form the requisite intent to commit robbery or murder. The fact that his use of drugs or some defensive mechanism shields his mind from the full horror of what he has done says nothing about his state of mind before or during the murders. No basis for disturbing the jury verdicts is presented.

Ross's only theory of "innocence" is that he killed his parents, while they slept, because he was angry that his father had been involved with another woman, and was divorcing his mother. Apparently, it was just a coincidence that Ross's anger surfaced at a time when he was desperate for money, the day after his mother had put an end to his freeloading. Moreover, there is no reasonable, innocent explanation for his possession of her ATM and Sam's Club card hours after her death; if Ross was just staging a robbery, he would have disposed of the items taken, rather than using them, or attempting to use them, for his own gain. The court below properly denied Ross's plea for acquittal.

This Court has held that a motion for judgment of acquittal should not be granted "unless there is no view of the evidence which the jury might take favorable to the opposite party." DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993); Lynch, 293 So. 2d at 45. On the facts of this case, there is only one reasonable conclusion to be drawn: Ross intentionally killed his parents for his own financial gain. This Court must affirm his convictions as fully supported by the evidence presented below.

ISSUE V

WHETHER THE DEATH PENALTY IS PROPORTIONATE.

Ross also contends that his death sentence is disproportionate. He claims that these murders are not among the most aggravated or least mitigated, and that the sentence is disproportionate compared to other capital cases.

A proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences, to insure that the death penalty is being uniformly imposed. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

The aggravating factors found in this case are: (1) defendant was previously convicted of violent felonies and (2) murder committed during a robbery and for pecuniary gain (merged) (8/1382-87). The court found three statutory mitigating factors: no significant criminal history (little weight), under extreme mental or emotional disturbance (proven only as to drug use, moderate weight), substantial impairment of capacity to appreciate criminality of his conduct or conform his conduct to the requirements of the law (proven only as to drug

use, moderate weight) (8/1388-94). The court rejected age (21 years old) as a statutory mitigator and ascribed little to moderate weight to seven non-statutory factors: history of substance abuse, history of mental and emotional problems, adjusts well to structured environment and behaved well in jail and in court, positive characteristics, confessed and cooperated with law enforcement, remorse, and ability to form loving and positive relationships with others (8/1394-99).

Factually similar cases support the imposition of the death penalty on Ross. Several cases involve young adult defendants that commit brutal, senseless crimes in order to obtain money for drugs. Griffin v. State, 820 So. 2d 906, 916-17 (Fla. 2002) (defendants shot two victims in well-planned robbery, similar aggravating and mitigating factors); Hayes v. State, 581 So. 2d 121 (Fla. 1991). Other comparable cases include: Robinson v. State, 761 So. 2d 269 (Fla. 1999); Cole v. State, 701 So. 2d 845, 853 (Fla. 1997) (defendants befriended the victims while camping, raped one victim and killed the other, stealing their property), cert. denied, 523 U.S. 1051 (1998); Shellito v. State, 701 So. 2d 837, 845 (Fla. 1997) (victim shot during robbery, similar aggravating and mitigating factors); Moore v. State, 701 So. 2d 545, 551-52 (Fla. 1997) (defendant robbed and killed a friend); Brown v. State, 565 So. 2d 304

(Fla.) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990).

Ross's argument on this issue makes no effort to compare this case with factually similar capital cases. Rather, he asserts that the case cannot be among the "most aggravated" because the aggravating factors of heinous, atrocious or cruel and cold, calculated and premeditated did not apply, and the case is not among the "least mitigated" because both statutory mental mitigators were found. Although this Court has acknowledged the relevance of HAC and CCP factors in a proportionality review, this Court also recognized that their presence or absence is "not controlling." Taylor v. State, 937 So. 2d 590, 601 (Fla. 2006); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999).

