IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1206

MARGARET A. ALLEN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 27

ARGUMENT 29

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE UNRELIABLE HEARSAY STATEMENT OF WITNESS MARTIN. 29

II. THE ISSUE REGARDING THE KIDNAPPING CHARGE, THAT THERE WAS NO EVIDENCE OF KIDNAPPING BECAUSE THE CONFINEMENT WAS MERELY INCIDENTAL TO THE MURDER WAS NOT PRESERVED, AND THE TRIAL COURT PROPERLY ADJUDICATED THE DEFENDANT GUILTY OF THE FIRST DEGREE FELONY MURDER BASED UPON THE KIDNAPPING CHARGE WHERE DEFENDANT WAS CHARGED UNDER SECTION 787.01(1)(a)(3), WHICH ONLY REQUIRES AN INTENT TO "INFLICT BODILY HARM OR TO TERRORIZE ANOTHER PERSON." 43

III. THE ISSUE REGARDING THE QUESTIONING DEFENDANT'S MENTAL HEALTH EXPERT IS UNPRESERVED AND DOES NOT REQUIRE REVERSAL. 51

IV. DEFENDANT'S DEATH SENTENCE WAS PROPERLY IMPOSED. 58

A. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT WAS ENGAGED IN THE KIDNAPPING OF WENDA WRIGHT AND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL..... 58

B. THE TRIAL COURT PROPERLY EVALUATED AND REJECTED THE STATUTORY MENTAL MITIGATORS..... 66

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN WEIGHING THE NONSTATUTORY MITIGATION IT FOUND..... 79

D. DEFENDANT'S SENTENCE IS PROPORTIONATE. 84

CONCLUSION 89

CERTIFICATE OF SERVICE 89

CERTIFICATE OF COMPLIANCE 90

TABLE OF AUTHORITIES

Cases

Aguirre-Jarquin v. State,
9 So. 3d 593 (Fla. 2009) 63

Allen v. State,
662 So. 2d 323 (Fla. 1995) 55, 56

Ault v. State,
53 So. 2d 175 (Fla. 2010) 71

Banks v. State,
46 So. 3d 989 (Fla. 2010) 51

Bedford v. State,
589 So. 2d 245 (Fla. 1991) 45

Belcher v. State,
851 So. 2d 678 (Fla. 2003) 65

Besarba v. State,
656 So. 2d 441 (Fla. 1995) 88

Black v. State,
367 So. 2d 656 (Fla. 3rd DCA 1979) 43

Blanco v. State,
706 So. 2d 7 (Fla. 1997) 60

Boyd v. State,
910 So. 2d 167 (Fla. 2005) 45

Brant v. State,
21 So. 3d 1276 (Fla. 2009) 61

Brown v. State,
721 So. 2d 274 (Fla. 1998) 62

Buzia v. State,
926 So. 2d 1203 (Fla. 2006) 62

Calvert v. State,
730 So. 2d 316 (Fla. 5th DCA 1999) 41

Campbell v. State,
571 So. 2d 415 (Fla. 1990) 67

Carpenter v. State,
785 So. 2d 1182 (Fla. 2001) 35

Carter v. State,
560 So. 2d 1166 (Fla. 1990) 88

Cave v. State,
727 So. 2d 227 (Fla. 1998) 58

Chambers v. Mississippi,
410 U.S. 284 (1973) 37, 38, 39

Companioni v. City of Tampa,
51 So. 3d 452 (Fla. 2010) 51

Conahan v. State,
844 So. 2d 629 (Fla. 2003) 46

Conner v. State,
19 So. 3d 1117 (Fla. 2nd DCA 2009) 47, 48, 49

Consalvo v. State,
697 So. 2d 805 (Fla. 1997) 86

Crook v. State,
813 So. 2d 68 (Fla. 2002) 77, 78

Crook v. State,
908 So. 2d 350 (Fla. 2005) 86

Davis v. State,
698 So. 2d 1182 (Fla. 1997) 56

Down v. State,
574 So. 2d 1095 (Fla. 1991) 87

Faison v. State,
426 So. 2d 963 (Fla. 1983) 43, 45

Foster v. State,
679 So. 2d 747(Fla. 1996), ... 68

Frances v. State,
970 So. 2d 806 (Fla. 2007) 86

Francis v. State,
473 So. 2d 672 (Fla. 1985) 85

Francis v. State,
808 So. 2d 110 (Fla. 2001) 60

Geralds v. State,
601 So. 2d 1157 (Fla. 1992) 67

Geralds v. State,
674 So. 2d 96 (Fla. 1996) 60, 61

Guzman v. State,
721 So. 2d 1155 (Fla. 1998) 68

Hayward v. State,
24 So. 3d 17 (Fla. 2009) 53

Hernandez v. State,
913 So. 2d 36 (Fla. 3rd DCA 2005) 45

Hoskins v. State,
965 So. 2d 1 (Fla. 2007) 65

Hudson v. State,
708 So. 2d 256 (Fla. 1998) 84

Hunt v. Seaboard Coast Line R. Co.,
327 So. 2d 193 (Fla. 1976) 40

James v. State,
695 So. 2d 1229 (Fla. 1997) 62, 66, 74

Jones V. State,
678 So. 2d 309 (Fla. 1996) 36

Kearse v. State,
770 So. 2d 1119 (Fla. 2000) 67

Knowles v. State,
632 So. 2d 62 (Fla. 1993) 88

Kopsho v. State,
84 So. 3d 204 (Fla. 2012) 45

Larkins v. State,
739 So. 2d 90 (Fla. 1999) 87

Livingston v. State,
565 So. 2d 1288 (Fla. 1988) 88

Lynch v. State,
841 So. 2d 362 (Fla. 2003) 62

Magna v. State,
350 So. 2d 1088 (Fla. 4th DCA 1977) 36

Maldonado Melendez v. State,
51 So. 3d 624 (Fla. 5th DCA 2011) 49

Mansfield v. State,
758 So. 2d 636 (Fla. 2000) 65, 67

McWatters v. State,
36 So. 3d 613 (Fla. 2010) 62

Miller v. State,
770 So. 2d 1144 (Fla. 2000) 85

Miller v. State,
926 So. 2d 1243 (Fla. 2006) 60

Morris v. State,
811 So. 2d 661 (Fla. 2002) 86

Morton v. State,
689 So. 2d 259 (Fla. 1997) 30

Neary v. State,
384 So. 2d 881 (Fla. 1980) 87

Nibert v. State,
574 So. 2d 1059 (Fla. 1990) 67

Ochoa v. State,
826 So. 2d 956 (Fla. 2002) 62

Oxford v. State,
959 So. 2d 187 (Fla. 2007) 87

Palmes v. Wainwright,
460 So. 2d 362 (Fla. 1984) 84

Parker v. Matthews,
132 S.Ct. 2148 (2012) 75, 76

Payne v. State,
426 So. 2d 1296 (Fla. 2nd DCA 1983) 53

Peavy v. State,
442 So. 2d 200 (Fla. 1983) 63

Perry v. State,
57 So. 3d 910 (Fla. 1st DCA 2011) 48

Porter v. State,
564 So. 2d 1060(Fla. 1990), ... 85

Prevatt v. State,
866 So. 2d 729 (Fla. 5th DCA 2004) 34, 35

Ray v. State,
755 So. 2d 604 (Fla. 2000) 29

Roberts v. State,
510 So. 2d 885 (Fla. 1987) 68

Robertson v. State,
699 So. 2d 1343 (Fla. 1997) 88

Robinson v. State,
761 So. 2d 269 (Fla. 1999) 78

Rodriguez v. State,
753 So. 2d 29 (Fla. 2000) 53

Rolling v. State,
695 So. 2d 278 (Fla. 1997) 62

San Martin v. State,
705 So. 2d 1337 (Fla. 1997) 54

Simpson v. State,
418 So. 2d 984 (Fla. 1982) 51

Sims v. State,
681 So. 2d 1112 (Fla. 1996) 83

Sireci v. State,
587 So. 2d 450 (Fla. 1991) 79

Smith v. State,
28 So. 3d 838 (Fla. 2009) 51, 52

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 41

State v. Lumarque,
990 So. 2d 1241 (Fla. 3rd DCA 2008) 47

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982) 40, 43

Sutton v. State,
834 So. 2d 332 (Fla. 5th DCA 2003) 45

Swafford v. State,
533 So. 2d 270 (Fla. 1988) 62

Tibbs v. State,
397 So. 2d 1120 (Fla. 1981) 44

Tompkins v. State,
502 So. 2d 415 (Fla. 1986) 62

Trease v. State,
768 So. 2d 1050 (Fla. 2000) 67

Waddell v. State,
696 So. 2d 1229 (Fla. 3rd DCA 1997) 45

Walker v. State,
707 So. 2d 300 (Fla. 1997) 52, 55

Walls v. State,
641 So. 2d 381 (Fla. 1994) 74, 75

Willacy v. State,
696 So. 2d 693 (Fla. 1997) 58

Woodard v. State,
579 So. 2d 875 (Fla. 1st DCA 1991) 33, 34

Statutes

§ 90.804, Fla. Stat. (2011) 39

§90.804(2)(C), Fla. Stat 29, 32, 36, 37

STATEMENT OF CASE AND FACTS

Wenda Denise Wright was a wife and a mother of two baby boys. (T. 797) Wenda Wright and her husband knew Defendant almost all of their lifes. (T. 798) They lived in a community where everybody knew each other. (T. 864) Around February 8, 2005, Quintin Allen went to Defendant's house to repay $200 that he owed her. (T. 866) When he came to Defendant's house, Allen spent some time talking and socializing with Defendant's two young daughters. (T. 868) At the same time, Allen observed James Martin and Keith Bailey were present, helping Defendant paint her house. (T. 867) Soon thereafter, Defendant noticed that her purse was missing and told Allen to stay in the house with her kids. (T. 867-868)

Defendant left the house and returned after five minutes with Wenda Denise Wright. (T. 869-871) Defendant and Wenda Wright stayed alone in the house for about 15 minutes. (T. 920-921) Defendant left the house for the second time and directed Allen: "Don't let her leave." (T. 920) At one point, Wenda said that she wanted to go home, and Allen replied that Defendant did not want her to go anywhere so Wenda stayed in the house. (T. 922-923) After Defendant came back, Allen heard Wenda Wright state that she did not have Defendant's purse, and Defendant

insist that Wenda did have Defendant's purse and needed to disclose the purse's location. (T. 872-873)

Defendant then told Allen that her purse has been missing and that Wenda Wright stole it because she was at the house earlier that morning for the purpose of cleaning fish and cleaning up Defendant's house. (T. 882-883) Allen told Defendant that she has a habit of misplacing things, and Defendant agreed with that statement so they started searching through the entire house. (T. 885-886) While Defendant and Allen were searching for the purse for about 20 or 30 minutes, Wenda Wright was sitting on the sofa in the living room. (T. 886-887) At the same time, James Martin, who was painting Defendant's house, entered the house. (T. 887) Defendant's young daughters were playing in their room. (T. 887-888) Defendant kept asking Wenda Wright about her purse that was missing. (T. 889) Wenda Wright kept replying: "I don't have your purse. Why would I have your purse. As good as you was to me today." (T. 889-890) Defendant replied with an arrogant and confident voice level: "Well, my nephew is going to plat my hair. And when he is done platting my hair, you better tell me where my mother fucking purse is at." (T. 890)

While Allen was working on Defendant's hair, Defendant asked Wenda Wright again about her purse. (T. 896-897) Wenda replied: "I don't have your purse. I don't have your purse. Why

won't you let me go home. I don't have your purse." (T. 896-897) Immediately after Allen finished Defendant's hair, Wenda Wright dropped to her knees, wrapped her hands around Defendant's waist and started crying. (T. 898-899) Wenda begged Defendant to let her go home: "Margaret, please let me go home. All I want to do is go home to see my kids. I don't have your purse. Why are you doing me like this? And if you are going to beat my ass, beat my ass. Just do what you are going to do and let me go home to my kids." (T. 897-899;) Defendant replied: "I don't know what are you doing all that crying for because all it is is fake ass tears. Bitch, you better tell me where my purse is at." (T. 901) At that moment, Wenda Wright walked to the Defendant's front door, and Defendant hit her in the back of the head with her fist. (T. 901-902). Wenda Wright fell on the floor and remained in the corner balled up. (T.900-901) While remaining on the floor, Wenda Wright continued to assert that she did not take the purse, and Defendant punched her a couple more times. (T. 901-902)

After Defendant finished punching Wenda Wright, she pulled a gun, pointed it at Allen and demanded that he help her holding Wenda Wright. (T. 903) Defendant went to the bathroom and came back with bleach, spritz, nail polish remover and green rubbing alcohol. (T. 903) Allen, who at the time of the incident was 18

years old and in fear for his life, complied with Defendant's request and held Wenda Wright down. (T. 903-904) Allen was holding Wenda's arms and legs while Wenda was covering herself. (T. 904)

Defendant started pouring the chemicals onto Wenda Wright's face. (T. 905) Wenda Wright was trying to move her head side to side in order to avoid the chemicals and to use her hands to prevent the chemicals entering her eyes and mouth. (T. 905-906) Up to this point, Wenda was hit by Defendant six or seven times in her upper chest area. (T. 907) Defendant's daughter walked into the room. (T. 908) Defendant grabbed three or four belts from her closet and continued beating Wenda Wright. (T. 908) Defendant commanded Allen to tie up Wenda Wright's legs with a belt. (T. 908-910)

