IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2258

CECIL SHYRON KING,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

Renie Telzer-Bain was a retired 82 year-old nurse who lived and breathed for her family. (T. 1581-82) Renie loved and cared for her sons, Dana and Lewis, and adored her only grandson, Miles. (T. 1582) Renie was also very close to her daughter-in-law, Lyza Telzer, and they used to talk on the phone around ten times a day. (T. 1582, 436)

On December 28, 2009, Lyza Telzer and her son, Miles, visited Renie, brought her some gifts, and had dinner together. (T. 442-43) The following day, Lyza Telzer did not call Renie because she had just returned from a short trip and needed to catch up with work. (T. 444) Lyza Telzer tried to reach Renie by phone, around 4:00 p.m., but Renie did not answer. (T. 444) At first, Lyza Telzer was not concerned because it was still day time and Renie was an active 82 years-old woman who was still driving her car, shopping and running her own errands. (T. 444) Approximately 30 minutes after the first call, Lyza Telzer called her mother-in-law again, hoping that she would answer this time. (T. 444-45) At that time, Lyza called her husband, and asked him if he had spoken to his mother that day, and he said that he had not. (T. 445) Lyza Telzer decided to go to Renie’s home and check if she was okay. (T. 446)

When Lyza Telzer came to Renie's home, she opened the garage with a clicker and noticed that Renie's car was gone, which she considered unusual because it was already late at night. (T. 446) Lyza asked Renie's neighbor, Richard Broxton, to accompany her walking in the house. (T. 447, 514) Lyza and Richard tried to get in the house through the door that led from the garage into the house, but the door was locked, which was unusual because that door was always unlocked if Renie left the house. (T. 448)

Then, Lyza and Richard opened the door with a screwdriver, entered into the house and observed everything looked normal at first sight. (T. 449, 474, 515-16) The living room and dining room looked normal as well. (T. 449) Soon thereafter, Lyza and Richard entered the bedroom and noticed that it had been ransacked because the bed was piled with stuff. (T. 449, 516) They ran out. (T. 450) Lyza's husband called her, and when she answered he kept asking: "How's my mom, where's my mom, how's my mom?" Lyza replied: "She's not here. I guess she's okay. She's just not here. I can't tell you anything." (T. 450)

At that moment, while still on the phone with her husband, Lyza looked again into the bedroom and saw Renie's feet. (T. 450,517) Lyza called Richard to come in because she was scared that there was some burglar or murderer in the house. (T. 450,

516) Lyza kneeled down and saw Renie, lying face down. (T. 450) Lyza felt Renie's hands were cold, and she knew she was dead. (T. 451, 476) Lyza started screaming, and her husband heard the screams over the phone, but he could not understand whether his mom was alive or dead. (T. 451) Richard Broxton immediately called the police. (T. 517)

The police came within four or five minutes, and Lyza and Richard had to leave the house because the police had to process the crime scene. (T. 451, 517-21) When the police came, they searched the house in order to make sure that there was nobody else in the residence. (T. 528) The crime scene technicians processed the house in search for potential evidence. (T. 587-598) Particularly, they searched the house for potential fingerprints and DNA, and among other evidence, they found a piece of cantaloupe on the kitchen table that seemed like it had a bite mark, which was swabbed for potential DNA. (T. 607, 630-32, 780)

The police soon found Renie's missing vehicle, a few blocks away from Defendant's residence. (T. 881) Fingerprints from the vehicle matched to Defendant's cousin, Rashad Montfort. (T. 885, 867-68) Montfort confirmed that he got Renie's vehicle from Defendant. (T. 885-86) James Roman confirmed that he and Defendant had serviced Renie's yard. (T. 893) The police found

out that Defendant had pawned a unique bracelet that belonged to Renie. (T. 898, 848-89) Renie's belongings were found in Defendant's apartment. (T. 798-814, 950, 1053) Defendant's DNA matched to the DNA that was found on the piece of fruit on the crime scene. (T. 1024-25, 1235-36)

As a result, Defendant was charged by indictment with the first degree murder on or between December 28, 2009 and December 29, 2009 (Count I), armed burglary (Count II), grand theft of a motor vehicle (Count III), dealing in stolen property (Count IV), and false verification of a pawnbroker transaction (Count V). (R. 21-22)

Prior to trial, Defendant moved to declare Florida's capital sentencing statute unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). (R. 221-412, 460-74) The trial court denied these motions as contrary to the settled Florida law. (R. 1533)

At trial, Lyza Telzer testified and gave a detailed explanation of events that led to the discovery of Renie's body. (T. 434-508) Her testimony is incorporated in previous paragraphs of this brief.

Lyza Telzer testified that she loved and referred to Renie as her mother because she did not have a mother of her own. (T. 435) Renie and Lyza lived only four miles apart, and they used

to see each other five times a week. (T. 436) She was having contact with Renie on a daily basis because Renie was an elderly lady who lived alone, and Lyza wanted to make sure that Renie was doing fine. (T. 436) Lyza Telzer testified that Renie was a very organized woman who kept everything in place in her home. (T. 438) In terms of habits, Renie kept the door of her house locked and did not have an alarm system, but did have a dog. (T. 441) Renie stayed up late at night because she loved to watch TV shows and slept until 10:00 or 11:00 o'clock. (T. 439-40)

Lyza Telzer identified photographs of possessions that belonged to Renie: wallets, pearls, a Mont Blanc pen, necklaces, scissors, an eyeglass case, a Lancome make-up jewelry gift, a watch, a custom made gold ring, watches, baby things for Miles, earrings (which Lyza gave to Renie), a ring and necklace, opera glasses, a watch (which Lyza gave to Renie), earrings that belonged to Lyza's mother, a part of necklace that Lyza gave Renie, a magnifying glass, pearl earrings, baby charms, bracelets, shirts for men that Renie kept for her sons and grandson, a purse, planners, a tool set with a hammer, a purse that Lyza and Dana gave Renie for Mother's day, an ivory chess set from Hong Kong, a sterling silver case, sterling silver pieces, Ralph Lauren neckties, a wallet with credit cards, and a Ralph Lauren floral pillow sham. (T. 456-472)

On cross, Lyza Telzer could not remember if she saw any fruit on the table at Renie's house. However, Renie probably had a container of fruit in the refrigerator. (T. 478) Lyza explained that she left Renie's house immediately after the police arrived, and she did not witness any police work. (T. 483) She further testified that she identified Renie's bracelet that had been pawned. (T. 489)

On redirect, Lyza Telzer testified that Renie never kept fruit out of the refrigerator. (T. 492)

Richard Broxton, Renie's neighbor, testified and gave a detailed explanation of events that led to the discovery of Renie's body. (T. 508-525) His testimony is incorporated in previous paragraphs of this brief.

Jeffrey Liedke, a policeman, testified that on December 29, 2009 he was dispatched to the residence at 8824 Goodbys Trace Drive. (T. 527) He explained that he and Officer Farris were the first law enforcement officers who arrived on the scene. (T. 528) After he spoke briefly with Lyza and Richard, he and Officer Farris entered the residence to clear the house. (T. 528) Liedke further testified that while he and Officer Farris were searching the house, they tried not to touch any evidence. (T. 529) He explained that Lyza Telzer told him that Renie's

vehicle was missing, and he put out the BOLO (be-on-the-look-out) message for the vehicle. (T. 530)

Valerie Rao, an expert in forensic pathology, testified that Dr. Margarita Arruza performed the autopsy on Renie Telzer-Bain's body. (T. 544) Dr. Rao testified that based on her review of Dr. Arruza's autopsy report, notes and photographs, the manner of Renie's death was homicide, and blunt head trauma was deemed the cause of death. (T. 544-45)

Dr. Rao further testified that Renie suffered numerous injuries to her body: the back of her head, the nape of her neck, the neck, the upper back, the back of her right hand, the right leg and the left knee (T. 545) Rao determined that there were 17-20 different blows inflicted upon Renie's body. (T. 545) Dr. Rao identified a photograph that showed a laceration underneath the chin, which indicated that the injury was inflicted with the claw of a hammer. (T. 548) Dr. Rao further identified a photograph that showed a semi-circular pattern on the back of Renie's head, which indicated that this injury was caused by the face of a hammer. (T. 549) Dr. Rao identified a photograph that showed injuries to the top of the head. The scalp was lacerated. The scull was fractured and pushed into the brain, which indicated that these injuries were lethal. (T. 550) The prosecutor showed Dr. Rao the hammer that has been

introduced in evidence, and Dr. Rao confirmed that that hammer could have been used to cause the head injury. (T. 550-51) Dr. Rao identified a photograph that showed injuries on the back of Renie's neck, which indicated that these injuries could have been inflicted by the claw of a hammer. (T. 551) Dr. Rao further identified a photograph that showed injuries on the back and right part of Renie's neck and signs of tremendous bruising, which indicated that these injuries were caused by the claw part of a hammer. (T. 553) Dr. Rao identified a photograph that showed injury on Renie's upper back, which showed that her fifth rib was fractured probably with the claw. (T. 554). Dr. Rao further identified a photograph that showed purple bruises on Renie's hands, which evidenced defensive wounds. (T. 555) Dr. Rao also identified a photograph that showed numerous tears on Renie's shirt, which was consistent with the hammer impact. (T. 556)

Dr. Rao testified that Renie was alive when the injuries were inflicted upon her but could not determine the sequence of the blows. (T. 557) Dr. Rao further stated that the injuries to the top of the head were inflicted with sufficient force that fractured the skull and pushed the bone fragments into the brain. (T. 558) Also, significant force was used to inflict

injuries to the back of Renie's neck because the underlying fat and tissue was ripped off. (T. 558)

Dr. Rao further testified that these injuries could have caused tremendous pain. (T. 559) Defensive wounds indicated that Renie was conscious while she was trying to defend herself. (T. 560) Dr. Rao could not determine how long Renie was alive but it was certainly not seconds because she suffered 17-20 blows to her body. (T. 561) Dr. Rao stated that Renie was in pain while these blows were inflicted upon her. (T. 561) Dr. Rao testified that she found no alcohol in Renie's system and that she was fairly healthy for her age. (T. 565)