This Court has upheld a number of death sentences as proportionate when neither HAC nor CCP were applied, with mental mitigation far more compelling than that presented by Ross. Taylor, 937 So. 2d at 601; Mendoza v. State, 700 So. 2d 670 (Fla. 1997); Pope v. State, 679 So. 2d 710 (Fla. 1997); Heath v. State, 638 So. 2d 600 (Fla. 1994). See also Taylor v. State, 855 So. 2d 1, 32 (Fla. 2003), cert. denied, 541 U.S. 905 (2004)

(no HAC or CCP); Griffin; Bryant v. State, 785 So. 2d 422, 437 (Fla. 2001); Shellito; Moore; Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997), cert. denied, 522 U.S. 1129 (1998); Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996), cert. denied, 520 U.S. 1123 (1997); Vining v. State, 637 So. 2d 921, 928 (Fla. 1994).

The aggravating factors applied in this case were each allocated "significant weight" by the trial judge (8/1383-87). In addition, although HAC and CCP were not found and weighed in aggravation, the evidence demonstrated that Ross's actions were both brutal and deliberate, facts which can be considered in proportionality even in the absence of HAC and CCP. See Sliney, 699 So. 2d at 672 (noting brutality of attack in upholding proportionality of sentence, despite trial court's failure to find HAC). When the totality of the circumstances are considered, Richard and Kathleen's murders are clearly among the most aggravated and well support the death sentences imposed.

In addition, despite the finding of the mental mitigators which were proven "only as to the Defendant's drug use," the mitigation presented below was not substantial or extensive. All factors must be considered by exploring the evidentiary support and trial court findings. With regard to the statutory mitigation that was found, the trial court's order fully explains why it was not compelling:

A. Statutory Mitigating Circumstances

1. The Defendant has no significant history of prior criminal activity (§ 921.141(6)(a))

The purpose of this mitigator is to help determine the Defendant's character. The Defendant presented argument that he has no significant history of criminal activity, and no crimes of violence.

The Defendant's record includes a juvenile arrest for breaking into a bowling alley. During that incident, the Defendant and some friends entered the bowling alley and trashed it, and the Defendant took a bowling pin as a souvenir of the event. As a result, the Defendant was accused of criminal mischief and theft.

In 2001, the Defendant was charged with possession of marijuana and possession of paraphernalia, in which he pled guilty and was sentenced to six months of probation. The Defendant subsequently admitted to violating his probation by, among other things, testing positive for marijuana numerous times. The Court revoked his probation and sentenced him to thirty days in the county jail, concurrent both counts.

The Court finds this mitigator has indeed been proven, but gives it little weight. Aside from and despite these criminal charges, the Defendant continuously engaged in illegal drug activity that did not lead to arrests or convictions, but made impossible his ability to hold down a job or attend school. He smoked marijuana and used Xanax regularly, and used cocaine, acid, and ecstasy.

2. Capital felony committed while defendant was under the influence of extreme mental or emotional disturbance (§ 921.141(6)(b))

The extreme mental or emotional disturbance mitigating circumstance has been described as a condition "less than insanity but more than the emotions of an average man, however inflamed." This circumstance is established if there is evidence of a mental or emotional condition that interfered with, but did not obviate the Defendant's knowledge of right and wrong. The Defendant presented argument that he

was under the influence of extreme mental or emotional disturbance at the time of the murders, and in support presented testimony from Dr. Maher and Dr. Wood.

Dr. Maher, a psychiatrist, saw the Defendant on January 14, 2004 and February 14, 2007, and reviewed police materials and school and mental health records. Dr. Maher opined that the Defendant suffers from, and did suffer from at the time of the murders, a "preschizophrenic condition," had "a history of very severe substance abuse of a variety of different drugs," and suffered from "adjustment disorder with mixed emotional features." Dr. Maher testified that the "preschizophrenic condition," complicated by the polysubstance abuse, was "the basis. . . of his mental disturbance" which imposed upon him an impairment in his ability to think and function normally.

The Defendant also offered Dr. Wood, a professor of neuropsychology, who administered a PET scan to the Defendant in January 2005, met with him in the spring of 2007, and interviewed the Defendant's sister and the Glenns. He described the Defendant as "the sickest" and "most mentally ill" defendant he has ever examined, and opined that the Defendant's prodromal, or "preliminary," schizophrenia seriously impaired his choices. In arriving at this opinion, Dr. Wood relied on the Defendant's PET scan, which he described as "highly typical of schizophrenics whose symptoms are positive symptoms." He also relied on the results of an MMPI, the Defendant's inappropriate affect during the PET scan, the Defendant's response to the change from private to public school, drug use, and possible head injury.