Defendant then told her daughter, who was still standing in the room, to give her a piece of the duct tape because she wanted to put it on Wenda Wright's mouth. (T. 910-912) Because the duct tape would not stick to Wenda Wright's mouth, Defendant put the belt around her neck and pulled both ends of it. (T. 913-914) Wenda Wright was terrified and started screaming: "Please stop. Please stop. I am about to piss on myself. I am about to piss on myself." (T. 913-914; 1004-1005) The next moment, Wenda Wright began to shake, and around three minutes

later, she stopped moving. (T. 914-915) Defendant was holding the belt around Wenda's neck for three minutes while Allen was holding her down. (T. 915) After these three minutes passed by, Defendant's daughter asked if Wenda was dead and Defendant replied: "Nah, she is not dead. She is just unconscious. That bitch will wake up in a minute." (T. 915)

Thereafter, Defendant told Allen to hold the other end of the belt in case Wenda Wright regained consciousness so that she would not be able to run away. (T. 915-916) He was holding one end of the belt while Defendant was holding the other part of the belt for maybe two minutes. (T. 915-917) Defendant then went to grab some sheets so that Allen could tie Wenda up in case she regained consciousness. (T. 916-918)

After the incident, Allen told Defendant that he needed to go to buy a cigar. (T. 925-926) Defendant was reluctant to let him go, but, after he assured her that he will be back, she let him go. Allen left and never came back. (T. 926)

The next day, Defendant went searching for Allen. She found him in front of the barbershop, in a car with his brother. (T. 928, 1172-1175) Defendant approached the car with the gun and asked Allen where he has been. Allen walked away with Defendant, got into her truck and saw James Martin sitting in the back. (T. 928-929, 1176) At that moment, Defendant said to Allen: "Nephew,

she is dead." (T. 929) Allen replied that Wenda Wright was dead last night, and Defendant said that Wenda woke up in the middle of the night, that she did not tell her fast enough where the purse was and then she died. (T. 929-930) After Allen asked Defendant to explain why she needed him, she replied: "Bitch, what do you think? You are going to help me get rid of this body before my kids come home from school." (T. 930) Soon thereafter, Defendant, Allen and James Martin went to the Lowe's on State Road 50. (T. 931, 1184-1189) James Martin went in the store to buy plywood, which would be used as a ramp to roll Wenda Wright's body on the back of the truck. (T. 930-933, 1184-1189)

After about ten minutes later, Defendant and Allen went into the Lowe's and saw Martin next to the lumber station, waiting for the lumber to be cut. (T. 934, 1186-1187) After getting the plywood, the group drove around. (T. 934-936)

Defendant, Allen and Martin stopped at a mechanic shop, where Defendant borrowed a heavy duty dolly. (T. 937-938, 1178-1180) They then went back to Defendant's house to get Wenda Wright's body. (T. 938-939) Wenda Wright's body was wrapped up in a carpet. (T. 943-944) Defendant directed Allen to move her car on the side of the house so that it looked like he was fixing the car. (T. 945-946). Then, Defendant directed Martin to put the plywood on the back of the truck, and Allen and Martin

tied the body on the dolly with Defendant's assistance. (T. 948-949) Wenda Wright's body fell off the dolly, and Defendant, Allen and Martin pushed the body back inside the house so that the body can be retied and reloaded.(T. 948, 954) The second attempt was successful in getting Wenda Wright's body into the truck. (T. 955)

On the way to the burial place, Defendant, Allen and Martin stopped by the house of Defendant's mother to take two shovels. (T. 956-957, 1215) After Defendant found the shovels, they proceeded to search for a good place to dispose of Wenda Wright's body. (T. 958-959) After a while, Defendant found a location, turned onto a dirt road and came to a locked gate. (T. 959, 1192-1193) Allen and Martin began to dig a hole while Defendant stood there making sure that nobody was coming until the body disposal was completed. (T. 963-964, 1217) At one point, after Defendant saw the hole was deep enough, she directed Allen and Martin: "Throw the body in the hole." (T. 964) While disposing of the body, Defendant turned to Martin and said: "No, not my mother fucking carpet-that is evidence." (T. 966) Defendant untied the carpet and dropped the body in the hole. (T. 966) Allen and Martin shoveled the dirt and sand over the body and threw the debris on top in order to disguise the area. (T. 966-968, 1222-1225)

When they finally finished the body disposal, they got back in the truck, and Defendant looked at the sky and said: "Thank you God." (T. 972-973) They stopped at the gas station, and Defendant directed Martin to throw the carpet into the dumpster. (T. 974, 1228-1229) When that was done, they proceeded to pick up Defendant's daughter. (T. 973-975)

The next day, Allen voluntarily went to the police. He reported the murder of Wenda Wright, explained what happened and directed the police to the burial place. (T. 1063)

As a result, Defendant was charged by indictment with the first degree felony murder during the course of the kidnapping of Wenda Wright on or between February 8, 2005 and February 11, 2005 (Count I) and kidnapping with the intent to terrorize or inflict bodily harm. (Count II). (T. 332-333)

At trial, Quintin Allen testified and gave a detailed explanation of events that led to Wenda Wright's murder. (T. 857-1082) His testimony is incorporated in previous paragraphs of this brief. He entered a plea to second degree murder and received a sentence of fifteen years in prison, followed by five years probation, in connection with the murder of Wenda Wright. (T. 859-860)

On cross, Allen could not confirm if Wenda at any point could have left the house if she wished to do so. (T. 1033) He

further stated that he was in fear and did not leave. (T. 1033) During the entire cross-examination, Allen was never questioned regarding whether he admitted to choking Wenda Wright to co-defendant James Martin while they were in adjoining cells. (T. 1020-1070) Furthermore, on cross, Allen was never asked who actually choked the victim. (T. 1020-1070)

Theresa Bechard, who was employed as a cashier with Lowe's, recognized Defendant from the photographs. (T. 1084-1086) Bechard explained that she remembered the subject transaction with Defendant based on the receipt she issued that had her initials at the top and her ID number. (T. 1086-1087) Bechard further testified that Defendant was accompanied by two other gentlemen at Lowe's. (T. 1088)

William Meehan, who was working at a transmission shop in Titusville, FL, testified that on or about February 9, 2005, a woman and two men came to his store to borrow a hand truck. (T. 1096-1098) He testified that when police showed him photographs for identification, he was not able to conclusively identify Defendant but stated that she looked like the woman. (T. 1114-1118) Meehan identified co-defendant James Martin, as the man who assisted loading a hand truck in the vehicle. (T. 1117)

James Martin testified that, on February 8, 2005, he came to Defendant's house in order to fix her car. (T. 1130-1131)

While he was working on the car, Defendant came and asked whether he had seen her purse. (T. 1136-1137) Per Defendant's request, Martin helped her search for the purse. (T. 1136-1140) He knew Quintin Allen and recognized his voice coming from the house but had not seen him arrive because he was working under the car. (T. 1144-1146) Martin testified that, on the night of the incident, he spent the night at Defendant's house, and after he fixed the car, he went to sleep, so he was not present when Wenda Wright was killed and did not see who killed her. (T. 1144-1154, 1297) The next morning, Martin noticed Wenda Wright's body in the sitting room area. (T. 1167-1169) Wenda Wright's body had a bandanna tied around her hands, and her clothes was on. (T. 1170) Martin touched the body and felt it was cold. (T. 1170-1171) Martin testified that at that particular moment, Defendant told him she needed him to help her bury the body. (T. 1170-1171)

On cross, Martin testified that when Allen came to Defendant's house, Allen wanted to borrow some money to eat. (T. 1250) He stated that Allen was giving directions where to dispose Wenda's body, not how to dispose the body. (T. 1255-1256)

When the defense tried to question Martin about an admission Allen allegedly made that he choked Wenda Wright, the

State objected, and Defendant proffered the testimony. During the proffered examination, Martin stated that Allen never told him he choked Wenda Wright nor had he ever heard Allen admit that. (T. 1261-1262) Martin further explained that, during the deposition, he had said that Allen knew a special hold that he could have used to choke Wenda, and that Allen almost choked some boy in jail using that same hold. (T. 1262-1263) He also stated that Allen never told him that he choked Wenda Wright and that he never said that Allen told him he had. (T. 1264-1265)

The State argued that the statement was inadmissible hearsay, and there were no indicia of reliability under Chambers v. Mississippi. (T. 1270-1271) The State further argued that this was improper impeachment as the defense was trying to impeach Martin with a different set of questions then he was asked in the deposition. (T. 1271) Also, the State argued that Allen, the person who allegedly made the statement, was never asked if he made this statement to Martin, for which reason he could not be impeached. (T. 1271-1272) Defense argued that the statement could be admitted as a statement against interest. (T. 1280-1282) The Court ruled that the subject statement was hearsay and therefore excluded it. (T. 1289-1290)

Corporal Gary Boyer testified that back in 2005, he was a part of the investigative team at the Titusville Police

Department and was involved in the investigation of the death of Wenda Wright. (T. 1323) Boyer further testified that Quintin Allen directed the police to the gravesite and, without this direction, he would not have known where to go to search for the body. (T. 1324)

Dr. Sajid Qaiser testified that from 2000 to 2006, he worked as an associate medical examiner for Brevard County. (T. 1405) Dr. Qaiser explained that he was contacted by State Attorney's office to review an autopsy that was performed on Wenda Wright but was not the person that actually performed the subject autopsy (T. 1405-1407) The autopsy was performed by Dr. Whitmore, who was no longer employed with the Brevard Medical Examiner's office. (T. 1407) Dr. Qaiser explained that he was asked to review the autopsy findings, photographs and other materials for preparation of the trial. (T. 1407)

Dr. Qaiser identified photographs from Wenda Wright's autopsy. (T. 1408-1439) He stated that he relied on these photographs in reaching the conclusion about the cause of death of Wenda Wright. (T. 1410-1418) The subject autopsy photographs were accurate and were made a part of the official record of Wenda Wright's autopsy at the Medical Examiner's office. (T. 1419)

During the direct examination, Dr. Qaiser identified an autopsy photograph that showed the right side of Wenda Wright's face. (T. 1425-1426) The photograph showed a large contusion, which was of a different color from the face skin, and Dr. Qaiser explained that this indicated that Wenda Wright was alive when the contusion occurred. (T. 1426-1427) Dr. Qaiser identified a photograph that showed bruising on the following areas of Wenda Wright's body: back of the ear, lower eyelid and center of the forehead. (T. 1427-1428) The photograph also showed a furrow mark located where the neck joins with the head. (T. 1427-1428) Dr. Qaiser indicated that this furrow was connected to ligature strangulation and explained that ligature strangulation occurs when the neck is compressed from the outside with an object such as a belt or rope. (T. 1428) Such strangulation occludes the blood vessels in the neck that are providing blood to the brain and to the face and compresses the airway. (T. 1428) Dr. Qaiser concluded that, in this case, a ligature mark reflected that a belt or some item was applied hard enough around the victim's neck to leave that sort of mark. (T. 1428)

Dr. Qaiser further identified a photograph from the autopsy that showed contusions and bruises on the following areas of Wenda Wright's body: the left side of the torso, the trunk, the

leg area, the chest, the cheek, the area under the lower eyelid, the left side of the eyebrow area, the upper arm, the shoulder area and the abdominal area. (T. 1432-1433)

Dr. Qaiser further identified a photograph that showed a fainted furrow mark on the left wrist, which indicated that a ligature or any kind of band was applied over the wrist to restrain or subdue Wenda Wright. (T. 1433) The knee area showed contusion marks as a result of kicking or punching. (T. 1433) On the back of Wenda Wright's neck, there was a black line, which evidenced that a ligature had been applied very hard to the neck. (T. 1433-1434) Dr. Qaiser testified that he found a reflection of the skin of the neck, which is indicative of strangulation. (T. 1436-1438)

Finally, Dr. Qaiser testified that, based on his review of all of the reports and photographs, the manner of Wenda Wright's death was homicidal violence, and ligature strangulation was deemed the cause of death. (T. 1442-1443) However, Dr. Qaiser did not agree with Dr. Whitmore, who believed that cocaine intoxication could have contributed to the death of Wenda Wright. (T. 1443-1444) He explained that although there was evidence of cocaine in Wenda Wright's body, the amounts were so small so that they did not contribute to the cause of death. (T. 1443-1445)

Dr. Qaiser further testified that Wenda Wright could have been conscious and aware of the injuries and the various blows that she suffered. (T. 1446-1447) He further explained that, usually if the blows were to the head, it could take 10 to 20 seconds to make a person unconscious, and any of these blows could have made her unconscious. (T. 1446-1447) If someone was rendered unconscious by a blow to the head, they would not necessarily remain unconscious and could regain consciousness after such a blow. (T. 1447-1448)

Dr. Qaiser explained that it takes a person four to six minutes to die from strangulation. (T. 1448). Such a person can remain conscious during part of that four to six minutes period and can also be aware of what is happening to them while they are conscious during the strangulation. (T. 1447-1449) Wenda Wright could have lost control of her bladder during the strangulation while being conscious at the same time. (T. 1451)