On cross, as to the defensive wounds, Dr. Rao excluded the possibility that Renie's wounds or bruises were caused by a fall. (T. 570) As to the consciousness, Dr. Rao explained that unless someone is deeply in a coma, that person could still feel the pain. (T. 574) If a person is unconscious, that does not mean that they could not feel pain. (T. 574) Dr. Rao confirmed that the bruises she found on Renie's body were fresh and most probably sustained at the time of the incident. (T. 575)

Shannon Pfister, a crime scene technician, testified that when she entered the crime scene, she had a clear white suit as a protection from contamination of the scene with hairs and fiber. (T. 594) Pfister testified that she and Detective Stapp

collected the evidence and took the photographs from the crime scene. (T. 595) She identified a photograph that showed some shoe impressions from the yard and from the door, which indicated that somebody tried to kick in the door. (T. 599, 604, 654) Pfister also identified a photograph that showed that the rear sliding door in the backyard was damaged, which indicated that someone had pried it open to enter the house. (T. 599-601) Pfister identified a photograph that showed blood that was found on the floor, underneath Renie's arms and her head area, which indicated that Renie tried to move around. (T. 613-14)

Pfister testified that she processed the crime scene for possible prints and DNA. (T. 607) She processed the drawers, the sliding glass door, the garage door opener, envelops, filing cabinets, wires where the TV had been placed, and a wallet with the items in it. (T. 606-608, 611, 615, 628, 632-33) Pfister testified that she collected a blood sample from the countertop in the kitchen. (T. 629) Pfister identified a photograph that showed the fruit container with a piece of cantaloupe on the lid of the container and explained that she swabbed the fruit itself for DNA and processed the container lid for possible prints. (T. 631-32) Pfister testified that she also processed the dining room, the living room area, the master bedroom and the south bedroom. (T. 643-45) Pfister further testified that she was

present when Detective Stapp processed the cantaloupe for DNA, and explained that the cantaloupe itself was not kept because it would disintegrate. (T. 649)

On cross, Pfister testified that she and her colleagues were processing the crime scene for three days and that she processed the fruit from the kitchen table the second day. (T. 657) Pfister explained that she did not preserve the fruit from the kitchen table before she left the scene the first day, because she did not want to disturb the scene until she was ready to process it. (T. 658) Pfister insisted that the evidence from the fruit was not destroyed. DNA was collected, and a fingerprint was obtained from the lid. (T. 659) Pfister testified that there was no need to keep the fruit because it was swabbed for DNA and because they do not keep perishable items in the property room. (T. 660-61)

On redirect, Pfister testified that she and Detective Stapp specifically documented every item that they processed at the crime scene, a total of 34 areas. (T. 673) She explained that when the DNA swab was taken from the cantaloupe, it was left to air dry along with other swabs, which was a normal process with regard to the evidence processing. (T. 675)

James Roman, who was the owner of a landscaping company in Jacksonville, FL, testified that Renie Telzer-Bain was his

customer for four or five years. (T. 682) He hired Defendant around July 2009, and Defendant worked for him for approximately four months. (T. 684) During this four month period, Roman and Defendant went to Renie's residence 8-10 times. (T. 685) Roman testified that November 2009 was the last month that Defendant worked for him. (T. 684) Roman explained that he and Defendant always went together to Renie's residence. (T. 685) Roman testified that Defendant did not have a car. (T. 686) He further testified that it usually took 20 minutes to trim Renie's yard. (T. 686) Roman testified that sometimes Defendant did the front yard and he did the backyard, but they were never separated for for more than five minutes. (T. 687) Roman testified that he entered Renie's residence only once when she asked him to fix something in her toilet. (T. 688) Roman confirmed that, during this four month period, he and Defendant never went inside Renie's residence. (T. 688) Renie never went outside while they were working, and he and Defendant never used the bathroom. (T. 689) Renie would pay them by leaving a check under the door mat. (T. 689) Roman further testified that Renie never served them with cantaloupe or anything else. (T. 690)

Roman further testified that in December 2009, he went to West Virginia to visit his family. While he was there, he received a phone call from Defendant, who informed him that

something had happened to one of his customers. (T. 691) Roman testified that Defendant usually called him only related to work. (T. 692)

On cross, Roman confirmed that Renie had never had to come out to let him in because the door was always open when he went there to work. (T. 694) Roman explained that when police came to interview him, they asked if he had anything that belonged to Defendant, and he gave them Defendant's hat. (T. 696)

Rashad Montfort, Defendant's cousin, testified that Defendant did not own a car. (T. 708) Montfort testified that around December 29, 2009, Defendant let him borrow a Cadillac. (T. 711) In fact, Montfort told Defendant that he was waiting to pick up some food for his girlfriend, and Defendant suggested that Montfort should take the car. (T. 713-14) Defendant gave him the keys and told him that the car was parked around the corner, on Barnett Street. (T. 714) Montfort explained that after he dropped off the food to his girlfriend, he picked up his friend, "Monk Man." (T. 717) Then, Montfort went with his friend to buy a little bag of marijuana, went to his cousin's home, dropped off his friend, and returned the car to Defendant. (T. 719) Later that day, Montfort borrowed the car again from Defendant, picked up a few friends, and rode around town. (T. 720) Montfort testified that he was touching the car while using

it. (T. 721) Montfort further testified that when police came to question him, he told them that he had borrowed the car from Defendant. (T. 722-23)

Montfort further testified that the police asked him to wear a recording device during contact with Defendant, and he agreed to do it. (T. 723) The conversation between Defendant and Montfort was recorded, and the tapes were played at trial. (T. 728-38) On the first tape, Montfort told Defendant that the police questioned him about the car and how he got it. (T. 729-30) Defendant asked Montfort from who did he tell the police he got the car. (T. 731) Montfort told Defendant that he got the car from somebody in the hood. (T. 731-32) Montfort told Defendant that the police questioned him about the murder of some old lady, and that the police got Montfort's fingerprints from the car. (T. 732-33) Defendant did not say anything about the car. (T. 732-35)

On second tape, Montfort told Defendant that more people had been questioned about the murder of an old lady. (T. 738) Defendant told Montfort that he should tell the police that he did not know anything about the car. (T. 738-39)

On cross, Montfort testified that it was his idea to tape the conversation with Defendant because he wanted to clear himself from any involvement in the murder. (T. 751) Montfort

further testified that had never heard of a guy named “Little Budha.” (T. 758)

On redirect, Montfort testified that when Defendant told him not to say anything to the police regarding the car, Defendant actually wanted Montfort not to implicate him. (T. 766)

On recross, Montfort insisted that he told the police that he got the car from Defendant. (T. 768)

Lia Vankeuren, a police officer, testified that on December 30, 2009, she was dispatched with regard to an abandoned vehicle, a Cadillac, in the West 18th Street Avenue area. (T. 771) She stated that when she arrived on the scene, she ran the tag and determined that the vehicle was stolen. (T. 772)

Tracy Stapp, a crime scene investigator, testified that she and Detective Pfister were involved in processing the crime scene at 8824 Goodbys Trace Drive. (T. 776) Stapp testified that she processed the piece of cantaloupe that was found on the lid of a fruit container. (779-80) She explained that that piece of cantaloupe looked like it had a bite mark, so she processed it for DNA. (T. 780) Stapp further testified that she processed the cantaloupe at the scene because fruits and other perishable items were not accepted in the property room. (T. 782) Stapp

further testified that she also processed the vehicle for any possible DNA. (T. 785)

Stapp testified that she and Detective Pfister collected evidence from Defendant's residence. (T. 795-96) She collected the hammer that was placed on top of the microwave, a white pillowcase with a pillow sham that seemed to match a pillow sham she had seen at Renie's residence, purses, clothing, a suitcase with a tool bag in it, a box of silverware, a chess set, watches, charms, pearls, a white bag with jewelry in it, a pocketbook, necklaces, bracelets, rings, earrings, and a blue duffel bag. (T. 798-814)

On cross, Stapp excluded the possibility that DNA swabs could have been contaminated on the scene. (T. 826) She explained that perishable items, such as fruit, are usually processed on the scene, and that sometimes a supervisor would allow the item to be placed in the property room, but it had to be processed and removed within a few hours. (T. 829-830)

Kamangu Tube testified that he was previously employed as an assistant manager at Cash America pawnshop. (T. 843-44) He identified the slip regarding a pawn transaction he made with Defendant, which included information from Defendant's ID, based on his employer ID number. (T. 848) He identified the bracelet Defendant pawned at his shop, based on the notation in the pawn

form. (T. 848) Tube testified that there was nothing unique about this particular bracelet. (T. 849)

Thomas Howell, a print examiner for the Jacksonville Sheriff's Office, testified that he analyzed items that came from the crime scene but did not find any latent prints of sufficient value for identification. (T. 863) Howell compared Defendant's fingerprints to the fingerprint on the pawn slip, and they matched. (T. 864) Howell testified that he processed a latent lift cards from Renie's vehicle and determined that they matched to the fingerprints of Robert Epps and Rashad Montfort. (T. 867-68) Howell testified that he compared Defendant's fingerprints to the prints lifted from Renie's vehicle, but there was no match. (T. 868)

Edwin Maurice Cayenne, Jr., a homicide detective, testified that he was assigned to investigate Renie Telzer-Bain's homicide and was responsible for the crime scene. (T. 873-74) Cayenne testified that Lyza Telzer gave him a detailed list of the items that were stolen from Renie's residence. (T. 877) Cayenne testified that the footprints that were collected at the crime scene did not match the shoes that were collected from Defendant's residence. (T. 881-83) The fingerprints from the vehicle matched to Robert Epps and Rashad Montfort. (T. 885) Cayenne testified that after Montfort was identified, he

interviewed him, and Montfort confirmed that he got the vehicle from Defendant. (T. 885-86) Montfort explained that Defendant let him borrow the vehicle and instructed him to return the vehicle to the location that was two blocks away from Defendant's apartment complex. (T. 890-91) Cayenne testified that he checked Montfort's phone records in order to corroborate his story and determined that he was telling the truth. (T. 892)