While the Defendant may have difficulties, the Court is not persuaded that he has demonstrated he suffers from "preliminary schizophrenia." The State presented the testimony of Dr. Edward Eikman, a radiologist, who testified that the Defendant's PET scan images were normal, and that there are no consistent patterns of sensitivity and specificity for a diagnosis of schizophrenia.

In addition, there was testimony that the Defendant had been to mental health professionals in the past, including Victoria Vandelew, and "always made up stuff, and generally tried to aggravate the person." In this case, the Defendant certainly had incentive to feign mental problems, and in fact the

Court specifically finds that he did so. Shortly after the State charged him with two counts of first-degree murder, the Defendant wrote a letter to Erin from jail indicating that his "only defense is the insanity plea, temporary insanity that is." Dr. Maher testified that he believed the Defendant avoided telling him everything he remembered about the murders, and Dr. Wood testified that the Defendant scored "very high" on the "lie or self-report of very unusual or unlikely circumstances" scale of the MMPI, and opined that he "modestly exaggerated" his symptoms.

Dr. Wood and Dr. Maher also acknowledged that the Defendant's hallucinations were all self-reported, and that there was no evidence of hallucinations from other sources. In addition, Dr. Wood testified the Defendant was "not sure, but [gave] a 75 percent likelihood that he remember[ed] voices talking to him telling him to try to clean himself off and to try to make it look like a robbery." Although the Defendant told Dr. Wood that voices told him what to do during the bowling alley incident, when the Defendant saw Vandelew shortly after the bowling alley incident, he specifically denied experiencing hallucinations, and told her that he broke into the bowling alley "for money." There is no evidence that he ever told family members, friends, prior health care providers, law enforcement, correctional officers at the jail, or anyone else that he experiences or has experienced hallucinations.

Finally, Dr. Maher testified that his opinion was based in part on his observation that the Defendant has "apparently normal but superficial and limited relationships with people." This conclusion is hard to reconcile with other evidence presented in this case. As discussed below, throughout the penalty phase, numerous family members and friends testified to relationships with the Defendant that were not clearly superficial or limited.

As far as the Defendant's extreme emotional disturbance, Dr. Maher opined that the Defendant had several emotional stressors in his life: (I) he was failing in life, did not work successfully and used drugs constantly; (2) he had recently broken up with his longtime girlfriend, Samantha; (3) he started a new relationship with Erin, who was much younger than

him; and (4) his parents were divorcing. The Court finds that the Defendant has not proven that he was under extreme emotional disturbance, as defined by case law.

The Court does find that the Defendant did have a drug problem, and this Court has struggled with the question of whether the drug use either obviated or interfered with his knowledge of right and wrong or impaired his ability to appreciate the criminality of his conduct. There is ample evidence that the Defendant was thinking clearly and goal- oriented immediately after the murders, and there is no doubt the Defendant knew after the fact that what he had done was wrong. After killing both of his parents, the Defendant methodically went around the house and attempted to make it look like someone else had committed these murders by staging a burglary. He retrieved rope, manipulated his parents' bloody, lifeless bodies in order to place the ropes around their necks, threw their clothes and other personal items all over the floor, and opened the kitchen slider door as an apparent entry point for the unknown burglar. In his subsequent interviews with Det. Waldron, the Defendant claimed that the house had been ransacked, that it looked like someone had been looking for something, and denied any involvement in their deaths.