On cross, Dr. Qaiser insisted that the toxicology report did not show a high level of cocaine. (T. 1470-1471) He further stated that it is not necessarily true that, in most cases of ligature strangulation, petechia are formed around the cornea. (T. 1472) It is also not necessarily true that, in Wenda Wright's type of strangulation, the hyoid bone is fractured. (T. 1472) Dr. Qaiser further stated that, during the strangulation

trauma, any person could be conscious, semi-conscious or unconscious, and that if the person was unconscious, he would not make expressions like moaning and crying, which did not mean that they did not feel it. (T. 1473-1474)

During the trial, the Court ruled not to admit the report of Dr. Whitmore, who performed the autopsy, into evidence on the grounds that it might confuse the jury and the defense had already cross-examined Dr. Qaiser from that report. (T. 1490-1491)

After the State rested, Defendant moved for a judgment of acquittal as to the kidnapping charge and argued that, based on Allen's testimony, Wenda Wright could have left at any time. (T. 1495) The State argued that Wenda Wright was held against her will, her feet and hands were bound, and she was tortured and terrorized, which satisfied the elements of kidnapping. (T. 1496-1497) The Court denied the motion. (T. 1497)

After deliberating, the jury returned a verdict of guilty of first degree felony murder as to Count I and guilty of kidnapping as to Count II. (T. 1669) The trial court adjudicated Defendant in accordance with the verdict. (T. 1676)

At the penalty phase, the State presented the testimony of Dr. Sajid Qaiser, who explained, as to pain sensation, that the activity within the brain of those people who were profoundly

unconscious was the same as normal people. (T. 1708-1709) They can feel the pain, and the only difference is that they could not outwardly manifest it. (T. 1709) Dr. Qaiser explained that, during the course of being beaten, Wenda Wright could have been experiencing any of the levels of pain while being conscious. (T. 1711-1712) She could have been also experiencing the pain even if unconscious. (T. 1711-1712) Dr. Qaiser stated that a ligature marks on the back of Wenda Wright's neck and wrist were fresh and recent marks, which indicated that the contusion could occur immediately prior to death. (T. 1721-1723)

Dr. Qaiser further testified that during the strangulation process, a person would lose the consciousness, and the moment the noose is released, the consciousness would be regained. (T. 1724) There would be difficulty in breathing, a sense of choking and a sense of pressure radiating above and below the ligature point. (T. 1724) There would also be a sense of panic involved. (T. 1724) Dr. Qaiser explained also that during the strangulation, there would be a jerky motion, a movement of the entire trunk of the body, extremities, head and neck, and this movement indicated that a person was trying to stay alive. (T. 1724-1725) The behavior of Wenda Wright was found to be consistent with this description. (T. 1725) Dr. Qaiser stated that he considered the testimony of an eyewitness when he

reached his opinion that Wenda Wright was conscious when the ligature was placed around her neck. (T. 1734) It would take 10-20 seconds for a person being strangled to lose consciousness, and it would take them 4-6 minutes to die. (T. 1734-1735)

In mitigation, Dr. Gebel, an expert in the area of neurology, testified that the neurological examination, which involved an interview taking history from the Defendant, showed that she suffered numerous head traumas through the years. (T. 1743-1744) Dr. Gabel further stated he then examined Defendant and, as a result of Defendant not being cooperative, the mental status test was difficult. (T. 1744-1745) He concluded that it did not seem like Defendant had any major brain injury, but the mental status itself was questionable. (T. 1745) Dr. Gabel testified that as a result of the brain damage, Defendant would not have impulse control and would not have the ability to plan day-to-day activities. (T. 1749-1751) He also stated that Defendant's brain damage would affect her ability to appreciate the criminality of her conduct. (T. 1752) She would not be able to think through executive functioning and would have difficulty in conforming her conduct to the requirements of the law. (T. 1752-1753)

On cross, Dr. Gebel testified that an MRI test, which would show structural brain damage, was never performed on Defendant.

(T. 1756-1757) He stated that, based on the interview with Defendant, she never used drugs. (T. 1758) Dr. Gebel further confirmed that a person who had problems with executive functioning would not be able to go to Lowe's and buy plywood, give money to somebody to buy plywood, or to go to the cash register and get into an argument with a cashier about the fact that she did not want to pay for the entire sheet of plywood. (T. 1758-1760) That person would also not be able to get shovels and drive another group of people to a grave site to get rid of a body. (T. 1760-1761)

Dr. Joseph Wu testified that based on medical records, Defendant had at least ten cases of traumatic injuries, most of which involved the head. (T. 1815-1816) Dr. Wu testified that Defendant's PET scan showed a right-sided asymmetrical change where the degree of difference between the right and left side is much greater in Defendant that in the normal population. (T. 1815-1816) The right side of Defendant's brain is much slower than the left side of her brain in some of the frontal lobe area, which is consistent with damage to the frontal lobe from some kind of head trauma. (T. 1819-1820) He stated that it would be difficult for an individual with this kind of a traumatic brain injury to be able to conform her conduct to the requirements of society consistently when faced with some kind

of provocation. (T. 1929-1830) Defendant would have an impaired ability to regulate an emotional overreaction but that did not mean that her ability to plan or execute would be impaired. (T. 1830-1831)

On cross, Dr. Wu testified that the scan he used to compare to Defendant's scan was not acquired on the same machine. (T. 1837-1838) He stated that there are scientists who disagree with using PET scans for the purpose of neuropsychiatric evaluations. (T. 1839-1840)

Dr. Wu further testified that the murder of Wenda Wright was the only episode of Defendant's inability to control her impulses of which he was aware. (T. 1853-1854) He stated that if somebody had an impulse control inability, a disproportionate overreaction to provocation would not necessarily occur on every occasion. (T. 1854) Dr. Wu further stated that a person with an impulse control problem cannot control when they would have a disproportionate overreaction, and there is a possibility for such reaction to occur all of a sudden even though it had not occurred for years. (T. 1854-1855) In furtherance of the previous response, the State asked Dr. Wu to explain if this kind of reaction might happen in future, and Dr. Wu stated that that he could not say it would but that Defendant is at a higher risk. (T. 1855) After Dr. Wu stated that based on the PET scan

and medical history Defendant would be exposed to having problems with impulse control, the State asked if Defendant would be a risk to a prison guard who would watch her in the future. (T. 1855) Thereafter, Defense made an objection, and the Court sustained it. (T. 1856) Defense did not ask for a curative instruction nor move for mistrial. (T. 1856)

Dr. Wu further testified that a PET scan is often done in conjunction with an MRI to formulate an opinion. (T. 1856) It would be preferable if he had an MRI in conjunction with PET scan before he formed his opinion in this case, but this was not essential. (T. 1856) Dr. Wu further stated that he was familiar with the American College of Radiology and its criteria for the use of various imaging techniques in assessing brain injury. (T. 1857) He stated that PET scans do not have the same degree of resolution in terms of anatomy, so you can probably get a much higher degree of resolution anatomically with an MRI. (T. 1857) Dr. Wu also stated that in criminal cases he had only testified for defendants. (T. 1859)

Myrtle Hudson, Defendant's aunt, testified that Defendant grew up in a drug filled and violent neighborhood. (T. 1878-1879) Ms. Hudson also testified that Defendant never used drugs but did use alcohol. (T. 1879) Defendant never got married, but she had been involved in two deadly abusive relationships, where

she had been beaten unconscious. (T. 1880) Hudson further stated that she was aware of Defendant's head injuries. (T. 1885-1886)

After deliberating, the jury recommended that the trial court impose a death sentence upon Defendant by a vote of 12-0. (T. 1988-1989)

At the Spencer hearing, Hudson stated that Defendant was physically abused by her uncle and sexually abused by her brother and uncle. (T. 220-221) Hudson only heard that Defendant had been abused and did not have any personal knowledge about it. (T. 220-221) The abuse was never reported to the police (T. 220-221) Defendant was involved in physically abusive relationships and had a few abortions. (T. 221) Hudson further stated that Defendant had a stroke when she was 16, and because of this, one of her eyes is bigger than the other one. (T. 222)

Bessie Noble, a doctor of education from Syracuse University, testified that Defendant was abused from an early age, semi-literate and totally confused. (T. 231-232) Ms. Noble did not personally observe any abuse. (T. 231-232)

Tara Posley, Defendant's cousin, stated that Defendant helped those who needed help, including the victim's family (T. 236-237) She grew up in violent, drug filled neighborhood, and she was involved with drugs in order to provide for her family. (T. 237-239)

Defendant testified that she felt sorry for what happened. (T. 246) She grew up in a violent place and was abused and beaten almost to death on several occasion when she suffered head injuries. (T.246-249)

On cross, Defendant testified that she was sorry when she found out that her friend Wenda Wright was dead, but that she was not sorry when she took her body to the burial place because she did not do that. (T. 249-250) Defendant stated that she was not addicted to drugs but did sell them. (T. 250-251) Defendant stated that she was previously arrested on several occasions for violent crimes. (T. 251) She also stated that her youngest daughter lied when she said to the police that she was present during the incident and Defendant asked to bring her bleach, liquids and belts. (T. 251-253) She also stated that she did not feel comfortable with the police being present when Dr. Gabel was examining her. (T. 252-253)

Irene Posley, Defendant's grandmother, testified that Defendant lived with her when she was a child, and that she was not a violent child. (T. 259) Posley testified that she and her husband provided a loving home for Defendant. (T. 259-260) On cross, Posley stated that while Defendant was living at her house, there was no drugs allowed in the house, and children were appropriately disciplined. (T. 261-262) Posley testified

that Defendant could always come to her if she needed help. (T. 264)

Johny Dublin, the common law husband of Wenda Wright, testified that he and Ms. Wright had two sons together and had a loving relationship. (T. 266-268) Wenda Wright was the best mother and took care of her boys. (T. 267-268) Dublin further testified that since Wenda Wright was murdered, it has been hard for him to raise the boys all by himself. (T. 269) He explained that his wife's murder had a huge impact on his family, and his son Jabori still has nightmares about what happened because he was with his mother when it all started. (T. 269) Jabori would wake up in the middle of the night and start running, hitting the wall and hurting himself. (T. 269) The other son was angry when he heard what Defendant did to his mother. (T. 270) Dublin further stated that the last time he saw his wife, Wenda Wright, was when she accompanied Defendant to her home. (T. 271) He saw Defendant after his wife disappeared, but she never told him what happened. (T. 271-272) Dublin stated that he had been depressed for five years, during which period he turned to Jesus, and that the lost of his wife affected his health because of the emotional trauma and stress. (T. 272-273)

Diane Baxter, Wenda Wright's sister-in-law, testified that her death had a huge impact on the family, and she had to help

raise Wenda Wright's two boys as a surrogate mother. (T. 276-277) The older boy missed his mother very much and would sing about her. (T. 278) The younger boy said that he does not believe in God because he cannot bring his mother back: "God is supposed to do everything, but my momma can't come, Auntie." (T. 278-279) Baxter stated that Wenda Wright was a loving mother who would do anything for her family and was loved by her neighbors as well. (T. 280-281)

Maria Jackson, Wenda Wright's sister, testified that the younger boy had a hard time understanding his mother's death. (T. 286) The older boy was angry. (T. 285-286) Wenda Wright's death was a huge loss for her family. (T. 287)

Ralph Baxter testified that Wenda's husband, Johnny Dublin had been helpless since his wife's death and that it affected their children, too. (T. 288-289)

The trial court agreed with the jury's recommendation and imposed a death sentence upon Defendant for Count One First Degree Felony Murder and a life sentence for Count Two Kidnapping. (T. 941-965) The Court found two aggravators applicable in this case: during the course of a kidnapping and heinous, atrocious or cruel (HAC) aggravators. (T. 951-953) The trial court accorded great weight to each of the aggravators. (T. 951-953) The Court found no statutory mitigators. (T. 953-

958) The Court found four non-statutory mitigators: Defendant has been the victim of physical abuse and possible sexual abuse in the past-some weight; Defendant has brain damage as a result of prior acts of physical abuse and that the brain damage results in episodes of lack of impulse control-some weight; Defendant grew up in a neighborhood where there were acts of violence and illegal drugs-some weight; and Defendant would help others by providing shelter, food or money-little weight. (T. 958-961) The trial court found that the mitigating circumstances are insufficient in weight to outweigh the two aggravating circumstances, which have been proven beyond a reasonable doubt. (T. 962)

This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly excluded the hearsay testimony of James Martin. The statement was not reliable, and no evidence was offered to corroborate its trustworthiness. Further, Defendant did not demonstrate that Allen was unavailable to testify, as required pursuant to section 90.804(2). Defendant was not denied due process, and no Chambers issue exists. Defendant's alternative suggestion that the statement was admissible as an admission of a party opponent or a co-conspirator's statement was not preserved. Moreover, the trial court did not abuse its discretion in excluding this evidence.

The issue regarding the kidnapping charge based on the ground that the confinement was merely incidental to the murder was not preserved. Faison has no application here because Defendant was charged under section 787.01(1)(a)(3). Moreover, the kidnapping of Wenda Wright was neither incidental to the murder nor was the restraint momentary. The kidnapping charge should stand.

The issue regarding the questioning of Defendant's mental health expert was not preserved. Moreover, defense counsel opened the door by asking questions related to that area. Defendant did not meet his burden to show fundamental error occurred.