He conducted a pawn check on Rashad Montfort, Robert Epps, Marcus Buckman and Arnold Sampson (individuals who were riding in Renie's vehicle with Montfort), in order to check if they pawned any of the items that were taken from Renie's residence and confirmed that they had never pawned any such items. (T. 889)

Cayenne testified that he interviewed James Roman who confirmed that Defendant worked for him and provided the police with the hat that Defendant used in order to get DNA. (T. 894-95) Cayenne further testified that during the investigation, after he found out that a unique bracelet from Renie's collection was pawned, he contacted Lyza Telzer for purposes of identification, and she confirmed that it belonged to Renie. (T. 896-97) Cayenne testified that the investigation revealed that Defendant had pawned this unique piece of jewelry that belonged to Renie. (T. 898) Cayenne further testified that he also

checked Defendant's phone records that indicated that Defendant placed a phone call around 5:24 a.m., (the morning Cayenne believed the murder might have occurred and when the body was discovered) using a tower that was near the bus station at 201 West Union Street, which was located three miles away from Defendant's home. (T. 898-99) Cayenne further explained that Defendant said at that particular time he was at his home, which Cayenne thought was not true because the signal would have come from a different tower. (T. 901)

Cayenne testified that he investigated a bus route that led from the bus station that Defendant used to Renie's home and determined that that particular bus route had a station right across the street from Renie's apartment complex. (T. 905-06) Cayenne spoke to the bus driver that drove the bus route on the subject morning, but the driver could not identify Defendant because it was a rush-hour time. (T. 906)

On February 1, 2010, Defendant was served with an arrest warrant and a search warrant for his place of residence. (T. 906-07) After Defendant was arrested, Cayenne interviewed Defendant at the police station. (T. 907-1051) This interview was videotaped and played at the trial. (T. 914-1051) Defendant was asked if he had pawned some items recently. (T. 918) Defendant confirmed that he had pawned a bracelet and explained

that he purchased it from a person he knew as “Budha.” (T. 919) Defendant said that “Budha” sold him this bracelet for $50, and he pawned it for $300. (923-25) Defendant explained that he needed this money because his rent was overdue. (T. 926)

Defendant said that he worked for J&J Lawn Service, that October 2009 was the last time he worked for this company, and that he worked there together with James Roman. (T. 931-32) Defendant said that the last time they were doing lawns in the Baymeadows area was around September or October, or even November. (T. 933-35) Defendant further mentioned that the woman who had been murdered was one of his customers. (T. 938) Defendant said that he called Roman when he heard about this murder. (T. 943) He further said that he has never been inside of this woman’s house and that she never gave him any money for his services. (T. 944)

During the interview Cayenne asked Defendant about the items that were found in his house. (T. 950) Some of the items that the police found were: a Louis Vuitonn purse, a luggage bag, and a toolbox. (T. 948-50) Defendant explained that he got these items from a vacant apartment close to his home. (T. 950) He explained that he entered this vacant apartment because his apartment had been burglarized, and he wanted to take something from the guys that he thought have probably burglarized his

apartment. (T. 954-56) Defendant said that he bought the bracelet, the iron and some other items from a guy he knew as "Budha." (T. 962) Defendant insisted that he never gave the keys to a Cadillac, or any other car, to anyone, including his cousin, Montfort. (T. 969-70) Defendant insisted that between December 28, and early morning hours on December 29, he was at his home. (T. 981-82) Defendant insisted that he did not murder the old lady. (T. 999, 1006, 1011) Next, Cayenne obtained a DNA sample from Defendant. (T. 1005-06)

Cayenne further testified that Defendant's DNA matched to the DNA that was found on the piece of fruit on the crime scene. (T. 1024-25)

On February 5, 2010, Cayenne conducted a second interview of Defendant. (T. 1026-51) Defendant continued to insist that he had found all items found in his apartment that belonged to Renie in a vacant apartment adjacent to his home. (T. 1031) When Cayenne asked Defendant again if he had ever been inside Renie's house, he answered that he was once in the living room and the patio. (T. 1039-40, 1042) Defendant further said that Renie used to give him and Roman fruit and confirmed that the last time he was at her house was several months ago. (T. 1043)

Cayenne further testified that after the second interview, he went back to Renie's residence to recover a pillowcase that

he later determined matched to the pillowcase found inside of Defendant's residence. (T. 1053)

On cross, Cayenne testified that the prints lifted from the vehicle were linked to Montfort and Epps. (T. 1095) Cayenne talked to Montfort who said he got the keys for the vehicle from Defendant. (T. 1100-01) He then talked to Roman who confirmed that Defendant worked for him and provided Cayenne with a straw hat that Defendant had used. (T. 1101-02) The straw hat was never submitted for DNA analysis because Jason Hitt, a DNA analyst, told Cayenne that it would have been better if he had a cheek swabs to compare with DNA from the fruit. (T. 1103) Cayenne testified that he determined, based on the phone records, that Defendant made a phone call from a location about a block and a half from the cell tower which was in close proximity to the Jacksonville Transit Authority Bus Station. (T. 1108-10) Cayenne further testified that the distance between Defendant's residence and the cell tower located in close proximity to the Jacksonville Transit Authority was three miles, and there was a theoretical possibility that Defendant could have been checking text messages from his front porch at 5:25 a.m. (T. 1114)

Cayenne testified that, after Defendant told him he bought the pawned bracelet from a guy he knew as "Budha," Cayenne tried

to ascertain the identity of “Budha,” and got the list of persons with this nickname from the crime analysis unit, which he kept in the file. (T. 1130-34) Cayenne further testified that he never received any information of any person named “Budha.” (T. 1134)

Cayenne testified that nobody witnessed Defendant provide keys to the Cadillac to Montfort. (T. 1152-53) Cayenne further stated that nobody saw Defendant in that Cadillac. (T. 1153)

On redirect, Cayenne testified that nobody corroborated Defendant’s story that he found the stolen items in the vacant apartment close to his home. (T. 1171)

Jason Hitt, a crime laboratory analyst and forensic scientist, identified the evidence from the murder scene that he examined: Renie’s blood card, the fingernail clippings, the DNA swab from a melon, the DNA swab from a cable cord, the swab from the interior garage door opener and the swab from the table. (T. 1219-21) Hitt testified that he could not obtain DNA profile from Renie’s fingernail clipping, the cable cord and the interior garage door. (T. 1225-26) Hitt got DNA profile from a table near the phone. (T. 1227)

Hitt testified that he was able to get DNA from the cantaloupe on the container lid. (T. 1228) Hill testified that the DNA from the table near the phone matched Renie’s DNA. (T.

1229) He identified Renie's DNA from the carpet near her head and feet. (T. 1232-33) Hitt further testified that he could not develop DNA from the swab from the guest bathroom toilet. (T. 1232) Hill further testified that DNA profile from the swab from the cantaloupe matched Defendant's DNA profile and only 1 in 440 trillion Caucasians, 1 in 770 trillion African-Americans, and 1 in 280 trillion southeastern Hispanics could have that same DNA profile. (T. 1235-36, 1253, 1255)

On cross, Hitt testified that this was the first time he extracted DNA from the fruit. (T. 1267) Hill testified that Defendant's DNA matched the DNA profile from the cantaloupe at 11 of 13 loci. (T. 1278) Hitt further explained that because he did not have DNA profile at two loci he could not make a match at these two loci, and because Defendant matched 11 out of 13 loci, he could not be excluded for these two. (T. 1279-80)

Daniel Roberts, a criminal defense investigator, testified that he visited the Rosa Parks bus station in order to look for surveillance cameras. (T. 1311) He observed that cameras were posted throughout the entire bus station. (T. 1311) Roberts testified that he did not know if any of these cameras were operational when he observed them. (T. 1312-13) He did not know if these cameras were operational in 2009. (T. 1212-13)

After deliberating, the jury returned a verdict of guilty of first degree murder as to Count I (finding both premeditated and felony murder during a burglary), guilty of burglary as to Count II, guilty of grant theft auto as to Count III, guilty of dealing in stolen property as to Count IV, and guilty of false verification of ownership on a pawn broker transaction form as to Count V. (T. 1490-91)

At the penalty phase, Defendant objected to a jury instruction on the HAC aggravator on the ground that the evidence was insufficient to support the finding of the HAC aggravator. (T. 1526) In particular, Defendant argued that Dr. Rao's testimony could not support a finding of the HAC aggravator because Renie's death occurred at best in minutes, and Dr. Rao could not determine the sequence of the wounds that were inflicted upon Renie. (T. 1527) The State argued that the evidence that was presented during the trial was sufficient to find the HAC aggravator. (T. 1527) The court overruled the objection and instructed the jury as to the HAC aggravator. (T. 1527, 1714-15)

Miles Telzer, Renie's grandson, read a victim impact statement prepared by his father, Dana Telzer. (T. 1568-1572) Dana Telzer stated that his mother, Renie Telzer-Bain, was both a mother and a father figure to him and his brother because they

lost the father at very young age. (T. 1569) Renie taught him to be a gentleman and treat people with respect. (T. 1569) He will never forget how his mother taught him and his brother how to throw their first baseball. (T. 1570) Renie was working extra shifts in order to be able to be at home before Dana and his brother would come back from school. (T. 1570) Renie dedicated her life to the nursing profession and helping people. (T. 1570) After Renie retired, she was very active and even volunteered as a nurse at Taylor Manor, where the staff and patients loved her so much that they offered her a permanent job, where she worked until the age of 80. (T. 1570) Renie beat cancer three times and never lost her spirit. (T. 1571) Renie's death had a huge impact on Miles because they were very close. (T. 1571) Dana said that he respected and admired Renie as a mother and a friend and that she always let him know how much she loved him. (T. 1571) The most important lesson she taught him was that a man's worth is not measured by his wallet but by his soul. (T. 1572)