It appears, however, that the Defendant's drug use may have interfered with his inhibitions prior to the murders (which occurred around 3:30am). There is evidence that the Defendant had been using Xanax, smoking marijuana, and drinking alcohol at some point before the murders. On the evening of January 6th, after it had gotten dark, the Defendant and Erin picked up a friend, Mike Young, and went to another friend's house, where they all drank beer, took Xanax, and smoked marijuana. The Defendant drove Erin and Mike to Erin's home, where there is conflicting evidence regarding whether they drank beer and smoked marijuana, but the Court found no evidence they took Xanax. The Defendant eventually drove Mike home at around 3-3:30am. Dr. Maher testified that the Defendant's use of Xanax could have played a role in the murders, in that its presence in his system likely made him "irritated, agitated, [and] impulsive" and "action-oriented," and removed his inhibitions. There

was, however, no specific testimony regarding exactly when the Defendant took marijuana, alcohol, or Xanax in relation to the murders, and there was no testimony regarding how long the effects of each of these substances would last. In other words, this Court cannot say with certainty when in relation to the murders the Defendant took these substances, or whether the Defendant was actually under the influence at the time of the murders, was withdrawing from any effects of these substances, or was completely sober.

Nevertheless, the Court is reasonably convinced that drug use may have interfered with the Defendant's inhibitions and self-control, although it did not obviate his knowledge of right or wrong to the point of a "drug-induced frenzy." The Court therefore finds that this mitigator has been proven only as to the Defendant's drug use, and gives it moderate weight. The Court finds that this mitigator has otherwise not been proven.

3. Capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (§ 921.141(6)(f))

Case law concerning this mitigating circumstance provides the following guidance concerning its application:

> Mental disturbance, which interferes with but does not obviate the defendant's knowledge of right and wrong may be considered as a mitigating circumstance. [T]his circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

Dr. Maher testified that as a result of his preschizophrenic condition, complicated by years of polysubstance abuse, the Defendant had a decreased "ability to choose voluntarily what to do, to resist his impulse to do whatever horrid thing came into his head," and his ability to appreciate the criminality of his conduct or to conform his conduct to the

> requirements of the law was "substantially impaired." Dr. Wood testified that the Defendant's "ability to know what he was doing, to appreciate the significance of his behavior, to know even the wrongness and rightness of behavior... was seriously. . . impaired."
>
> As indicated previously, the Court is not persuaded that the Defendant has sufficiently established that he suffered from a "preschizophrenic condition" or that he was under an extreme emotional disturbance at the time of the killings. Indeed, the mental health evidence appeared to this Court to have been exaggerated by the Defendant. As discussed previously, however, the Court finds that the Defendant's drug use, which was extensive, may have interfered with his ability to think clearly prior to the murders and may have interfered with his inhibitions.
>
> The Court gives this mitigator moderate weight as to the drug use only. Otherwise, the Court finds this mitigator has not been proven.

(8/1388-94) (footnotes omitted).

Ross's claim that the court below "ignored uncontradicted evidence that Blaine suffers from a significant mental disorder" (Appellant's Initial Brief, p. 99) is refuted by the record. The court clearly did not ignore the testimony of Dr. Maher and Dr. Wood, but fully explained why such testimony was rejected on the facts of this case. The court's finding that Ross feigned mental problems had ample support in the record, and the finding against any significant mental disorder was proper based on Dr. Eikman's testimony of a normal PET scan, testimony of Ross's ability to form meaningful relationships, and Ross's actions after the murders, demonstrating clear thinking and goal-oriented behavior. Clearly, Ross's claim of a significant

mental disorder was contradicted below. See Morton v. State, 789 So. 2d 324, 330 (Fla. 2001); Robinson v. State, 761 So. 2d 269 (Fla. 1999) (trial court is not bound to accept unrebutted expert testimony, where it is inconsistent with the other evidence).

Thus, the mitigating factors in this case do not generate any significant reduction of Ross's moral culpability. When the evidentiary underpinnings of Ross's case for mitigation are reviewed, the proportionality of his sentences is confirmed.

The death sentences imposed for these murders are not disproportionate when compared to other factually similar cases. Ross's request for a life sentence on this basis must be denied.

CONCLUSION

WHEREFORE, based on the foregoing facts, arguments and citations of authority, this Court must affirm the convictions and sentences imposed by the lower court.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

CAROL M. DITTMAR
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished by U.S. Regular Mail to, this Steven L. Bolotin, Assistant Public Defender, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this 22nd day of December, 2008.

CERTIFICATE OF FONT COMPLIANCE

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

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COUNSEL FOR APPELLEE