The heinous, atrocious, or cruel aggravating circumstance was proven beyond a reasonable doubt. The record indicates that Wenda Wright was terrorized over a substantial period of time and was aware of what was happening to her. The statutory mitigators that (1) defendant was under the influence or extreme mental or emotional disturbance, and (2) defendant's capacity to conform her conduct to the requirements of the law was substantially impaired were properly evaluated and rejected. The trial court properly weighed and considered the non-statutory mitigators. Defendant's death sentence is proportionate. When the facts, as found by the trial court are considered, this Court has affirmed death sentences in similar cases.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE UNRELIABLE HEARSAY STATEMENT OF WITNESS MARTIN.

Defendant asserts that the trial court abused its discretion in refusing to allow him to attempt to impeach Martin with a prior inconsistent statement. Defendant contends that Martin's prior inconsistent statement was admissible as a statement against the penalty interest of a different witness, Allen. Acknowledging that Martin's prior inconsistent statement, even considered for the truth of the matter asserted, would not satisfy the requirement of §90.804(2)(C), Fla. Stat., Defendant further contends that the exclusion of this statement unconstitutionally prevented him from presenting a full defense under the due process clause. Alternatively, he suggests that the prior inconsistent statement should have been admitted as a statement of a party opponent or under the co-conspirator hearsay exception. However, the trial court did not abuse its discretion in excluding this evidence.

The admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 611 (Fla. 2000).

While Defendant asserts that the testimony he sought to elicit was admissible as a statement of Allen that was against Allen's penal interest, the trial court did not abuse its discretion in rejecting this argument. In Morton v. State, 689 So. 2d 259, 263-264 (Fla. 1997), this Court held that a prior inconsistent statement cannot be used as substantive evidence but only for purposes of impeachment. This Court also reasoned that if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded.[1] In the case at bar, it appears that Defendant tried to use a prior inconsistent statement under the guise of impeachment where the primary purpose was to place before the jury substantive evidence that was otherwise inadmissible.

After Martin denied that Allen ever told him that he choked Wenda Wright, Defendant referred him to a statement made at deposition, and the following colloquy occurred:

> A [Martin]: Yeah, but—yeah. You didn't write everything. I remember saying that there. I remember saying he got a special hold that he used to choke her with. Because he nearly choked the boy out in jail with that same hold.

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[1]Rodriguez v. State, 753 So. 2d 29 (Fla. 2000), receded from Morton to the extent it holds that a prior inconsistent statement cannot be used as substantive evidence in a penalty phase proceeding.

Q [defense]: I am going to continue in the deposition. I asked you then, "Quintin said that," question. And you said, "Yes."

"So, did you hear him say he choked her?"

"Yeah. He next-he next to me, he let me read the deposition and the autopsy report."

So I asked you did Quintin say that?

A [Martin]: Right. In the room you asked me that and I said no.

Q [defense]: So you are disputing what the court reporter wrote down? Would you like to see it?

A [Martin]: No, I don't need to see it. I know I didn't say choke hold. How can I say something if it is a lie because me and him talked like that? If me and him talked, like he didn't kill nobody and he didn't do that.

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Q[defense]: So, now you are saying that he didn't say that?

A[Martin]: No. What I am saying is he didn't tell me that he choked her. But he said—yeah,, I know you said he choked people, but I didn't say nothing about he choked her. I said yeah he probably did choke her. Because how can a 140 pound woman hocked a 290—

(T. 1261-1265)

In light of the above proffered testimony, because Martin had denied ever saying that Allen made the statement at issue and Defendant was attempting to use Martin's prior inconsistent statement to impeach Martin, Defendant never had any admissible evidence that Allen made a statement against Allen's penal

interests. Thus, the trial court did not abuse its discretion in rejecting this argument.

Moreover, even if Martin's prior inconsistent statement could have been accepted as substantive evidence (which it cannot), the trial court would still not have abused its discretion in excluding the statement because it lacked indicia of reliability and was a statement by an available witness such that it was inadmissible under §90.804(2)(C), Fla. Stat. Defendant contends that the statement here is trustworthy and reliable when allegedly made by Allen to Martin while incarcerated and while discussing the facts of the case. It is the State's position that the hearsay statement involved in this case was offered at trial under circumstances that did not provide considerable assurance of reliability. For admissibility of statement against penal interests, which is offered to exculpate the accused, Section 90.804(2) requires that, there be sufficient corroborating circumstances that show the trustworthiness of the statement. This provision ensures that a statement or confession by a third party will not be admissible when there are serious questions as to its reliability. Ehrhardt, Florida Evidence §804.4, p.1027 (2006 ed).

Defendant misinterpreted the record by stating that Allen made the subject statement to Martin while they incarcerated

together discussing the facts of the case that inculpated him in the actual killing of Wenda Wright. The record does not indicate that Martin and Allen ever discussed the facts of the case while incarcerated because Martin only stated that Allen got the autopsy report (which Martin did not have) and gave it to him. In fact, Martin testified that he and Allen never talked about the autopsy report. (T. 1257-1258)

Martin denied making the statement at issue in the first place. When Defendant referred Martin to his previous statement from the deposition, Martin disputed the context of the statement, explicitly stating that he was referring to Allen nearly choking some boy in prison, which clearly cannot be a statement against penal interest related to this case because Allen allegedly admitted to choking some other person. Further, the statement is not consistent with the physical evidence because ligature marks were found on Wenda's body, indicating that ligature, not manual, strangulation was the cause of death. Moreover, Defendant failed to offer any evidence to corroborate the trustworthiness of the statement at issue thereby offering the statement itself for the purposes of corroboration.

In Woodard v. State, 579 So. 2d 875, 877 (Fla. 1st DCA 1991), the court made it clear that a declaration against penal interest that was offered to exculpate the accused was

inadmissible where the "recited circumstances" did not establish trustworthiness. The defendant "improperly relies in part on the substance of Harris's statement itself to establish corroboration of the statement's reliability." Id.[2] Like in Woodard, here, Defendant solely relies on Martin's inconsistent statement regarding Allen's alleged statement itself thereby trying to establish the statement's reliability without offering any other assurances of reliability.

Similarly, with regard to reliability, in Prevatt v. State, 866 So. 2d 729 (Fla. 5th DCA 2004), the court held that an accomplice's out-of-court statement to the defendant's mother that he would explain to a jury at defendant's trial that he alone was responsible for victim's death, and that defendant was actually trying to stop accomplice, was not sufficiently reliable to be admissible as statement against declarant's penal interest, where there was no evidence to corroborate the statement.[3]

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[2]On cross-examination, defense counsel proffered testimony from a police officer that the co-defendant admitted to him she took all the five items seized and that defendant was not involved in her activities. Defense counsel asserted that corroboration was shown by the co-defendant's guilty plea. The trial court ruled that the proffered statements were inadmissible hearsay. Id.

[3]The accomplice allegedly told Defendant's mother: "You don't have to worry, I am going to tell the truth when I get on the stand; I'm going to tell them Randy [Prevatt] was trying to stop me and that he wasn't going to let Randy take the fall for

In support of her contention, that the trial court should have found sufficient indicia of reliability, Defendant relies on Carpenter v. State, 785 So. 2d 1182 (Fla. 2001). However, this reliance is misplaced. First, in Carpenter, two witnesses were willing to testify concerning the out-of-court statements made by alleged perpetrator of murder while the alleged perpetrator and the witnesses were jailed together. However, the trial court excluded the statement because it found the witnesses incredible. Unlike in Carpenter, here, Martin not only had not been willing to testify concerning the statement allegedly made by Allen, but denied that Allen ever made a statement and that Martin had ever said Allen did. Second, unlike in Carpenter, here, the declarant (Allen) was available to testify. Third, unlike in Carpenter, here, the subject statement is inconsistent with the evidence that was presented at trial. In fact, the subject statement indicates that Allen allegedly used a special leg hold to choke the victim whereas the physical evidence indicates that ligature strangulation was

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this." Id. The Court noted that the statements here were not excluded because the trial court found that Defendant's mother lacked credibility. Rather, the statements were excluded because the defendant, the proponent of the statements, with the burden of demonstrating admissibility, failed to offer any evidence to corroborate the trustworthiness of the statement. Id. at 730.

deemed the cause of death. Given these circumstances, Carpenter does not show that that the trial court abused its discretion.

Further, Section 90.804 (2)(C), Florida Statutes, also requires a predicate showing of unavailability of declarant as a witness. See Jones V. State, 678 So. 2d 309, 313 (Fla. 1996) (in order for a statement against penal interests to be admissible, section 90.804(2) requires a showing that the declarant is unavailable as a witness. The party seeking to introduce a statement against a penal interest bears the burden of establishing the unavailability of declarant). In Jones, the Court found that the statement against interest allegedly made by a third party declarant, confessing a murder to a fellow inmate while incarcerated, was properly excluded where the defendant failed to demonstrate that the declarant was unavailable to testify. The Jones Court further reasoned that it did not need to consider whether the defendant met the additional burden of establishing that the declarant's alleged confessions were statements against penal interest within the meaning of section 90.804 (2), where the defendant failed to demonstrate that the declarant was unavailable. Jones, 678 So. 2d at 314;[4] see also Magna v. State, 350 So. 2d 1088 (Fla. 4th

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[4]The State repeatedly stated that the declarant was available to testify. Id.

DCA 1977) (Before an admission against penal interest is admissible, it must be shown that the person confessing is unavailable to testify himself. The reason for such requirement is obvious: if the person confessing is available to testify, he should be brought into court so the jury can hear his testimony directly. The burden of showing the unavailability of the declarant is on the party who offers the out-of-court statement). Here, Defendant did not demonstrate that Allen was unavailable to testify as required pursuant to section 90.804(2). In fact, Defendant had already questioned Allen, but never asked him if he made the alleged statement to Martin.

Defendant's suggestion that exclusion of the statement would violate the due process clause is also meritless because the statement was not reliable. Further, there was no reason to abandon the unavailability requirement of §90.804(2)(C), Fla. Stat., as Florida law would have provided an alternate means of admitting the testimony if it had been reliable. In support of her contention of a violation of the due process clause, Defendant relies on Chambers v. Mississippi, 410 U.S. 284 (1973). However, Defendant's reliance on Chambers is misplaced.

The Chambers court dealt with a situation where the defendant's request to cross-examine a witness was denied on the basis of a Mississippi common law rule that a party may not

impeach his own witness. Chambers, 410 U.S. at 296. After the defendant was arrested for murder, another person (McDonald) made, but later repudiated, a written confession. Also, on three separated occasions, each time to a different friend, McDonald orally admitted the killing. 410 U.S. at 284. The Mississippi common law rule rests on the presumption-without regard to the circumstances of the particular case-that a party who calls a witness vouches for his credibility. Id. at 296. Because Chambers was defeated in his attempt to challenge directly McDonald's renunciation of his prior confession, Chambers sought to introduce the testimony of the three witnesses to whom McDonald had admitted that he shot the officer and got denied. Id. at 296.[5] The concern in Chambers was that exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross examine McDonald denied him a trial in accord with traditional and fundamental standards of due process. The Court specifically held:

> In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and

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[5]As a result of the rule's corollary requirement that the party calling the witness is bound by anything he might say, Chambers was effectively prevented from exploring the circumstances of McDonald's three prior oral confessions and from challenging the renunciation of the written confession. Id. at 297.

> procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

Chambers, 410 U.S. at 302.

In contrast, no such denial of due process occurred in the case at bar. Defendant was able to question Allen about the subject statement against penal interests he allegedly made to Martin. In that regard, Defendant does not even assert that the trial court prevented him from calling or cross examining Allen as a witness. In fact, when Defendant's counsel cross examined Allen, he never questioned him about making the alleged statement to Martin regarding choking Wenda Wright. Assuming, *arguendo*, Defendant had used the opportunity to examine Allen about making such a statement, he could have properly impeached Allen through Martin's testimony, if Martin was willing to admit the statement had been made. Because the cases are not factually or procedurally similar and Chambers was expressly limited to its facts, Defendant's due process rights have not been violated. To the contrary, Florida law, under its hearsay exceptions, would have permitted the very testimony that Mississippi law precluded in Chambers had it existed in this case. See § 90.804, Fla. Stat. (2011). Therefore, no Chambers issue exists, and the Court properly excluded the challenged evidence.

Defendant's alternative suggestion that the statement was admissible as an admission of a party opponent or a co-conspirator's statement is unpreserved and meritless. "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception or motion below." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Here, Defendant did not satisfy this requirement. After the State objected to the admissibility of the subject statement, Defendant argued that the statement could be admitted as a statement against interest. (T. 1280-1282) Defendant now claims that that this statement could have been admitted as an admission of a party opponent or a co-conspirator's statement. As such, this argument is not preserved for review.

Even if this argument had been preserved, the trial court would still not have abused its discretion in excluding the statement at issue. In order to be admitted as an admission of a party, the statement has to be made by a party to the litigation, which here, clearly, is not the case. See Hunt v. Seaboard Coast Line R. Co., 327 So. 2d 193 (Fla. 1976) (recognizing the difference between the admission of a party and a declaration against interest: an admission is made by a party

to the litigation, while a declaration against interest is made by a non party).

The requirement that the co-conspirator's statement be admitted is that the statement must be made while the conspiracy is in existence and before it is terminated.[6] Ehrhardt, Florida Evidence, Section 803.18e, p. 965 (2006 ed); see also Calvert v. State, 730 So. 2d 316 (Fla. 5th DCA 1999)(statements made after conspiracy had ended were inadmissible under section 90.803(18)(e)). Clearly, any statement allegedly made by Allen does not meet the admission requirements because it was not made while the conspiracy was in existence.