Sue Giddings testified that she worked with Renie at Taylor Manor hospital for many years. (T. 1573) She first met Renie through her husband who described Renie as a caring and dedicated person who "always treated every patient, no matter what his or her temperament was like, in the same and loving manner." (T. 1574) Giddings testified that Renie was a "dynamo"

nurse despite her age and performed her duties at a high level. (T. 1574) Giddings testified that Renie was also a primary caregiver for Gidding's mother-in-law, which is why she appreciated all the extra care Renie gave her. (T. 1575) Renie was devoted to her family, especially to her grandson, Miles, and every time she talked about him her eyes would light up and her face would shine. (T. 1576) Renie was devoted to Miles who was the center of her universe. (T. 1576) Giddings further testified that her life was touched by Renie and her absence left a hole "that will not soon be filled in all of the lives that Renie was a part of." (T. 1576)

Donna Broxton, Renie's neighbor, testified that she loved Renie. She was a wonderful lady, and "there was not a mean bone in her body." (T. 1578) Renie shared delicious meals that she cooked and appreciated the things that Broxton and her husband did for her. (T. 1579) Broxton and Renie talked about everything, and Renie always talked about her family, especially her grandson. (T. 1579) Broxton testified that Renie talked about the possibility of her grandson moving in with her. (T. 1579) Renie even wanted a lemon tree in her backyard because Miles loved lemons so much. (T. 1580) Broxton testified that Renie had a huge impact on her life, and "the impact she left on

our lives and others around her will last for eternity." (T. 1580)

Lyza Telzer, Renie's daughter-in-law, testified that Renie was the most special person she had known. (T. 1581) Renie was like a mother to her. (T. 1582) Telzer described Renie as "a true southern lady, elegant, classy, intelligent, well-educated, and informed about politics and current events." (T. 1582) Renie worked until she was 80 years old. (T. 1582) Renie lived and breathed for her family. (T. 1582) Renie was a fabulous cook, and soups were her specialty. (T. 1582) Renie loved to read and was passionate about the culture and art. (T. 1583) Renie was an upstanding citizen who loved to help people. (T. 1583) Telzer testified that Renie's death had a huge impact on her and her family, and "mere words are inadequate to express our deep love for her and the anguish we feel everyday since her murder."

Cecil King, Sr., Defendant's father, testified that his relationship with Defendant was okay. (T. 1593) Defendant was six years old when his parents got divorced. (T. 1593) After the separation, Defendant lived with his mother so King Sr. could not see Defendant because his mother kept him sheltered. (T. 1594) King Sr. did not attend Defendant's graduation. (T. 1596) King Sr. testified that he did not know that Defendant's mother had a breast cancer, and during that time, he did not have any

contact with Defendant. (T. 1596-97) He found out that Defendant was greatly affected by his mother's death. (T. 1597) After Defendant moved to North Carolina, where he ran a cell phone business, they stayed in touch. (T. 1597) Defendant had a close relationship with his son. (T. 1599) Defendant cared exceptionally well for his grandmother who had Alzheimer's. (T. 1599) King Sr. testified that Defendant's death would affect his life a lot. (T. 1600)

On cross, King Sr. testified that he knew Defendant ran a cell phone business. (T. 1613) King Sr. was aware that Defendant was terminated from that position. (T. 1613)

Rodney King, Defendant's uncle, testified that he knew Defendant all his life. (T. 1615) At an early age, Defendant was very playful. (T. 1615) Defendant was thinking of becoming a minister. (T. 1616) Defendant took care of King's mother who had Alzheimer's. (T. 1617) Defendant's death would affect him tremendously. (T. 1618)

Cecelia Ealy, Defendant's aunt, testified that Defendant was a playful child. (T. 1627) When Ealy broke her hip, Defendant took care of her mother. (T. 1627-28) Defendant took care of his mother when she had a breast cancer. (T. 1628)

Michelle Ealy, Defendant's cousin, testified that Defendant was like a brother to her. (T. 1632) Defendant helped Ealy's

mother when she was hurt. (T. 1632) Defendant took care of his grandmother who had Alzheimer's. (T. 1632-33) Ealy's children loved Defendant, and enjoyed spending time with him. (T. 1633)

Lavon Bracy testified that she knew Defendant through his mother. (T. 1636) Defendant participated in church activities. (T. 1637) She testified that Defendant took care of his mother when she had a breast cancer. (T. 1637) Defendant bought a wig for his mother and was very attentive to her in her final days. (T. 1637) Defendant was very affected by his mother's death. (T. 1638)

Sakenia Fraser, Defendant's half-sister, testified that Defendant was very close to his mother, and her death affected him very much. (T. 1641) Fraser testified that Defendant surprised her when he came to her wedding because he never confirmed that he would come. (T. 1642) Fraser testified that Defendant took care of her grandmother when her aunt was in the hospital. (T. 1644) Fraser's daughter loved Defendant. (T. 1646)

During the State's penalty phase closing argument, the prosecutor argued that the murder was committed while Defendant was engaged in the commission of a burglary. (T. 1663-66) The prosecutor pointed out that Defendant knew that the victim was an elderly woman who was not a threat to him, that he could have picked some other time to burglarize the house when the victim

was not there, and that Defendant killed her so that he could commit the burglary without getting caught. (T. 1665) Thereafter, Defense made no objection. Defense neither asked for a curative instruction nor moved for mistrial. (T. 1663, 1665, 1674, 1689)

During Defendant's penalty phase closing argument, the defense counsel argued that Defendant did not have a history of prior violent crimes. (T. 1685) The State made an objection. (T. 1685) During the side-bar conference, the State argued that defense counsel's argument was improper because there was no evidence introduced by the defense that Defendant did not have a significant criminal history of violence. (T. 1686-87) Defense argued that the argument was proper because Defendant did not have prior violent criminal history, and that if he did, the State would have presented it during the penalty phase. (T. 1687) The court sustained the objection. (T. 1688) Thereafter, the State asked for a curative instruction, and the court instructed the jury to disregard the statement. (T. 1689, 1691)

After deliberating, the jury recommended that the trial court impose a death sentence upon Defendant by a vote of 8-4. (T. 1734)

At the Spencer hearing, Felicia Mintz, Defendant's former girlfriend, testified that she dated Defendant consistently for

approximately a year, and that they lived together and talked about getting married and having children. (R. 1335) During this time, Mintz did not learn much about Defendant's background, but she learned that Defendant was very close to his mother. (R. 1336) She knew Defendant was working lawn service. (R. 1336) After Defendant and Mintz broke up, they did not consistently stay in touch. (R. 1337) Mintz spoke to Defendant after his son was born, and thereafter they lost contact. (R. 1337) Mintz testified that Defendant was a very nice guy, smart and funny. (R. 1337)

On cross, Mintz testified that she heard that Defendant was selling the property that did not belong to him. (R. 1340) Mintz knew that Defendant was arrested and spent almost a whole year in jail, and during that period, they did not have any contact. (R. 1341) Defendant did not tell her that he spent some time in jail before he met her. (R. 1343) Mintz testified that Defendant only told her a part of his life. (R. 1346)

Officer Barnes, a corrections officer, testified that he never had any problems with Defendant. (R. 1350) Defendant interacted well with other inmates. (R. 1350) Barnes stated that Defendant allegedly organized gang activity and was charging inmates taxes on their personal property, for which reason he was moved to a different floor. (R. 1350)

The trial court agreed with the jury's recommendation and imposed a death sentence upon Defendant for Count One First Degree Murder, a life sentence for Count Two Armed Burglary of a Dwelling with an Assault/Battery, ten years imprisonment for Count Three Grand Theft Auto, 30 years imprisonment for Count Four Dealing in Stolen Property and ten years imprisonment for Count Five False Verification of Ownership on Pawnbroker Transaction Form. (R. 1256-1290) The Court found two aggravators applicable in this case: the capital felony was committed while Defendant was engaged in the commission of a burglary and the capital felony was committed for pecuniary gain were merged and considered as one aggravating circumstance, and heinous atrocious or cruel (HAC) aggravator. (R. 1271-75) The trial court accorded great weight to each of the aggravators. (R. 1271-75) The Court found no statutory mitigators. (R. 1276) The Court found eighteen non-statutory mitigators: Defendant is a good inmate-slight weight; Defendant has a potential for rehabilitation and would positively contribute to the prison population-slight weight; Defendant has a lack of a violent history and the incident at issue was situational-little weight; the incident at issue was situational-no weight; Defendant is a good parent, loves his two-years old son Cecil Shyron King Jr., and his son loves him-moderate weight; Defendant loves children

in general and they love him-moderate weight; Defendant is the only biological child of his mother and father-little weight; Defendant's parents divorced when he was a young child, which negatively affected Defendant's relationship with his father-little weight; Defendant has a lack of positive role models-no weight; Defendant was on the track and football teams in high schools-slight weight; Defendant graduated from high school and attended Johnson Community College in Kansas-little weight; Defendant and his mother were very close and Defendant took his mother's death very hard-some weight; Defendant went to church with his mother and even considered becoming a minister-slight weight; Defendant cared for his family members, including his mother, grandmother, and aunt, when they were ill-moderate weight; Defendant loves his sister and she loves him-little weight; Defendant was employed throughout his life-no weight; Defendant has family who writes him letters and visits him and would continue to do so if Defendant was sentenced to life in prison-slight weight; and Defendant being sentenced to death would adversely affect his family-some weight. (R. 1275-1288) The trial court found that the mitigating circumstances were insufficient in weight to outweigh the two aggravating circumstances, which have been proven beyond a reasonable doubt. (R. 1288)

This appeal follows.

SUMMARY OF THE ARGUMENT

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.

The trial court properly instructed the jury on the HAC aggravator. The heinous, atrocious, or cruel aggravating circumstance was proven beyond a reasonable doubt. The record indicates that Renie Telzer-Bain was bludgeoned to death with a hammer, was conscious during the attack and suffered defensive injuries.

The issue regarding the comment during the State's penalty phase closing is unpreserved. Further, the comment was proper, and Defendant did not meet his burden to show fundamental error occurred.

The trial court properly prohibited the defense counsel from making an improper argument with regard to Defendant's prior violent history, and any error was harmless. The record indicates that Defendant was precluded from making such argument because there was no evidence presented regarding his criminal history before the jury.