Even if this Court finds that the trial court erred in excluding Martin's testimony, such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Allen (who reported the crime and got convicted for his participation in the crime), as well as Martin, both testified regarding the facts of the crime and their testimony was corroborated by the physical evidence. Further, the subject

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[6]Hearsay statements made by one member of a conspiracy are admissible against another member of the conspiracy when it is shown: 1) that both the person making the statement and the person against whom it is offered are members of a conspiracy; 2) that the statement was made during the course of conspiracy; and 3) that the statement was made in furtherance of the conspiracy. Ehrhardt, Florida Evidence, Section 803.18e, p. 964 (2006 ed.).

statement would not exculpate Defendant because the leg hold, allegedly used by Allen to choke Wenda, is not consistent with the physical evidence in this case because the cause of death was determined to be ligature strangulation. Furthermore, the statement at issue was certainly not the statement against the penal interest of Allen related to this case because according to Martin, Allen was talking about choking some boy in prison. Additionally, Allen never denied not assisting to choking Wenda in the first place. Moreover, the statement at issue, which allegedly amounts to a statement attributed to Allen that he choked Wenda Wright, does not necessarily exculpate Defendant, because this statement does not say that Defendant was not involved. Given the wealth of evidence against Defendant, any error in the exclusion of this testimony cannot be said to have affected the verdict and was, therefore, harmless. Defendant's conviction should be affirmed.

II. THE ISSUE REGARDING THE KIDNAPPING CHARGE, THAT THERE WAS NO EVIDENCE OF KIDNAPPING BECAUSE THE CONFINEMENT WAS MERELY INCIDENTAL TO THE MURDER WAS NOT PRESERVED, AND THE TRIAL COURT PROPERLY ADJUDICATED THE DEFENDANT GUILTY OF THE FIRST DEGREE FELONY MURDER BASED UPON THE KIDNAPPING CHARGE WHERE DEFENDANT WAS CHARGED UNDER SECTION 787.01(1)(a)(3), WHICH ONLY REQUIRES AN INTENT TO "INFLICT BODILY HARM OR TO TERRORIZE ANOTHER PERSON."

Defendant complains that there was no evidence of kidnapping because the confinement was insufficient and inseparable from the murder, thereby relying on Faison v. State, 426 So. 2d 963 (Fla. 1983). Acknowledging that Faison does not apply where a defendant was charged under section 787.01(1)(a)(3), Defendant further contends that courts should consider whether the confinement was merely incidental to the other underlying felony in order to find sufficient evidence of confinement, whether the defendant was charged under subsection (1)(a)(2) or subsection (1)(a)(3). However, this issue is unpreserved and meritless.

"[I]n order for an argument to be cognizable on appeal, it must be a specific contention asserted as a legal ground for objection, exception or motion below." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982); see also Black v. State, 367 So. 2d 656 (Fla. 3rd DCA 1979). When Defendant moved for a judgment of acquittal, she argued that kidnapping had not been established

because Wenda Wright could have left Defendant's house at any time. Defendant now argues, however, that there was no kidnapping because the confinement was merely incidental to the murder. Because Defendant did not present this later argument to the trial court, it is not preserved.

Even if this argument had been preserved, Defendant's conviction should still be affirmed. The standard of review of sufficiency of the evidence to support a verdict is substantial, competent evidence. Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981)(the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment). Defendant has not carried her burden to show a lack of substantial, competent evidence of kidnapping. Clearly, the record contains evidence sufficient to support the jury verdict.

Defendant first asserts that because the confinement was incidental to Wenda's murder, there was no evidence to support the kidnapping charge, thereby relying on Faison. However, Defendant's reliance on Faison is misplaced. The law is well settled by this Court that when Defendant is charged with confining, abducting or imprisoning with the intent to "inflict bodily harm upon or to terrorize", under section

787.01(1)(a)(3), rather than with the intent to "commit or facilitate commission of any felony" under subsection 787.01(1)(a)(2), Faison, has no application.[7] Bedford v. State, 589 So. 2d 245 (Fla. 1991); see also Boyd v. State, 910 So. 2d 167, 184 (Fla. 2005)(competent, substantial evidence supports the finding that Boyd had the intent to harm or terrorize Dacosta while confining her after she voluntary entered the van. Thus, even if Dacosta's kidnapping did not meet the requirements of Faison, Boyd would still be guilty of kidnapping under section (1)(a)(3) of the statute); Kopsho v. State, 84 So. 3d 204, 218 (Fla. 2012) (holding that the State need not prove Faison elements to obtain conviction under section 787.01(1)(a)(3), which only requires an intent to "inflict bodily harm upon or terrorize another person"); Waddell v. State, 696 So. 2d 1229 (Fla. 3rd DCA 1997); Hernandez v. State, 913 So. 2d 36 (Fla. 3rd DCA 2005); Sutton v. State, 834 So. 2d 332 (Fla. 5th DCA 2003). Clearly, Defendant's argument is

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[7]Faison held that subsection 787.01(1)(a)(2) does not apply to unlawful confinements or movements that were merely incidental to, or inherent in, the nature of the underlying felony. Id. at 251. Under Faison, to support a kidnapping conviction under section 787.01(1)(a)(2) the movement or confinement must also: a) not be slight, inconsequential and merely incidental to the other crime; b) not be of the kind inherent in the nature of the other crime; and c) have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection. Faison, 426 So. 2d at 965.

irrelevant because, as mentioned in previously cited cases, the State need not prove that the confinement was not incidental and inseparable from the other crime when defendant was charged under section 787.01(1)(a)(3).

Here, the record supports the finding that Defendant confined Wenda Wright with intent to inflict bodily harm upon or to terrorize her. Wenda Wright wanted to leave and go home but was not allowed. She was told by Allen (who was directed by Defendant not to let her leave) that Defendant did not want her to go anywhere. (T. 922-923) When she tried to leave, Defendant punched her and knocked her on the ground. (T. 895-901) While repeatedly asking to be let go to her family, Wenda Wright begged and cried at the same time. (T. 897-899) The whole terrorizing criminal act occurred over a substantial period of time, where Wenda Wright was mercilessly beaten with fists and belts, had caustic substances poured over her face and begged Defendant to stop. (T. 903-914) Wenda's legs were tied with a belt so that she could not move. (T. 908-910) After she finished beating Wenda Wright, Defendant strangled her to death with a belt. (T. 915-916) Ligature marks were found on her neck and wrist, and her body was bruised. (T. 1427-28, 1429-30, 1433-34)

Similarly, this Court in Conahan v. State, 844 So. 2d 629 (Fla. 2003), sustained the kidnapping charge and found that the

victim was confined against his will for the purpose of inflicting bodily harm upon or terrorizing him, where while the victim at first went willingly with the defendant, his wrists and lower body bore ligature wounds and the victim was tied to a tree or other such rough surface. See also State v. Lumarque, 990 So. 2d 1241 (Fla. 3rd DCA 2008)(evidence that defendant after being permitted to enter former wife's house, grabbed former wife by the neck, dragged her to her bedroom, strangled her, smothered her with a pillow, and forced her to perform oral sex was sufficient to support charge of kidnapping with the intent to inflict bodily harm upon or to terrorize the victim).

Second, while Defendant concedes that this Court and others do not "necessarily" apply Faison where defendant was charged under section 787.01(1)(a)(3), he contends, however, relying on Conner v. State, 19 So. 3d 1117 (Fla. 2nd DCA 2009), that courts still must consider whether the State may convert any murder, robbery, sexual battery, or other crime involving an assault on another person into two separate crimes by charging defendant under subsection (1)(a)(3), instead of (1)(a)(2). Defendant further contends, that the Court must examine facts to determine whether the confinement was merely incidental to the other charged crime (although in this case there is no such other crime) to find sufficient evidence of confinement whether the

defendant was charged under subsection (1)(a)(2) or subsection (1)(a)(3).

Defendant's reliance on Conner is misplaced. The Conner court recognized that the Faison test is not applicable when a defendant is charged with kidnapping under subsection (1)(a)(3). Conner, 19 So. 3d at 1121-22. It then reasoned that because the kidnapping statute required proof of an abduction, imprisonment or confinement without defining the terms and there was no proof of an abduction or imprisonment, a court needed to look to the facts of the case, including whether any restraint on the victim's movement was merely incidental to another crime the defendant was committing, to determine if the evidence was sufficient to prove a confinement. Id. at 1122-24. Because the only restraint on the victim's movement was the attempt to kill the victim and lasted less than a minute, the court found insufficient evidence of confinement. Id. at 1124-25.[8]

The court in Perry v. State, 57 So. 3d 910, 913 (Fla. 1st DCA 2011), considered the holding in Conner, distinguished it, and found the facts sufficient to establish confinement under section 787.01(1)(a)(3), where the beating lasted at least seven

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[8]In Conner, the defendant jumped out of a vehicle and attacked a student waiting at a bus stop, holding her down and choking her. Id. at 1119.

minutes and involved the victim being beaten in one room, dragged by her hair into another room where the beating continued, and then dragged by her neck or hair outside where the beating concluded. See also Maldonado Melendez v. State, 51 So. 3d 624, 624-25 (Fla. 5th DCA 2011).

The Conner case is distinguishable on its facts from the case at bar. The record clearly establishes that the confinement of Wenda Wright was neither incidental to the murder nor was the restraint momentary. Here, the entire criminal episode lasted hours. Before Defendant went to Wenda Wright's house to search for the purse, she directed Allen: "Don't let that bitch leave the house. If she try to leave this house, beat her mother fucking with a bat or anything. Just don't let that bitch leave this house." (T. 869) While in the house, Defendant threatened Wenda: "By the time my nephew is done platting my hair, you better tell me where my mother fucking purse is." (T. 895) Wenda Wright asked Defendant why she did not want to let her go home. (T. 897) When Wenda Wright dropped down on her knees and started crying, she begged: "Margaret, please let me go home. All I want to do is go home to see my kids." (T. 899) When Wenda Wright tried to leave, Defendant hit her in the head and continued punching her a couple more times after Wenda fell to the floor. (T. 901-902) Wenda Wright was held down, and her arms and legs

were restrained by Allen, while Defendant poured chemical onto her face and strangled her with a belt. (T. 903-907) Further, Defendant told Allen that Wenda remained alive after these acts and did not die until the middle of the night, several hours later. (T. 929-930) Moreover, Wenda was tied up during the night. (T. 916-918, 1170) In all, the kidnapping charge should stand.

III. THE ISSUE REGARDING THE QUESTIONING DEFENDANT'S MENTAL HEALTH EXPERT IS UNPRESERVED AND DOES NOT REQUIRE REVERSAL.

Defendant contends that the prosecutor improperly interjected "future dangerousness" as a nonstatutory aggravator into proceeding, when questioning the defense mental expert about his testimony that Defendant suffered from brain damage resulting in a lack of impulse control. Defendant further contends that this prosecutorial questioning constitutes fundamental error mandating a new penalty phase trial. However, any error in this questioning is unpreserved and does not merit reversal.

It is well settled that in order to preserve an issue regarding a trial court's ruling regarding the admissibility of evidence for appellate review, a defendant must make a contemporaneous objection on the grounds later asserted on appeal. Banks v. State, 46 So. 3d 989, 997 (Fla. 2010); Smith v. State, 28 So. 3d 838, 856-57 (Fla. 2009). Moreover, where the trial court has sustained a defendant's objection, it is further necessary for a defendant to move for a mistrial to preserve an issue for appeal. Simpson v. State, 418 So. 2d 984, 986 (Fla. 1982); see also Companioni v. City of Tampa, 51 So. 3d 452, 455-56 (Fla. 2010).

Here, Defendant did not satisfy these requirements. When Defendant finally objected after the State asked Dr. Wu about the possibility of future events for the second time, he did so based on the assertion that the question called for speculation; not that it presented impressible evidence of future dangerousness. (T. 1855-56) When the trial court sustained the objection on this basis, Defendant asked for no further relief. (T. 1856) As such, this issue is not preserved for review.

While Defendant suggests that this Court held in Walker v. State, 707 So. 2d 300 (Fla. 1997), that a lack of preservation did not affect the analysis of this issue, this is not true. In Walker, 707 So. 2d at 314 n.8, this Court expressly found that the defendant had preserved the issue by both objecting and moving for a mistrial when the objection was sustained. In the portion of Walker on which Defendant relies, this Court merely noted that the mere asking of an improper question can be prejudicial, while ultimately finding that it had not been so prejudicial as to require reversal in that case because the question was isolated. Id. at 314. Thus, Defendant's reliance on Walker is misplaced. The issue is unpreserved.

Because the issue is unpreserved, Defendant would only be entitled to relief if he could show that the error was fundamental. Smith v. State, 28 So. 3d at 857. Fundamental error

has been defined as the type of error which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Hayward v. State, 24 So. 3d 17, 42 (Fla. 2009). Here, Defendant cannot demonstrate fundamental error for several reasons.

First, the State submits that defense counsel "opened the door" through his line of questioning of Dr. Wu. See Rodriguez v. State, 753 So. 2d 29 (Fla. 2000)(holding that the concept of "opening the door" allows the admission of otherwise inadmissible testimony to qualify, explain, or limit testimony or evidence previously admitted, and is based on considerations of fairness and the truth-seeking function of a trial); see Payne v. State, 426 So. 2d 1296, 1300 (Fla. 2nd DCA 1983)(one "opens the door" to otherwise proscribed area or topic by asking questions relating to that area). During direct, Defendant elicited from Dr. Wu that individuals with the type of frontal lobe damage he had found in Defendant had more difficulty controlling their impulses and responded disproportionally to provocation. (T. 1823) She also had Dr. Wu testify that these alleged problems did not consistently manifest themselves and did not manifest themselves in connection with the alleged cause of the brain damage. (T. 1824-26) Thus, according to Dr. Wu, the

fact that the head traumas that allegedly caused the brain damage had occurred during the early 1990's but Defendant had not manifested any disproportionate response until the murder in 2005 was irrelevant. (T. 1824-25) In fact, Defendant directly asked Dr. Wu, "So, it can occur at any time?," and elicited an affirmative response. (T. 1826) By presenting this evidence, Defendant, herself, suggested that she could be violent in the future and opened the door to the State's question. See San Martin v. State, 705 So. 2d 1337, 1347 (Fla. 1997).

Second, the State's questions were not even directed at showing Defendant could be dangerous in the future. Instead, the State was attempting to show the lack of factual support for Dr. Wu's opinion. In this vein, the State began its questioning by eliciting from Dr. Wu that he had no information showing that Defendant had ever exhibited the type of lack of impulse control or disproportionate response at any time other than during this crime. (T. 1853-54) It then attempted to have Dr. Wu admit that the type of problems with impulse control he found did not happen in a random manner, but Dr. Wu insisted that they did. (T. 1854) It then inquired whether Dr. Wu was predicting that similar acts would occur in the future, and Dr. Wu indicated that he was not, particularly since individuals with this type of brain damage do better in prison. (T. 1855) It was only after

Dr. Wu insisted that his opinion was Defendant "had a greater vulnerability of having problems with impulse control" despite the lack of evidence of such lack of control in her past and lack of expectation of such problems in the future, that the State inquired if Dr. Wu was suggesting Defendant would be violent in the future. Defendant objected and the objection was sustained. (T. 1855) Given these circumstances, it is clear that the State was attempting to show that Dr. Wu's opinion had no basis in fact; not that Defendant would be dangerous in the future.

Third, this Court had repeatedly refused to reverse death sentences in similar situation. In Walker, 707 So. 2d at 314, this Court held that the prosecutor's question regarding whether a defendant might kill again was improper, but any error was harmless because the question was isolated and the issue was not mentioned in closing as to the aggravating factors the jury could consider. Here, the question was isolated and asked in connection with established a lack of support for Dr. Wu's opinion. Like in Walker, the issue was never argued in closing. (T. 1555-1588) The trial court also properly instructed the jurors as to the aggravating factors. (T. 1970-1983)

In Allen v. State, 662 So. 2d 323, 331 (Fla. 1995), the prosecutor reminded the jury that defendant had escaped from a

prison and that "no form of control, whether it was probation or parole or prison or work release was adequate to take care of this defendant. Had he served his out his term of years in Kansas at the time, this crime might not have been committed 13 months later." This Court refused to reverse because the comment was directed to another issue and the sentencing order specifically provides that the court's decision to impose the death sentence was based solely on the statutory aggravating factors. Here, like in Allen, the question concerned a different issue and the sentencing order provided that the court has considered all evidence and testimony presented, argument of counsel, the advisory verdict of the jury, and the applicable elements of aggravation and mitigation set forth in Florida Statutes. (T. 951) See also Davis v. State, 698 So. 2d 1182, 1192 (Fla. 1997).

Fourth, Defendant's sentence was extremely aggravated. Allen's testimony established how Defendant held Wenda against her will for hours while Defendant tortured Wenda. Defendant engaged in this conduct simply because she believed Wenda must have taken her missing purse. As the trial court found, Defendant's mitigation case was weak. The opinions of Defendant's experts were not consistent with the facts of this case and Defendant's life. As such, Defendant has not shown that

she did not receive a fair penalty phase. The death sentence should be affirmed.

IV. DEFENDANT'S DEATH SENTENCE WAS PROPERLY IMPOSED.

A. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT WAS ENGAGED IN THE KIDNAPPING OF WENDA WRIGHT AND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL.

Defendant asserts that the trial court erred in finding the aggravating circumstances of during the course of a kidnapping and HAC. However, this issue is meritless.

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applied the correct law and whether its findings are supported by competent, substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997); see also Cave v. State, 727 So. 2d 227, 230 (Fla. 1998). As the trial court's findings here did apply the correct law and are supported by competent, substantial evidence, they should be affirmed.

With regard to during the course of a kidnapping, the trial court found:

> The first aggravating circumstance requested is that murder was committed while the Defendant was engaged, or was accomplice, in the commission of, or an attempt to commit or in flight after committing or attempting to commit a kidnapping.
>
> The jury unanimously found the Defendant guilty of kidnapping. Kidnapping means forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority with the intent to inflict bodily harm upon or terrorize another person. The Court independently finds that the evidence presented and outlined above

supports the jury's finding that the Defendant committed the capital felony while engaged in kidnapping, or the attempt to commit a kidnapping. The victim asked to leave the Defendant's home, and was told she had to stay while the Defendant went to Ms. Wright's home and searched for the purse. When the Defendant returned to her own home, the victim repeatedly asked to be able to leave and return to her family. The Defendant refused to allow her to leave. When the victim attempted to leave on her own, the Defendant viciously punched her and knocked the victim to the floor. The victim was held down to the floor and bound, while the victim was pleading for the Defendant to let her leave to go home to be with her family.

> The Court finds that the State has proven beyond and to the exclusion of every reasonable doubt that the Defendant was engaged in the kidnapping, or attempt to commit a kidnapping, of Wenda Wright at the time Wenda Wright was murdered. This aggravator has been established beyond a reasonable doubt. The Court assigns this aggravator great weight.

(T. 951-952)

With regard to the aggravating circumstance of during the course of a kidnapping, Appellee refers this Court to the argument contained in Argument II of this brief, in order to avoid the repetition. The trial court's findings are supported by the evidence and should be affirmed.

Next, although Defendant recognizes that this Court has upheld the use of the during the course of a kidnapping aggravating circumstance to support a death sentence, she urges this Court to reconsider its position in the situation where the

Defendant was charged with the felony murder and not premeditation.

The law is settled by this Court that eligibility for this aggravating circumstance is not automatic. The list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. This scheme thus narrows the class of death-eligible defendants. Blanco v. State, 706 So. 2d 7 (Fla. 1997); see also Francis v. State, 808 So. 2d 110 (Fla. 2001); Miller v. State, 926 So. 2d 1243, 1260 (Fla. 2006)(finding meritless defendant's claim that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony).

With regard to the claim of absence of premeditation, this Court in Geralds v. State, 674 So. 2d 96 (Fla. 1996), affirmed the death sentence despite the absence of premeditation, where two aggravators were found: 1)HAC and 2)the murder was committed

during the course of a robbery and/or burglary. This Court stated:

> Having carefully scrutinized the record in this case, including the jury's unanimous recommendation of death, we are persuaded beyond a reasonable doubt that even without the aggravating circumstance of cold, calculated, and premeditated murder, the trial court still would have found that the aggravating factors present here substantially outweighed the mitigating evidence.

Id. at 104; see also Brant v. State, 21 So. 3d 1276 (Fla. 2009)(affirming conviction for first degree murder and sentence of death where two aggravators found: HAC and the murder was committed while engaged in the commission of a sexual battery; no premeditation found). The during the course of a kidnapping aggravator should be affirmed.

Defendant next challenges the sufficiency of the evidence to support the heinous, atrocious or cruel aggravating circumstance, asserting that it is more likely than not that Wenda Wright lost consciousness upon the initial blow to her head and her foreknowledge of death is based on speculation because there were no signs of defensive wounds. However, this issue is meritless. With regard to HAC, the trial court found:

> The second aggravating circumstance is whether the capital felony was especially heinous, atrocious or cruel. The Court finds the State established the aggravating circumstance of heinous, atrocious, or cruel, beyond a reasonable doubt. "[I]t is permissible to infer that strangulation, when perpetrated upon a

> conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." McWatters v. State, 36 So. 3d 613, 643 (Fla. 2010), citing to Ochoa v. State, 826 So. 2d 956, 963 (Fla. 2002) (quoting Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986). This murder was indeed conscienceless, pitiless and undoubtedly torturous to the victim. The Court assigns this aggravator great weight.

(T. 953)

This Court has held that even 30 to 60 seconds of terror supports the HAC aggravating circumstance. See Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997). This Court explained as follows:

> With respect to the HAC aggravator, this Court has held that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." James v. State, 695 So. 2d 1229, 1235 (Fla. 1997). This Court has also held that "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." Brown v. State, 721 So. 2d 274, 277 (Fla. 1998). Furthermore, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988); see also Lynch v. State, 841 So. 2d 362, 369 (Fla. 2003) ("[T]he focus should be upon the victim's perception of the circumstances...."). And, in Buzia v. State, 926 So. 2d 1203, 1214 (Fla. 2006), this Court upheld the finding of the HAC aggravator and stated: "Whether this state of consciousness lasted minutes or seconds, he was 'acutely aware' of his 'impending death.'" We have upheld the HAC aggravator where the victim was conscious for merely seconds."

Aguirre-Jarquin v. State, 9 So. 3d 593, 608-609 (Fla. 2009)(defendant argued that, because he stabbed the victim in the heart and she died instantly, the murder was not HAC); Peavy v. State, 442 So. 2d 200, 202-03 (Fla. 1983)(upholding finding of HAC where medical examiner testified that victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds).

This case is textbook example of HAC aggravator. The record reflects that Wenda Wright was terrorized over a substantial period of time and that she was aware of what was happening to her. Wenda Wright begged to be let go home because she did not know anything about Defendant's purse. (T. 897-899) When she tried to leave, Defendant punched her in the head, and she fell on the ground. (T. 901-902) Defendant continued punching her. (T. 901-902) According to Allen, he was holding Wenda Wright down while Defendant was pouring the chemicals onto her face. (T. 905) Defendant then beat Wenda Wright with belts while her legs were tied. (T. 908-910) Allen testified that Wenda Wright was terrified and screamed for Defendant to stop because she was going to wet on herself, which indicated that she was conscious. (T. 913-914; 1451) Wenda Wright was shaking and moving for around three minutes. (T. 914-915)

According to Dr. Qaiser, the cause of death was strangulation. (T. 1442-1443) Dr. Qaiser also testified that he found bruises and contusions on Wenda Wright's body which indicated that she was beaten. In particular, bruises were found on the back of the ear, forehead, left side of the torso, trunk and the leg area. (T. 1426-1428, 1429-1430, 1431) He also found ligature marks over Wenda's wrist and neck, which indicated that she was tied and strangled. (T. 1428, 1433, 1436-38) According to Dr. Qaiser, Wenda Wright could have been conscious while suffering various blows upon her body. (T. 1446-47) He explained that if someone suffers a blow to the head, it could take 10 to 20 seconds to become unconscious, and consciousness could be regained thereafter. (T. 1446-48) According to Dr. Qaiser, it could take a person 4 to 6 minutes to die as a result of strangulation, and such a person could remain conscious during part of that process and could be aware as well. (T. 1477-1499) Also, while being strangled, Wenda could have lost control of her bladder and remain conscious at the same time. (T. 1451) As to the pain sensation, Dr. Qaiser explained that unconscious people can feel it the same way like conscious people, but unconscious people cannot manifest it, which indicates that Wenda could feel the pain even if she was unconscious at some point during the attack. (T. 1709, 1711-12) During the

strangulation, the person could lose consciousness and then regain it again; there would be a jerky movement and a sense of panic. (T. 1724-25) Dr. Qaiser found Wenda's behavior consistent with this description. (T. 1725) Further, Dr. Qaiser's testimony indicated that during the strangulation, it takes a person 10-20 seconds to lose consciousness and 4-6 minutes to die. (T. 1734-35) Finally, given the fact that both Dr. Qaiser and Allen testified that Wenda was restrained, it is not surprising that she does not have any defensive wounds.

This Court has upheld HAC under similar circumstances. Mansfield v. State, 758 So. 2d 636 (Fla. 2000)(medical examiner testified that victim was conscious during strangulation and beating and suffered pain therefrom in a desperate struggle to breathe for at least a few minutes, although could not pinpoint exactly how long the victim experienced pain, as her testimony made clear that victim was conscious for more than a few minutes); Hoskins v. State, 965 So. 2d 1 (Fla. 2007)(defendant argued that because there was no showing that the victim was conscious during most of the attack, the murder was not HAC; this Court upheld HAC and reasoned that while victim may have been unconscious when she was initially attacked and transported, evidence showed that victim was conscious when defendant strangled her to death); Belcher v. State, 851 So. 2d

678 (Fla. 2003)(HAC found even though victim was probably only conscious for sometime between 30 seconds and a minute before her strangulation and drowning death); James v. State, 695 So. 2d 1229 (Fla. 1997)(HAC even though victim died quickly, victim looked at defendant when defendant grabbed her by neck and pulled up from couch where she had been sleeping, victim knew defendant well, and defendant strangled victim). As the trial court applied the correct law and its findings are supported by competent substantial evidence, the HAC aggravating circumstance should be affirmed.