The Ring claim was properly denied.

Defendant's conviction is supported by competent, substantial evidence.

ARGUMENT

I. DEFENDANT'S SENTENCE IS PROPORTIONATE.

Defendant asserts that his sentence is disproportionate. Acknowledging that the trial court properly found the merged aggravating circumstance of during the course of a burglary and for pecuniary gain, Defendant asserts that the trial court erred in finding the heinous, atrocious or cruel aggravating circumstance, for which reason, only one aggravating circumstance exists for the purposes of proportionality review. Defendant further asserts that even if this Court approves the HAC aggravating circumstance, the circumstances of the crime do not compel a death sentence when compared with other capital cases. However, 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 Beasley v. State, 774 So. 2d 649 (Fla. 2000). In Beasley, the victim had been bludgeoned to death with a hammer, although the impact pattern did not suggest whether the head or the claw end had been used. The victim sustained between fifteen and seventeen blows to the head (which were delivered with such force that the impacts fractured the victim's cheekbone and skull). The victim also sustained defensive injuries to the backs of both hands, on the back of upper arms, and on the back of the left forearm. The defendant, who worked as a handyman at the apartment which the victim managed, took the victim's money and car. The victim's body had been discovered by her daughter, who had not heard from the victim for two days. This Court upheld the sentence of death (aggravating factors were: the murder was committed during the course of a robbery and for pecuniary gain (merged) and HAC; these two aggravating factors were balanced against nineteen statutory mitigators (including no prior convictions for violent crimes, and not including any statutory mental mitigators).[1]

Similarly, in Miller v. State, 770 So. 2d 1144 (Fla. 2000), the defendant had beaten the victim with a pipe, and as a

[1] In Beasley, this Court upheld finding of HAC under the similar factual circumstances. (See Argument II regarding the HAC aggravator)

result, the victim died from three blows to the head, one of which fractured the skull and penetrated into the brain. This Court upheld the sentence of death (aggravating factors were: the murder was committed during an attempted robbery and for pecuniary gain (merged) and prior violent felony conviction; There were no statutory mitigators but the court found numerous nonstatutory mitigators). See also Woodel v. State, 985 So. 2d 524 (Fla. 2008)(sentence of death upheld for killing of elderly, 74 years old woman, who was stabbed and suffered blunt trauma injuries to her head. Aggravating factors were: the homicide was committed during a burglary, previous conviction of another capital felony based on the contemporaneous murder of victim's husband, HAC, and the victim was particularly vulnerable due to her advanced age or disability. The mitigation consisted of four statutory mitigators, including the defendants capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired and the felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and ten nonstatutory mitigators); Barnhill v. State, 834 So. 2d 836 (Fla. 2002) (sentence of death upheld for strangling the 84 years old victim. Aggravating factors were: the murder was committed during the commission of a robbery or burglary and pecuniary

gain (merged), previous felony conviction, CCP and HAC. Mitigation consisted of one statutory mitigator and numerous nonstatutory mitigators); Consalvo v. State, 697 So. 2d 805 (Fla. 1997)(sentence of death upheld. Two aggravators were found: avoid arrest and during the course of burglary; no statutory mitigators and nonstatutory mitigators of employment history and abusive childhood).

With regard to Defendant's assertion that the trial court improperly found HAC aggravator, 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.

Assuming *arguendo*, that this Court disapproves the finding of the heinous, atrocious or cruel aggravating circumstance, the death sentence in this case would still be upheld under the circumstances. This Court has upheld the death penalty despite mitigation where the single-aggravator was found. See, e.g., Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (sentence of death upheld where the single aggravator of prior violent felony and several nonstatutory mitigators were found); see also Lemon v. State, 456 So. 2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985).

This Court has reversed the death sentence given existence of only one aggravating circumstance, that the murder was committed during the course of a felony, in cases where substantial mitigation was found. See, e.g., McKinney v. State, 579 So. 2d 80 (Fla. 1991)(finding the sentence of death disproportionate for homicide where single aggravating circumstance was found- that the murder was committed during the course of violent felony, and statutory and nonstatutory mitigating circumstances that defendant had no significant history of prior criminal activity, had mental deficiencies, and alcohol and drug history); see also Woods v. State, 733 So. 2d 980 (Fla. 1999) (finding the sentence of death disproportionate where one aggravator was found-a contemporaneous felony, and substantial mitigation, including defendant's borderline intelligence, lack of violent criminal activity in the past, defendant's young age of 24 years when committed the murder, and cooperation with the police).

The cases relied upon by Defendant do not show that his sentence is disproportionate. Sinclare v. State, 657 So. 2d 1138 (Fla. 1995), included evidence in the record of the defendant's low intelligence level and emotional disturbances that had substantial weight. Further, this Court found death disproportionate where defendant's dull normal intelligence,

lack of father figure, and cooperation with police outweighed the single aggravating factor of murder committed during course of a robbery). Here, there were two aggravating circumstances found, there was no evidence of the emotional disturbance, and Defendant completed two years of college (which speaks of his intelligence level). The record does not indicate that Defendant lacked a father figure despite the fact that his parents got divorced. In fact, Defendant's father testified that their relationship was okay and that they were in touch.

Williams v. State, 707 So. 2d 683 (Fla. 1998), included the statutory mitigator that the defendant was eighteen years of age at the time of the murder and numerous nonstatutory mitigators. The single statutory aggravator was-the murder was committed for pecuniary gain. Here, the trial count found HAC aggravator and the homicide occurred during a burglary (merged with pecuniary gain). Further, unlike in Williams, here, Defendant was a mature 40 years old man at the time of the murder.

Jones v. State, 705 So. 2d 1364 (Fla. 1998), involved a defendant who was diagnosed as brain damaged at two months old, had mental age of a child, had an IQ of 76 and used alcohol and drugs prior to the commission of the murder. Here, none of these mitigating circumstances were found.

Rembert v. State, 445 So. 2d 337 (Fla. 1984), included the single aggravator-during the course of a robbery and significant mitigation. Here, the trial court found two aggravating circumstances, no statutory mitigation and assigned little, or no weight, to the nonstatutory mitigators.

Defendant next asserts that the murder in the instant case was committed in reaction to an unexpected event during a burglary, and therefore does not warrant a death sentence. However, this argument is meritless. For example, in Mendoza v. State, 700 So. 2d 670 (Fla. 1997), the defendant argued that the death penalty wad disproportionate because the murder was committed during a robbery and was a reflective action in response to the victim's resistance to the robbery. This Court found this argument meritless and upheld the death sentence. The aggravators were: the murder was committed during the robbery for pecuniary gain and prior violent felony. The defendant was 25 years of age at the time of the murder, and there was no mitigation found regarding drug abuse and mental problems.

In support of his contention, Defendant relies on Scott v. State, 66 So. 3d 923 (Fla. 2011). However, this reliance is misplaced. In Scott, the defendant shot the victim only once during an attempted armed robbery in response to the victim rushing on him with a chair. The court found two aggravators:

the murder was committed during an attempted armed robbery and previous conviction of a felony (which was based on aggravated battery committed at same time as the murder, and involved a relatively limited use of violence) and nine nonstatutory mitigators. The Court reasoned that "there is no evidence in this case that Scott planned to shoot any of the individuals inside the coin laundry prior to doing so, and therefore this murder could be viewed as a reactive action in response to the victim's resistance to the robbery. The fact that Scott left the coin laundry without attempting to shoot any of the remaining eyewitnesses further supports the inference that the defendant lacked a prearranged plan to murder."

Here, Defendant did not commit the murder in reaction to an unexpected event during the commission of a burglary. Unlike in Scott where the victim was shot only once, here, Defendant mercilessly struck Renie with a hammer 17-20 times fracturing her skull while she was trying to defend herself. Further, the record reflects that Defendant knew that the victim was an elderly lady who lived alone, and the murder was committed in the late evening or early morning hours, which indicated that Defendant should have anticipated that an elderly woman, such as Renie, would be at home.

Penn v. State, 574 So. 2d 1079 (Fla. 1991), involved a defendant who was a heavy drug user. Here, this mitigating circumstance was not present. Ross v. State, 474 So. 2d 1170 (Fla. 1985), involved a defendant who had been drinking before the attack and had a drinking problem, and the murder was a result of an angry domestic dispute. Here, none of these mitigating circumstances was found.

Miller v. State, 373 So. 2d 882 (Fla. 1979), and Jones v. State, 332 So. 2d 615 (Fla. 1976), both involved defendants who were mentally ill when they committed the murders. Here, that is not the case. Nibert v. State, 574 So. 2d 1059 (Fla. 1990), involved a defendant who drank heavily at the time of the murder, had extremely abused alcohol since his preteen years, was under influence of extreme mental or emotional disturbance, experienced substantial impairment of his capacity to control behavior, and was abused in his youth both, physically and psychologically.

Kramer v. State, 619 So. 2d 274 (Fla. 1993), included alcoholism, mental stress and severe loss of emotional control. This Court gave a significant weight to the fact that "the evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." Unlike

in Niebert and Kramer, here, none of these mitigating circumstances was found. As such, none of these cases show Defendant's sentence is disproportionate. It should be affirmed.

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AND FOUND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Appellant asserts that the trial court erred in instructing the jury over his objection regarding the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. Appellant contends that the evidence does not support the giving of this instruction and that the court erred in finding that this aggravating factor was established beyond any reasonable doubt. Defendant further asserts that the fact that there were multiple wounds inflicted upon Renie does not mean that she was conscious while sustaining those wounds, indicating that the murder was a result of a panicked attack and loss of emotional control at the time of the murder. However, this issue is meritless.

This Court has held that a trial judge is obligated to instruct the jury on an aggravating circumstance if the State presents evidence that could establish that aggravating circumstance. Kopsho v. State, 84 So. 3d 204, 219 (Fla. 2012); Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990). This is true if even the evidence is ultimately found insufficient to sustain a finding of the aggravating circumstance. Miller v. State, 42 So. 3d 204, 226-27 (Fla. 2010); see also Kopsho, 84 So. 3d at 219. Moreover, this Court reviews a trial court's decision to

give a particular jury instruction for an abuse of discretion. Card v. State, 803 So. 2d 613, 624 (Fla. 2001). 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). As the trial court's findings here did apply the correct law and are supported by competent, substantial evidence, its findings of HAC and giving of a jury instruction on HAC should be affirmed.