B. THE TRIAL COURT PROPERLY EVALUATED AND REJECTED THE STATUTORY MENTAL MITIGATORS

Defendant claims that the trial court erred in rejecting the statutory mitigators of: 1) under the influence of extreme mental or emotional disturbance; and 2) substantial impairment of Defendant's capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law. It is Defendant's position that her experts' testimony regarding brain damage compels the finding of these two statutory mitigators could not be rejected. However, the trial court's reasons for rejecting the mitigators are supported and should be affirmed.

While aggravators must be proven beyond a reasonable doubt, Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992), mitigators are "established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990) (finding judge may reject mitigator if record contains competent, substantial evidence supporting decision). In Campbell, this Court established relevant standards of review for mitigators: (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (2) whether a mitigating circumstance has been established is a question of fact and subject to the competent substantial evidence standard; and (3) the weight assigned to a mitigator is within the trial court's discretion and subject to the abuse of discretion standard. See, Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000)(observing whether mitigator exists and weight to be given it are matters within sentencing court's discretion); Trease v. State, 768 So. 2d 1050 (Fla. 2000) (receding in part from Campbell; holding that though judge must consider all mitigators, "little or no" weight may be assigned); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (explaining judge may reject mitigator provided record contains competent, substantial evidence to support rejection). At issue here is the

propriety of the trial court's rejection of mitigation. Thus, the standard of review is the competent, substantial evidence test where an appellate court must pay overwhelming deference to the trial judge's ruling. Guzman v. State, 721 So. 2d 1155 (Fla. 1998).

Defendant asserts that based on the testimony of her mental health experts and discussion with family members, she established that she was suffering from an extreme mental or emotional disturbance at the time of the murder and that her capacity to conform her conduct to the requirements of law was substantially impaired. The State disagrees. This Court stated:

> The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. Moreover, expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.

Foster v. State, 679 So. 2d 747, 755 (Fla. 1996), cert. denied, 520 U.S. 1122 (1997)(citations omitted); Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987)(opining "[i]n determining whether mitigating circumstances are applicable in a given case, the trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other

witness."). Analyzing the statutory mental mitigators, the trial judge found:

THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

The Defendant produced no evidence to establish that she was under the influence of extreme mental or emotional disturbance. The evidence established the Defendant was furious because her money was missing, and convinced that Ms. Wenda Wright stole her money. The Defendant followed through with planning and executing this crime. Although there was testimony the Defendant drank alcohol, no testimony was presented connecting alcohol use to this crime. No one testified the Defendant had a drug problem, or was using drugs at the time of the crime. The Court finds no connection between any alcohol or drug use and this crime. The Court finds this mitigating factor has not been established, therefore, the Court rejects the existence of this statutory mitigator.

THE CAPACITY TO APPRECIATE THE CRIMINALITY OF HER CONDUCT OR TO CONFORM HER CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED

Two medical doctors testified in support of this mitigating circumstance. Dr. Michael Gabel, a neurologist, testified he examined the Defendant and reviewed her medical records. He testified these records revealed hospitalizations, with head trauma. The doctor testified that the Defendant was not cooperative with his examination, giving him vague answers (At the Spencer hearing, the Defendant testified that she did not feel free to speak to the doctor, as officers were present at the examination). He opined that due to numerous head traumas, the Defendant has brain damage. He stated that she was at the "lower end of intellectual capacity." Dr. Gebel opined that this type of brain damage affects impulse control and affects the ability to think things through and plan.

Dr. Gebel testified the Defendant did not appear to have any major brain injury, although he did

testify she has organic brain damage due to physical injuries inflicted upon her. He opined that this brain damage "might" affect her ability to appreciate the criminality of her conduct, because she would understand the consequences of her actions to a lesser degree. He stated that she would have difficulty conforming her conduct to the requirements of law. Dr. Gabel further testified that he could not say the Defendant was substantially impaired mentally, because she was not cooperative.

Dr. Joseph Wu, a psychiatrist, testified on behalf of the Defendant, as an expert in neuro-psychiatry and brain imaging. He reviewed the results of the Defendant's PET scan (positron emission topography), and compared her scan with a normal scan. The doctor explained that the PET scan identifies abnormal less active areas of the brain. He also reviewed medical reports of at least ten cases of traumatic injuries to the Defendant, most of which involved her head. The doctor stated that the PET scan showed the right side of the Defendant's brain had an asymmetrical change, outside the normal range. He found this consistent with the earlier head traumas, and with the neurology report. Dr. Wu testified the implication then arises there has been damage to the frontal brain lobe, which is most critical in human functioning. Dr. Wu testified the frontal lobe is involved in judgment, impulse control, mood regulation, and the inability to respond appropriately to an injury, slight or provocation. The doctor opined that when this lobe is injured, a person does not have the same ability to control impulses.

Dr. Wu testified that the Defendant would have an impaired capacity to appreciate the criminality of her conduct, and that it would be difficult to conform her conduct to society. In his opinion, within a reasonable degree of medical probability, the Defendant had suffered a traumatic brain injury. He also testified that this impaired ability to regulate emotional reactions did not mean that her ability to plan was impaired.

This Court finds that the Defendant has established she suffered a brain injury/dysfunction, by preponderance of the evidence. However, a finding of a brain injury/dysfunction does not require a

finding that the statutory mitigator has been established. The Court finds the Defendant's actions during and after this murder indicate her awareness of the criminality of her conduct. This horrific crime did not occur impulsively, or in a split second. Instead, the events leading up to the murder unfolded over a substantial course of time. The victim was held captive in the Defendant's home while the Defendant walked over and searched the victim's home. Then the Defendant returned to her home and threatened the victim repeatedly. When the victim tried to leave, the Defendant punched her to the ground. The Defendant took the time to enter her bathroom, retrieve caustic liquid substances, and return to pour those substances on the victim's face. After beating the victim with fists and belts, the Defendant strangled her to death with a belt. The next day, she commandeered JT Martin and Quintin Allen and ordered them to help her bury the body. She lied to Johnny Dublin, the victim's husband, informing him the victim had left the Defendant's house and she had no idea where the victim went. The Defendant orchestrated the burial, ensuring that the necessary tools were available to complete the deed. She borrowed the Ford Explorer used to transport the body, and that vehicle has never been located. None of these actions suggests that the Defendant was either unaware her actions were criminal or that she was unable to conform her conduct to the requirements of the law had she wanted to do so. To the contrary, her deeds establish she knew she had committed a horrendous crime. There is no evidence indicating that any impairment affected the actions of the Defendant.

The Court finds this statutory mitigating circumstance has not been established. Ault v. State, 53 So. 2d 175 (Fla. 2010).

(T. 954-58)

These findings are supported by competent substantial evidence. While Defendant insists that the evidence of brain damage that she presented showed that she was under an extreme

mental or emotional disturbance at the time of the murder, neither of her experts so testified. (T. 1740-64, 1797-1859) In fact, neither of her experts was ever even asked if they had an opinion about this mitigator. (T. 1740-64, 1797-1859) Instead, both of her experts only offered opinions on whether Defendant's capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was substantially impaired. (T. 1752-53, 1829-31) Given these circumstances, the trial court's finding that there was no evidence of extreme mental or emotional disturbance is supported by competent substantial evidence. Thus, the rejection of the extreme mental or emotional disturbance mitigator should be affirmed.

Defendant next asserts that based on the testimony of her mental health experts, Dr. Gebel and Dr. Wu, she established that her capacity to conform her conduct to the requirements of law was substantially impaired. However, this claim is without merit. Dr. Gebel testified that based on his neurological examination and interview with Defendant, Defendant suffered head traumas in the past. He also stated that he examined Defendant, who was uncooperative, and as a result, the mental status test was difficult. Based on that fact, Dr. Gebel stated that it did not look like Defendant had any major brain injury

and that the mental status itself was questionable. (T. 1745) He testified that the problems he found would have prevent Defendant from engaging in the action taken to bury Wenda. Dr. Wu also testified that Defendant suffered head traumas in the past. While he did testify that Defendant would not be able to control her impulses and conform to the requirement of the society, he also indicated that the murder of Wenda Wright was the only episode that he was aware of regarding Defendant's inability to control her impulses. (T. 1853-54)

While Defendant insists that the evidence of the brain damage affected her capacity to conform her conduct to the requirements of the law, the facts of the case indicate otherwise. Dr. Gebel's testimony indicated that although Defendant did not have any major brain injury, she has organic brain damage that "might" affect her ability to appreciate the criminality of her conduct. (T. 1745, 1751-52) Dr. Wu insisted that Defendant has an impulse control problems despite the lack of evidence of such problems in her past. (T. 1853-55) More importantly, there was an obvious disagreement between these two mental experts as to the degree of executive functioning, which the trial court noted in its order. In that regard, although Dr. Gebel testified that, as a result of her brain damage, Defendant would have problems with executive functioning, he also stated

that a person with executive functioning problems would not be able to perform the tasks Defendant completed here (went to Lowe's to buy plywood; go into the argument with a cashier; organize a group of people to bury the body). (T. 1760-61) On the other hand, Dr. Wu testified that although Defendant has an impaired ability to regulate an emotional overreaction, it does not mean that her executive ability is impaired. (T. 1830-31) Finally, based on experts' testimony, the trial court found brain damage as nonstatutory mitigation.

Similarly, in Walls v. State, 641 So. 2d 381 (Fla. 1994), the trial court found the brain damage as a nonstatutory mitigating circumstance. Walls complained that the trial court improperly rejected expert testimony that he was suffering extreme emotional disturbance and that his capacity to conform his conduct to the law's requirements was substantially impaired. This Court held that opinion testimony, especially qualified expert opinion testimony, is not necessarily binding even if uncontroverted. See also James v. State, 695 So.2d 1229, 1237 (Fla. 1997)(upheld the trial court's weight of a would-be statutory mitigator as non-statutory). Here and there, the trial court "considered all the evidence presented as to [the defendant's] mental state" and "determin[ed] whether his mental

or emotional disturbance at the time of the offense rose to the level sufficient to establish it as a statutory mitigator."

Defendant also claims that because both mental health experts testified that Defendant had a problem to control her impulses and understand the consequences of her actions, the trial court should not have relied on inconsistency between experts' opinion and the facts of the case. However, this claim is meritless, because it was proper to do so under Walls. Walls v. State, 641 So. 2d at 391. Similarly, in Parker v. Matthews, 132 S.Ct. 2148 (2012), the mental health expert opined that Matthews was under the influence of extreme emotional disturbance at the time of the murder but the facts of the case indicated otherwise (the defendant borrowed money to purchase the murder weapon, waited several hours after buying the gun before starting for the victim's home, after the murder took steps to hide the gun and clean his clothes) The Sixth Circuit, discounted the above mentioned evidence because the mental health expert testified that Matthews' deliberateness and consciousness of wrongdoing were not inconsistent with the diagnosis of extreme emotional disturbance. Id. at 2153. The Supreme Court held that expert testimony does not trigger a conclusive presumption of correctness, and it was not unreasonable to conclude that the jurors were entitled to

consider the tension between the experts' testimony and their own common-sense understanding of emotional disturbance. Id. The Court further held that in resolving the conflict in favor of the mental health experts' testimony, the Sixth Circuit overstepped the proper limits of its authority. Id. Here, like in Matthews, although both experts testified that Defendant would act on impulse, the facts of the case indicate otherwise- Defendant spent a substantial amount of time looking for her missing purse, had her hair done, and then, attacked Wenda.

Defendant next claims that the trial court misunderstood Dr. Gebel's testimony. In fact, Defendant claims that the trial court first found that both mental health experts established that Defendant has brain damage, and then, in second paragraph, it found that based on Dr. Gebel's testimony, Defendant does not have any major brain injury. However, this claim is without merit because Defendant misinterpreted the trial court's sentencing order, thereby relying only on half a sentence in the order. Contrary to Defendant's contention, the trial court stated that, "Dr. Gebel testified the Defendant did not appear to have any major brain injury, although he did testify she has organic brain damage due to physical injuries inflicted upon her." (T. 955) Moreover, the subject trial court's findings are consistent with Dr. Gebel's testimony. (T. 1744-1751)

Defendant further claims that because of Defendant's inability to control impulses, the trial court should have ignored that, the next day after the murder, she organized the burial. However, this claim is also without merit because Dr. Gebel directly testified that Defendant could not have done such acts. (T. 1760-61) Given these circumstances, the trial court's rejection of these mitigations is supported by competent substantial evidence and should be affirmed.

In support of her claim that the trial court erred in rejecting the statutory mental health mitigating circumstances, Defendant extensively relies on Crook v. State, 813 So. 2d 68 (Fla. 2002). However, this reliance is misplaced. In Crook, the trial court had found both statutory mental mitigators, based on intoxicant use. Id. at 73, 75. It rejected brain damage as mitigation despite the uncontroverted testimony of three defense experts and the State's concession during its closing argument that brain damage was mitigation that needed to be weighed. Id. at 71-73. The trial court's reason for rejecting the brain damage evidence was that "there was no actual proof of any brain damage." Id. at 75. This Court determined that this finding was not supported by competent substantial evidence because the defense experts had presented such proof through their objective testing. Id. at 75.