Defendant challenges the sufficiency of the evidence to support the heinous, atrocious or cruel aggravating circumstance. However, this issue is meritless. With regard to HAC, the trial court found:

> Heinous, atrocious, or cruel ("HAC") has been held to be one of the most serious aggravating circumstances in the statutory sentencing scheme. Oxford v. State, 959 So. 2d 187, 191 (Fla. 2007). See also Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002)(holding that prior violent felony conviction and HAC are two of the most weighty aggravating circumstances in Florida's sentencing scheme). To qualify for the HAC aggravating circumstance, "the crime must be both conscienceless or pitiless and unnecessarily tortuous to the victim." Hertz v. Sate, 803 So. 2d 629, 651 (Fla. 2001)(citation omitted). HAC has to do with "the means and manner in which the death was inflicted and the immediate circumstances surrounding the death." Brown v. State, 721 So. 2d 274, 277 (Fla. 1998). The focus is on the victim's perception of circumstances as opposed to those of the

perpetrator. Lynch v. State, 841 So. 2d 362, 369 (Fla. 2003).

Ms. Telzer-Bain's perception of her circumstances no doubt involved extreme fear, tremendous pain, and impending doom. 82-year-old Renie Telzer-Bain was surprised in her home by a 6'5", 200 pound intruder whom she very well may have recognized. It is unclear if Ms. Telzer-Bain was asleep in the bedroom where she was found or was awake when the Defendant entered her home. What is clear is that she never had a chance. Most of Ms. Telzer-Bain's injuries were to her back-back of her head, back of her neck, and her right back. Other than her leg/knee, the only injury to the front of Ms. Telzer-Bain was an injury to the front of her neck. The Defendant caused these injuries by taking a hammer and using the round, flat head to strike Ms. Telzer-Bain and using the claw portion of the hammer to rip and tear Ms. Telzer-Bain's skin, fat, and tissue. 17 to 20 times the Defendant struck this defenseless woman with such force that her skull was pressed into her brain and her rib was broken. Ms. Telzer-Bain, unwilling to just give-up her life, tried to protect herself as is evidenced by the defensive injuries she sustained on her hand and arm.

Dr. Rao testified Ms. Telzer-Bain was alive when she received all of these injuries and the injuries she sustained would have caused tremendous pain. While Dr. Rao testified the injuries to the head would have caused Ms. Telzer-Bain to have lost consciousness very quickly, and the fact that there were defensive injuries suggests the head injuries were not the first sustained. In addition, the presentation of blood on the carpet in the bedroom, where Ms. Telzer-Bain was found suggests she tried to move around after sustaining one or some of the injuries. Further, if the head injuries were in fact the first Ms. Telzer-Bain sustained causing her to immediately fall unconscious, it would seem unlikely the Defendant would have continued to strike her 14 to 17 more times with the hammer. During this horrific murder, Renie Telzer-Bain had to experience disbelief and sorrow, that, at 82 years old and all she had survived, this is how her life would end and how her family would find her.

The evidence presented during the guilt phase of the trial proves beyond all reasonable doubt the

> existence of this aggravating circumstance. See Beasley v. State, 774 So. 2d 649, 669-70 (Fla. 2000)(upholding HAC aggravator where the sleeping victim was struck on the face and head with five hammer blows, awoke after first blow and lived anywhere from a few minutes to an hour); Penn v. State, 574 So. 2d 1079 (Fla. 1991)(upholding HAC aggravator where the victim was beat to death with a hammer, sustaining 31 injuries to her head and defensive injuries to her hands); Heiney v. State, 447 So. 2d 210, 216 (Fla. 1984)(upholding HAC aggravator where the victim received seven severe hammer blows to the head and had defensive injuries on his hands). This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed.

(R. 1273-75)

This Court has consistently upheld HAC in cases involving brutal beating deaths. See Bright v. State, 90 So. 3d 249 (Fla. 2012)(HAC found where both victims were struck multiple times about the head and neck with a hammer, and suffered multiple defensive wounds); Beasley v. State, 774 So. 2d 649, 670 (Fla. 2000)(HAC upheld where the victim suffered 15-17 blows to the head with a hammer and numerous defensive wounds); Heiney v. State, 447 So. 2d 210 (Fla. 1984)(HAC upheld where the victim was bludgeoned to death with a hammer and had defensive wounds); see also Guardado v. State, 965 So. 2d 108, 115-16 (Fla. 2007); Douglas v. State, 878 So. 2d 1246, 1260-61 (Fla. 2004); Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995); Owen v. State, 596 So. 2d 985 (Fla. 1992); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Roberts v. State,

510 So. 2d 885, 894 (Fla. 1987); Wilson v. State, 436 So. 2d 908 (Fla. 1983).

The only times that this Court has found that HAC was not applicable in a beating death involve situations where the victim was rendered immediately unconscious by a blow and did not regain consciousness. Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1998); Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994). In this case, no such evidence exists.

The record reflects that 82-year-old Renie, was attacked at her home, most probably, in the late night or early morning hours. (T. 442-444) It is unclear whether Renie was surprised by the attack while asleep in her bedroom, or was still awake watching her favorite TV shows. (T. 440) Either way, the evidence establish that Renie was killed as a result of numerous blows to her head and body. The evidence of injuries to her knee, hand and arm indicates that she attempted to defend herself. In that regard, the State presented the testimony of Dr. Rao.

According to Dr. Rao, the cause of death was blunt head trauma. (T. 544). Dr. Rao testified that Renie suffered numerous injuries to her body: the back of her head, the nape of her neck, the neck, the upper back, the back of her right hand, the right leg and the left knee (T. 545) She found that there were

17-20 different blows inflicted upon Renie's body. (T. 545) She also found a laceration underneath the chin, on the back and right part of the neck, and signs of tremendous bruising, which indicated that these injuries were caused by the claw part of a hammer. (T. 548, 551-553) Dr. Rao found an injury on the back of Renie's head, that indicated that this injury was caused by the face of the hammer. (T. 549) Dr. Rao further determined that Renie's the scalp was lacerated, her scull was fractured and the bone fragments were pushed into the brain, which indicated that these injuries were inflicted with a tremendous force. (T. 550, 558) She also determined that the fat and tissue on the back of Renie's neck was ripped off, which indicated that these injuries were inflicted with a significant force. (T. 558)

Dr. Rao found that Renie's fifth rib was fractured, which indicated that this injury was probably inflicted with the claw of a hammer. (T. 554) She also found numerous tears on Renie's shirt, which indicated that these impacts were made with a hammer, and were consistent with the injuries inflicted upon Renie. (T. 556)

According to Dr. Rao, the injuries on the back of Renie's right hand and left arm, and the knee evidenced defensive wounds. (T. 555, 557-58) Dr. Rao explicitly stated that Renie was alive when the injuries were inflicted upon her. (T. 557)

According to Dr. Rao, these injuries could have caused a tremendous pain. (T. 559) Dr. Rao explained that the defensive wounds indicated that Renie was conscious while she was trying to defend herself. (T. 560-61) Although Dr. Rao could not determine for how long Renie was alive, she explained that it was certainly not seconds because Renie suffered 17-20 blows to her body. (T. 561) According to Dr. Rao, Renie was in tremendous pain while these blows were inflicted upon her. (T. 559, 561) As to the consciousness, Dr. Rao explained that if a person is unconscious, that does not mean that they could not feel the pain, which indicated that Renie could feel the pain even if she was unconscious at some point during the attack. (T. 574) Given the enormous amount of evidence presented, the trial court properly found HAC aggravating circumstance. Moreover, there was more than sufficient evidence to support giving the jury instruction on HAC.

Defendant asserts that Dr. Rao's testimony supports the conclusion that the initial blow was to the head producing unconsciousness quickly, and that if the victim would have been struck in the head first, the victim would have become unconscious and would have suffered no pain. However, this claim is without merit. Defendant's assertion directly contradicts the evidence in this case as well as the common sense. Moreover,

Defendant entirely misinterpreted the record. Contrary to Defendant's contention, Dr. Rao stated the following: "The injuries to the head, she would have lost consciousness because of the trauma to the brain. However, if that's the first set of injuries she incurred, then she would have lost consciousness. But, if you look at the rest of the body she did, in fact, try to defend herself. So, she was trying to fight off the blows. So, you know, I couldn't tell you when—as long as she was trying to fend the blows, that's when she was not unconscious. She was conscious because these are conscious actions that we do to protect ourselves." (T. 560-61) Moreover, Renie suffered injuries to the front of her neck and the back of her head and body, which indicates that she had to move in order to sustain these injuries. Further, the blood found on the floor near her body also indicates that Renie tried to move while sustaining these injuries. Finally, contrary to Defendant's contention, Dr. Rao explicitly stated that Renie was in tremendous pain while these injuries were inflicted upon her, and that even if she was unconscious, she could have felt the pain. (T. 561, 559, 574)

Defendant next argues that since Renie might have lost consciousness after the initial blow, the fact that Defendant struck her multiple times was indicative of Defendant's temporary loss of emotional control at the time of the murder,

suggesting that Renie was not conscious during the infliction of multiple blows, and therefore, the heinous, atrocious or cruel aggravator should not be sustained. However, this claim 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. Defendant made an objection to a jury instruction on the heinous, atrocious, or cruel aggravator on the ground of insufficiency of evidence where Renie's death was very fast, if not instantaneous. (T. 1526-27) Defendant now claims that because Renie had lost consciousness after the initial blow (which is a misstatement unsupported by the record), the multiple wounds inflicted upon Renie resulted from Defendant's loss of emotional control, or panicked attack, for which reason the murder was not HAC. Defendant did not make this argument either during the penalty phase closing argument or in its sentencing memo. (T. 1675-1703, R. 1214-1229) As such, this argument is not preserved for review.