Here, in contrast, neither of Defendant's own experts ever testified that the brain damage caused Defendant to be under an extreme mental or emotional disturbance. Thus, the trial court was entirely correct to find no evidentiary support for this mitigator. Moreover, the trial court here did not reject the capacity mitigator because the evidence of brain damage was unproven. It rejected the capacity mitigator because the experts' testimony regarding this mitigator was inconsistent with the facts of this case. In fact, the trial court found brain damage as nonstatutory mitigation. As such, Defendant's reliance on Crook is misplaced.

The facts of our case are more similar to Robinson v. State, 761 So. 2d 269, 277 (Fla. 1999). In Robinson, the trial court found, as a nonstatutory mitigating circumstance, that the defendant had suffered brain damage to his frontal lobe but accorded it little weight because it was not connected to the crime. This Court upheld these findings because the sentencing order clearly reflected that the trial court considered the evidence and weighed it accordingly. Id. at 277.

The trial court's findings are consistent with the above presented testimonies, and supported by competent, substantial evidence. Finally, as previously stated, the trial court found that Defendant suffered a brain injury but did not find that it

arose the level to be characterized as the statutory mitigator. The trial court found and weighed Defendant's brain damage and lack of impulse control as a nonstatutory mitigator. The rejection of the subject statutory mitigators should be affirmed. See Sireci v. State, 587 So. 2d 450, 454 (Fla. 1991)(holding that the decision as to whether a particular mitigating circumstance is established lies with the judge and reversal is not warranted simply because an appellant draws a different conclusion).

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN WEIGHING THE NONSTATUTORY MITIGATION IT FOUND.

Defendant next challenges the weight assigned by the trial judge to the mitigation evidence presented. Specifically, she claims that the trial court assigned diminished weight to the substantial mitigation and "glossed" over substantial-non statutory factors without providing any adequate analysis. A review of the penalty phase evidence and the sentencing order establishes that these claims are without merit.

With respect to the various non-statutory mitigation offered, the trial court stated:

> THE DEFENDANT HAS BEEN THE VICTIM OF PHYSICAL ABUSE AND POSSIBLE SEXUAL ABUSE IN THE PAST
>
> The Defendant's aunt, Ms. Myrtle Posley Hudson, testified that she has known the Defendant from her

birth. Ms. Hudson knew the Defendant had been in two abusive relationships, where she had been beaten to the point of unconsciousness. At one point, Ms. Hudson entered the Defendant's home and a man kicked down the Defendant's door. He was on top of her, beating her. The Defendant was hospitalized, with bruises on her arms, chest and thighs. Later, this same man beat her and placed a gun to her head. Ms. Hudson testified that Defendant told her she had been sexually abused by a relative. She further stated that the hospital called her once to come see the Defendant, and the Defendant was beaten so badly her aunt did not recognize her. The Defendant's face and head were swollen, and she had scrapes and scars about her.

Ms. Hudson testified that the Defendant might have been sexually abused by an uncle and a brother. She testified the Defendant has a physical condition that causes her hands and feet to sweat. She further noted that the Defendant has an eye that does not focus straight ahead, which Ms. Hudson believes was caused by a stroke at an early age.

Ms. Hudson testified that she never knew the Defendant to use drugs, but she did drink alcohol. She further stated the Defendant has three children-the youngest daughter is living with the grandmother, the older daughter has recently been sentenced to five years in prison, and her son has been sentenced to eleven years in prison. The aunt further testified all the children have learning and behavioral issues, and have been in special classes at school.

Dr. Bessie Cooper also testified that the Defendant had been abused as a child. Dr. Bessie Cooper was told by others that the Defendant had been abused, but she did not personally observe any abuse. Dr. Cooper has a doctorate in education, and was not qualified as an expert witness.

Defendant testified that she had been abused by her family and others, and had been hospitalized several times. She stated that she had been beaten almost to death.

The Court finds this mitigating factor has been established by the greater weight of the evidence, and further finds this is a mitigating circumstance. The Court assigns it some weight to this non-statutory mitigator.

THE DEFENDANT HAS BRAIN DAMAGE AS A RESULT OF PRIOR ACTS OF PHYSICAL ABUSE AND THAT THE BRAIN DAMAGE RESULTS IN EPISODES OF LACK OF IMPULSE CONTROL

The Court finds traumatic brain injury has been established by the experts' testimony, although neither could agree to the extent that any damage would affect the Defendant's planning capabilities.

The Court finds this mitigating factor has been established by the greater weight of the evidence, and further finds this is a mitigating circumstance. The Court assigns some weight to this non-statutory mitigator.

THE DEFENDANT GREW UP IN A NEIGHBORHOOD WHERE THERE WERE ACTS OF VIOLENCE AND ILLEGAL DRUGS

Ms. Hudson testified that the Defendant grew up in a drug-filled neighborhood, surrounded by drugs, thugs and violence. Ms. Hudson stated the Defendant's father was absent during her childhood, and the Defendant lived with her mother and at times with Ms. Hudson. Ms. Hudson depicted a bleak childhood. Ms. Hudson never knew the Defendant to be involved in using drugs, but testified the Defendant drank alcohol. The Defendant specifically testified that she was addicted to "selling drugs" not to using drugs.

Irene Posley, the Defendant's grandmother, testified somewhat differently than Ms. Hudson. Ms. Posley stated that she and her husband provided a loving home for the Defendant from when the Defendant was five years old to around eight years old. Ms. Posley testified that she would have helped the Defendant in any way she could, and the Defendant was always welcome back in her home.

Ms. Tara Posley, the Defendant's cousin, testified that she grew up in the same neighborhood as the Defendant, and there was a lot of violence and drugs. She testified that drugs played a big part in the Defendant's life-and the Defendant did what she had to do to provide for her family.

The Court finds that this nonstatutory mitigator has been established by the great weight of the evidence, and further finds this is a mitigating

circumstance. The Court assigns this mitigator some weight.

THE DEFENDANT HELP OTHER PEOPLE BY PROVIDING SHELTER, FOOD OR MONEY

Ms. Hudson testified that the Defendant was always willing to help others, with shelter, food or money. Ms. Tara Posley testified that the Defendant was helpful to others, that she took people in and gave them food and money. The Court finds that this nonstatutory mitigator has been established by a preponderance of the evidence. The Court assigns this mitigator little weight.

SUMMARY OF FINDINGS

> The Court finds that the mitigating circumstances are insufficient in weight to outweigh the two aggravating circumstances, which have been proven beyond a reasonable doubt. The victim was terrorized, beaten then mercilessly strangled-as she begged for her life. There is no excuse or justification for the Defendant's conduct. The Court finds the sentence of death to be proportional.

(T. 958-962)

Clearly, the sentencing court gave careful consideration to the aggravating and mitigating circumstances, carefully weighed them as required by Florida law, and found that the aggravators outweighed the mitigation, with the result that death was the proper sentence. While Defendant insists that the trial court assigned diminished weight to nonstatutory mitigation, the record gives no support for such assertion because the evidence that was presented at the Spencer hearing was conflicting and inconsistent with the facts of this case.

First, both Ms. Hudson and Ms. Noble testified that they only heard that Defendant had been abused. (T. 220-22, 231-32) As such, these statements are unreliable hearsay statements, because neither of these witnesses had any personal knowledge of the alleged abuse. Second, contrary to Ms. Hudson, who stated that Defendant grew up in a drug-filled and violent neighborhood, Ms. Posley, Defendant's grandmother, testified that she provided a loving home for Defendant. (T. 1878-79, 261-62) Third, Tara Posley testified that Defendant supported her friends and provided help for those who needed it. (T. 236,239) However, this testimony is inconsistent with the facts of this case because Defendant murdered her longtime friend, Wenda Wright. As such, the sentencing court did not abuse its discretion in assigning weights to the mitigators it found, and the sentence should not be disturbed.

Defendant's contention that the trial court glossed over substantial mitigating factors and did not provide adequate analysis in the sentencing order is clearly without merit. For example, in Sims v. State, 681 So. 2d 1112, 1119 (Fla. 1996), the defendant asserted that the trial court failed to provide an adequate basis for review and the sentencing order did not comport to the Campbell guidelines. The trial judge after addressed the background mitigation in brief summary, listed the

twenty-five nonstatutory mitigating factors and stated: "The court has considered each of them carefully. The court finds little to no weight to each of them. The Court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances." This Court held that this order complies with Campbell requirements where the order specified which statutory and nonstatutory mitigating circumstances the trial judge found and the weight he attributed to these circumstances in determining whether to impose a death sentence.

Also, in support of its contention, Defendant relied on Hudson v. State, 708 So. 2d 256 (Fla. 1998). However, this reliance is misplaced. Unlike here, in Hudson, the trial court provided a summary analysis of statutory and nonstatutory factors without evaluating the evidence presented. Since that is not true here, the sentence of death should not be disturbed.

D. DEFENDANT'S SENTENCE IS PROPORTIONATE.

Defendant next argues that her sentence is disproportionate. This claim is wholly without merit.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court must "consider the totality of circumstances in a

case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991).

A comparison of this crime and its circumstances to other cases reveals that the sentence of death is warranted here. For example, the facts of this case are remarkably similar to the facts in Francis v. State, 473 So. 2d 672 (Fla. 1985). In Francis, the defendant forced the victim to crawl on his hands and knees and beg for his life. The victim was then placed on a toilet stool with his hands tied behind for a period in excess of two hours. During the time in the bathroom, the victim was placed in fear of death by way of injections of Drano and other foreign substances into his body, and finally defendant shot his victim in the heart, causing his death. This Court upheld the sentence of death (aggravating factors were: murder was committed to hinder a governmental function, HAC and CCP; mitigating factors were: no significant history of prior criminal history and recent good behavior in prison).[9] See also Miller v. State, 770 So. 2d 1144 (Fla. 2000) (sentence of death upheld for beating the victim to death. Aggravating factors

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[9]In Francis, this court upheld finding of HAC under the similar factual circumstances. (See argument above regarding the HAC aggravator)

were: prior violent felony and the homicide was committed during an attempted robbery and for pecuniary gain (merged). Mitigation consisted of ten nonstatutory factors including a frontal lobe deficiency that affects inhibition and impulse control); Morris v. State, 811 So. 2d 661 (Fla. 2002) (sentence of death upheld for beating and strangling the victim to death. Aggravating factors were: defendant was on parole, previous felony conviction, pecuniary gain and HAC. There was one statutory mitigator and numerous non statutory mitigators; the trial court gave moderate weight to defendant's organic brain damage); Consalvo v. State, 697 So. 2d 805 (Fla. 1997) (sentence of death upheld. Two aggravators were: avoid arrest and during the course of burglary; no statutory mitigators and nonstatutory mitigators of employment history and abusive childhood); Frances v. State, 970 So. 2d 806 (Fla. 2007)(sentence of death upheld for strangling the victim to death; Aggravators of previous conviction of another capital felony, during the course of robbery and HAC balanced against the statutory mitigator of age and a number of nonstatutory mitigators related to history, personality and conduct).

The cases relied upon by Defendant do not show that her sentence is disproportionate. Crook v. State, 908 So. 2d 350 (Fla. 2005), included extreme mitigation including frontal lobe

damage, a substance abuse problem that aggravated the defendant's mental deficiencies and a young age of 20 at the time of the murder. Here, the record indicates that Defendant did not have substance abuse problem and certainly was not young when she committed the crime. Moreover, the facts of the crime were actually consistent with an impulsive act.

Larkins v. State, 739 So. 2d 90 (Fla. 1999), included the prior violent felony aggravator that was predicated upon two convictions that were obtained almost twenty years before the murder and neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators were present. The defendant had a history of drug and alcohol abuse and substantial memory impairment. Here, HAC was found, and there was no history of substance abuse.

Down v. State, 574 So. 2d 1095 (Fla. 1991), included the fact that defendant was drinking the night before and day of murder, had a drug and alcohol abuse history, was borderline mentally retarded and suffered from schizoid personality disorder. Here, neither one of these mitigating circumstances was present. In Neary v. State, 384 So. 2d 881 (Fla. 1980), the defendant was young and a slow learner who needed special assistance to keep up in school. Oxford v. State, 959 So. 2d 187 (Fla. 2007), included two serious mental illnesses,

schizophrenia and bipolar disorder, which contributed to the murder. Here, there was no evidence of mental illness. Besarba v. State, 656 So. 2d 441 (Fla. 1995), and Knowles v. State, 632 So. 2d 62 (Fla. 1993), both involved only one aggravating circumstance and histories of substance abuse. In addition, in Knowles, defendant was intoxicated at the time of the murder. Here, that was not the case. Carter v. State, 560 So. 2d 1166 (Fla. 1990), included extensive drug abuse and possible intoxication at the time of murder. Robertson v. State, 699 So. 2d 1343 (Fla. 1997), involved a defendant who was 19 at the time of murder and has long history of mental illness and impaired capacity due to drug and alcohol abuse. Similarly, Livingston v. State, 565 So. 2d 1288 (Fla. 1988), involved a defendant who was 17 at the time of murder and extensively used drugs. Unlike Robertson and Livingston, here, none of these mitigating circumstances was found. As such, none of these cases show Defendant's sentence is disproportionate. It should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to James R. Wulchak, Public Defender's Office, 444 Seabreeze Blvd, Suite 210, Daytona Beach, FL 32118, this 19th day of July 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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