Even if this argument had been preserved, the trial court would still have properly found HAC under the circumstances of this case. This Court has consistently applied HAC where the

victim was repeatedly bludgeoned, without any discussion as to the defendant's mental condition. Accordingly, Defendant's emotional condition at the time of the murder is a fact that should not be considered because it is irrelevant to the finding of HAC. Rather, the relevant facts are those showing the means and manner in which the murder occurred. In that regard, the evidence in this case reflects that Renie was murdered as a result of numerous blows to her head and body. Dr. Rao explicitly stated that Renie was in tremendous pain while these injuries were inflicted upon her. The record also reflects that Renie suffered defensive injuries, which indicated that she was not rendered unconscious after the initial blow.

Moreover, the facts of the case indicate that the murder occurred on late evening or early morning hours. Given that fact, Defendant should have anticipated that Renie would be at home at that time. In sum, Defendant purposefully chose to burglarize Renie's house and knew exactly what he was doing, which thereby excluded any possibility of the panic at the time of the murder.

In support of his contention, Defendant relies on the following cases: Penn v. State, 574 So. 2d 1079 (Fla. 1991), Ross v. State, 474 So. 2d 1170 (Fla. 1985), Miller v. State, 373 So. 2d 882 (Fla. 1979), and Jones v. State, 332 So. 2d 615 (Fla.

1976). However, Defendant’s reliance on these cases in misplaced. This Court did not reversed HAC in these cases. As the trial court applied the correct law and its findings are supported by competent substantial evidence, the trial court properly instructed the jury and the HAC aggravating circumstance should be affirmed.

III. THE ISSUES REGARDING CLOSING ARGUMENTS DO NOT MERIT REVERSAL.

A. ANY ISSUE WITH REGARD TO COMMENTS DURING THE STATE'S PENALTY PHASE CLOSING ARGUMENT IS UNPRESERVED AND MERITLESS.

Defendant asserts that the prosecutor made an improper comment during closing argument at the penalty phase. In particular, he argues that the prosecutor improperly argued that the homicide was committed to eliminate the victim as a witness to the burglary, which was outside the scope of the evidence presented during the trial. However, the comment provides no basis for relief because it is unpreserved and does not constitute fundamental error.

To preserve an issue regarding a comment in closing, it is necessary for a defendant to make a contemporaneous objection to allegedly improper comment. Morton v. State, 789 So. 2d 324, 329 (Fla. 2001) When an issue regarding a comment is not preserved for review, this Court will only consider the issue if the comment constitutes fundamental error. Brooks v. State, 762 So. 2d 879, 899 (Fla. 2000). In demonstrating fundamental error, a defendant has a "high burden" of showing that the error was such that it "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, 40-41 (Fla. 2009).

During the penalty phase closing argument, the prosecutor made an introduction with regard to the aggravating circumstances that the jury would be instructed upon and therefore would consider: the homicide occurred during the course of a burglary, pecuniary gain, and HAC. The prosecutor stated the following:

> Let's talk about what an aggravating circumstance is legally, because this is what the Court is going to instruct you. It's a standard to guide the jury in making the choice. That's what an aggravating circumstance is. It is a circumstance which increases the gravity of a crime or the harm to the victim. 17 – over 17 blows, that increases the gravity of that murder. He could have hit her really once. Why did he take so long to kill her? Why was it, first of all, necessary to kill her, unless he wanted to make sure she couldn't come into this courtroom and identify him when he was burglarizing her house. But that is what an aggravator is. It increases the gravity of a crime, the way in which he murdered this innocent elderly 82 year old woman, or the harm to a victim.
>
> And under the law, in order to consider the death penalty as a possible penalty, you must determine that at least one aggravator has been proven. I would submit to you in this case we've proven three of them. You're already found two of them.

(T. 1662-63) Defendant did not object.

The prosecutor then argued the first aggravator-the homicide occurred during the course of a burglary. He stated the following:

> So what are the aggravating circumstances? We discussed a capital felony was committed while the defendant was engaged in the commission of a burglary. You must ask, well, why is that an aggravator. Well,

first of all, you've got to talk about what a burglary is. It's a burglary to a home. This victim's castle. And I just picked one of many pictures that we had in terms of the proof that a burglary was committed. You've already found that.

He did break into her house, he did ransack her house and he did take her jewelry and other property and her car and then he murdered her. Because a person's home, a victim's home, this victim's home, is sacred. It's a sanctuary in which she was entitled to be safe, especially at the time it occurred. I would submit at anytime. But, my gosh, she's home and she's sleeping when this man decided to go over there and burglarize her house. That's why this is an aggravator. Because the law says that a burglary, felony, such as this, a burglary is a serious crime. And in certain burglaries, if somebody gets killed, then, that's an aggravator for the death penalty because he could have done it without killing her. But he decided to murder her and that's why this is an aggravator that I would submit to you is entitled to great weight when you're weighing the aggravators and you're determining whether the mitigators outweigh the aggravators.

So when you talk about his character, he decided to burglarize the home that was sacred to that victim. You saw how she kept that house, how neat was it. My God. He also knew she was elderly. I mean how much harm could she do to him, other than he wanted to silence her so that he could do – he could commit the burglary without getting caught.

She was home, she felt safe, secure. She had worked hard for what she owned. Isn't she entitled to protect that property? But he wasn't content with breaking into her house and taking her treasure. He killed her. He wasn't happy with just taking her stuff. He had to brutally kill her. He had to beat her over and over. So he's willing to murder to cover his tracks. That's what this boils down to. By committing the burglary, it created an independent motive to kill because he knew she was going to be there. He could have burglarized the house at another time. He could have said, okay, I know – I'm going to wait out here, wait until she leaves. No, why did he decide? Because he wanted to be successful in his burglary at the time of night or early in the morning that he picked. And

> in doing so maybe he assumed that she wouldn't wake up. Kind of hard when you're rummaging through her house. But, that is why this aggravator is so weighty.

(T. 1663-66)

Defendant did not object. As such, this issue is not preserved for review under this Court's precedent.

Moreover, the unpreserved comments did not rise to the level of fundamental error. This Court has held that wide latitude is afforded to counsel during the argument. See Moore v. State, 701 So. 2d 545, 550 (Fla. 1997). "The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." Gonzalez v. State, 990 So. 2d 1017, 1028-29 (Fla. 2008); Thomas v. State, 748 So. 2d 970, 984 (Fla. 1999).

While Defendant insists that the prosecutor improperly argued that the murder was committed to eliminate the victim as a witness to the burglary because the State never asserted the avoid arrest aggravator, this is not true. The prosecutor's statements were fair comments on the evidence introduced during the trial and were relevant to the aggravating circumstance that capital felony was committed in the commission of a burglary and its weight. At the guilt phase, evidence was presented that Defendant knew the victim. Defendant decided to burglarize her house in the late evening or early morning hours, most probably

while she was still sleeping, which indicated that he should have anticipated that this 82-years-old lady would be at home. Finally, Defendant murdered Renie by hitting her with a hammer 17-20 times while she was trying to protect her property and defend herself from a 6’5”, 200 pound intruder. Defendant could have easily restrained Renie in order to take her property, but instead he decided to murder her brutally. Thus, the prosecutor was merely making an argument regarding the application of during the course of a burglary and the weight to be given to that aggravator. Thus, the comment was not improper. Moreover, the trial court instructed the jury that it was limited to consideration of only the during the course of a burglary, pecuniary gain, and HAC aggravators. (T. 1714)

Moreover, it should be remembered that since avoid arrest is an aggravator, the State was not making a comment on nonstatutory aggravation. Instead, it was merely make a proper inference that given the age and size disparity between Renie and Defendant and the fact that Defendant elected to commit this burglary at a time when he could have expected Renie to be home, he could have chosen to commit the burglary without having to murder her, which increased the weight to be afforded to the during the course of a burglary aggravator even if the inference was insufficient to prove avoid arrest. Thus, the prosecutor’s

comment was entirely proper because it was made in light of the evidence presented and within the context of this case.

Given these circumstances, the prosecutor's comments did not deprive Defendant of a fair penalty phase. This is particularly true when one considers that Defendant attacked Renie at her home while she was in bed and bludgeoned her to death with a hammer, simply because she refused to give up on her property. Rather than simply deciding to commit a burglary at some other time, or simply restraining this 82-years-old woman while stealing her property, Defendant chose to murder Renie in order to complete the burglary successfully. Thus, Defendant's sentence was extremely aggravated. Further, the mitigation was exceedingly weak. The jury heard that Defendant's parents got divorced when he was six years old and that his relationship with his father was okay. The jury also heard that Defendant was greatly affected by his mother's death, that he had cared for his grandmother who had Alzheimer's, that he had a good relationship with his siblings, and that the was thinking of becoming a minister. Defendant has not shown that he did not receive a fair penalty phase. The death sentence should be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING THE DEFENSE COUNSEL FROM MAKING AN IMPROPER ARGUMENT DURING THE PENALTY PHASE CLOSING ARGUMENT.

Defendant asserts that the trial court abused its discretion in prohibiting the defense counsel from arguing that Defendant had no prior violent criminal history. Defendant asserts that this was relevant to show a nonstatutory mitigating factor that Defendant did not commit any violent crimes in the past. Defendant further asserts that he should have been allowed to make this argument because it related to the State's lack of evidence to support the prior felony aggravator. However, the trial court did not abuse its discretion in prohibiting Defendant to make this argument.

It is well settled that it is within the trial judge's discretion to determine when an attorney's argument is improper, and such determination will not be upset absent abuse of discretion. Watson v. State, 651 So. 2d 1159, 1163 (Fla. 1994).

This Court has held that closing argument on matters outside the evidence is improper. See Bigham v. State, 995 So. 2d 207, 214 (Fla. 2008). In argument to the jury, counsel for all parties are restricted to the evidence and reasonable deductions therefrom but within this rule, they have a very wide discretion. Akin v. State, 86 Fla. 564, 574 (Fla. 1923). Any

attempt to pervert or misstate the evidence or to influence the jury by a statement of facts or conditions not supported by the evidence should be rebuked by the trial court. Id.

Here, during the penalty phase of the trial, neither the State nor Defendant presented any evidence regarding Defendant's criminal history. Despite that fact, during Defendant's penalty phase closing argument, the defense counsel argued to the jury that they should consider the fact, that Defendant had no history of violent crimes. In particular, the defense counsel stated the following:

> The bottom line is the Judge is also going to read you an instruction about merger and merger says that if you have a financial gain aggravator and you have a burglary aggravator, those two are merged and they only count as one aggravator. Those two aggravators that this prosecutor is seeking and asking you to kill Cecil King about count as one, not as two, and it's based on your verdict not any long history of significantly violent criminal acts.

(T. 1685) The State made an objection. (T. 1685) At sidebar, the State argued that Defendant's argument was improper because there was no evidence presented by the defense that Defendant had no significant criminal history of violence. (T. 1686-87) The State also argued that Defendant had chosen not to present this evidence because if he did, the State would be allowed to present the evidence on his prior record. (T. 1686) Defense argued that the argument was proper because Defendant did not

have prior violent criminal history, and that if he did, the State would have presented it during the penalty phase. (T. 1687) The Court sustained the objection and instructed the jury to disregard the statement. (T. 1688-91)

This ruling was not an abuse of discretion. As Defendant acknowledged before the trial court, there was no evidence presented regarding his criminal history before the jury. Thus, the comment concerned matters that were not in evidence and was improper. As such, the trial court did not abuse its discretion in sustaining the State's objection.

This is particularly true, as the comment was misleading. As the State pointed out when it objected to this comment, Defendant did have an extensive criminal history. However, as this Court has held, the State may not present evidence of a defendant's criminal history that does not satisfy the prior violent felony aggravator unless the defendant has claimed not to have a criminal history. Mendoza v. State, 700 So. 2d 670, 677 (Fla. 1997); Walton v. State, 547 So. 2d 622, 625 (Fla. 1989) ("Once a defendant claims that [no significant criminal history] mitigating circumstance is applicable, the state may rebut this claim with direct evidence of criminal activity."); see also Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977)(Admission of defendant's confession to a murder of which

he had yet to be convicted was fundamental error). Thus, because Defendant presented no evidence regarding his criminal history, the State was precluded from presenting this evidence. As such, permitting Defendant to comment about his criminal history without having presented evidence about his criminal history would have misled the jury. Thus, the trial court did not abuse its discretion in sustaining the State's objection.

In Garcia v. State, 564 So. 2d 124, 126-129 (Fla. 1990), this Court found comments improper in similar circumstances. There, the State convinced the trial court to exclude evidence and then proceeded to comment that the excluded evidence did not exist in closing. This Court held that "standing alone, the fallacious argument might not be reversible error. But combined with the prejudicial effect of excluding the same relevant evidence that the State argued did not exist, we find that Garcia was denied his right to a fair trial." Id. at 129.

Here, like in Garcia, there was no evidence introduced to the jury regarding Defendant's criminal history, which precluded the State from presenting evidence showing the true facts of his criminal history. As such, the trial court properly ruled that Defendant's argument was improper. See also Orme v. State, 677 So. 2d 258, 263 (Fla. 1996)(defendant who waived no significant criminal history mitigator to preclude rebuttal could not

subsequently argue mitigator was applicable based on lack of evidence).

In an attempt to avoid this result, Defendant suggested that he was merely arguing the absence of the prior violent felony aggravator and that the jury could infer that he did not have a prior violent felony conviction because the State did not attempt to prove that aggravator. However, he ignores that the jury would have no basis to make that inference. The jury was only instructed regarding the aggravators about which the State had presented evidence and was expressly told that the aggravation was limited to these aggravators. Thus, the jury would not have known that there was a prior violent felony aggravator and would have had no basis to make the inference Defendant sought. Moreover, as the jury is instructed the weighing process is qualitative, not quantitative, such that the number of aggravators proven is not relevant.

In Bigham, 995 So. 2d at 215, the defendant complained that the trial court abused its discretion by forbidding him from arguing that the State failed to prove the two counts on which the trial court had granted a judgment of acquittal. This Court held that the trial court properly restricted the defendant from arguing these two counts because they were no longer germane to the jury's consideration. Similarly here, by arguing about his

criminal history in the guise of showing that the prior violent felony aggravator was not proven, Defendant was attempting to argue matter that were not germane to the jury's consideration. As such, the trial court did not abuse its discretion in finding that the comment was not a proper inference from the evidence.

In support of his contention that Defendant had a right to argue the State's lack of evidence to support the prior violent felony aggravator, Defendant relies on Conahan v. State, 844 So. 2d 629 (Fla. 2003). However, this reliance is misplaced. In Conahan, the defendant presented evidence regarding his background and upbringing such that the State could present rebuttal evidence. Id. at 634. Moreover, the jury is required to be instructed on its ability to consider nonstatutory mitigation. See Hitchcock v. Dugger, 481 U.S. 393 (1987). Thus, the State's comment was based on evidence that had been presented and issues the jury was instructed to consider. As such, this Court determined that the comment was a proper comment on what the evidence showed and did not show. Conahan, 844 So. 2d at 640.

Here, in contrast, Defendant's comment concerned matters on which he had not presented evidence. As a result, the State was precluded from presenting rebuttal evidence, which existed. Thus, Defendant's comment did not concern matters that were or

could have been in evidence. Moreover, the jury had no way of knowing that the prior violent felony aggravator even existed because it were only instructed on the aggravators on which the State had presented evidence and were told that the aggravation was limited. As such, Defendant's reliance on Conahan is misplaced.

Even if the trial court could be considered to have abused its discretion in not allowing the defense counsel to make the subject comment, any error would be harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Had the trial court decided to permit the comment, it would have been permitted to fashion a remedy that prevented Defendant from misleading the jury, such that the jury would have been able to consider the true nature of Defendant's criminal history. United States v. Robinson, 485 U.S. 25 (1998)(Government comment on a defendant's failure to testify proper where the defendant had mislead the jury during his argument regarding whether the government had permitted the defendant to explain himself); State v. Ellis, 491 So.2d 1296, 1297 (Fla. 3d DCA 1986)(finding an abuse of discretion in refusing to reopen evidence when the ends of justice so requires). Moreover, the aggravation in this case was strong and the mitigating evidence, including the lack of convictions for violent felonies, was weak. As such, it cannot be said that the

exclusion of the defense counsel’s comments would have affected the outcome of the penalty phase, and Defendant’s sentence should be affirmed.

IV. DEFENDANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

Defendant argues that his death sentence violates Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000). Defendant further asks this Court to reconsider its position in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), as to the applicability of Ring to Florida's death penalty act. However, this claim is meritless.

Defendant's claim is not a basis for relief because he was also convicted of the underlying offense of armed burglary, which supports the aggravating circumstance of murder committed during the commission of a felony (armed burglary). Since Defendant was convicted of the underlying felony of armed burglary that conviction takes his case outside the reach of Ring:

> This Court has consistently held that a defendant is not entitled to relief under Ring if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator. See Baker, 71 So. 3d at 824 ("[W]e have previously explained that Ring is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony."); see also Douglas v. State, 878 So. 2d 1246, 1263–64 (Fla. 2004) (rejecting Ring claim where jury convicted defendant of committing murder during the commission of sexual battery); Caballero v. State, 851 So. 2d 655, 663–64 (Fla. 2003) (rejecting Ring claim where defendant was convicted by unanimous

> jury of committing murder during the commission of burglary and kidnapping); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). Accordingly, under this Court's precedent, Ellerbee is not entitled to relief under Ring.

Ellerbee v. State, 87 So. 3d 730, 747 (Fla. 2012); Caylor v. State, 78 So. 3d 482, 500 (Fla. 2011) ("Furthermore, Caylor was contemporaneously convicted of aggravated child abuse and sexual battery involving great physical force by a unanimous jury during the guilt phase of his trial. Ring is not implicated when, as here, the trial court has found as an aggravating circumstance that the murder was committed in the course of a felony that was found by the jury during the guilt phase; see also McGirth v. State, 48 So. 3d 777, 795 (Fla. 2010), cert. denied, 131 S. Ct. 2100, 179 L. Ed. 2d 898 (2011)."); Reese v. State, 14 So. 3d 913, 920 (Fla. 2009); Baker v. State, 71, So. 3d 802, 824 (Fla. 2011); Aguirre-Jarquin v. State, 9 So. 3d 593, 601 n.8 (Fla. 2009). Under settled Florida law, there is no basis for relief under Ring.

V. THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT.

While Defendant has not addressed the sufficiency of the evidence to sustain he convictions, this Court has a duty to address the sufficiency of evidence in each capital case. Ferguson v. State, 417 So. 2d 639, 642 (Fla. 1982). As such, the State submits that the evidence was sufficient to support Defendant's convictions.

Evidence is insufficient "in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Orme v. State, 677 So. 2d 258, 262 (Fla. 1996). "The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict," reversal is not required. Darling v. State, 808 So. 2d 145, 155 (Fla. 2002)(quoting State v. Law, 559 So. 2d 187, 188 (Fla. 1989). To meet this burden, the State is not required to "rebut conclusively, every possible variation of events;" it only has to present evidence that is inconsistent with Defendant's reasonable hypothesis. Darling, 808 So. 2d at 156 (quoting Law, 559 So. 2d at 189).

Here, the State presented a competent, substantial evidence to support Defendant's conviction of first-degree murder. Lyza

Telzer testified that she and her son, Myles Telzer, have last seen Renie at her home on the afternoon of December 29, 2009. The following day, she went to check on Renie because she could not reach her that day. After she and Richard Broxton entered Renie's house, they found out that it was burglarized and that Renie was murdered. Renie was bludgeoned to death with a hammer. She had suffered between 17-20 blows to her head, neck, back, hands, arm, leg, and knee. Her skull was fractured, and she also suffered defensive injuries.

The State presented ample evidence that connected Defendant to Renie's murder. Defendant was employed by James Roman, who had a lawn service company that maintained Renie's lawn. Roman testified that he and Defendant always worked together on Renie's lawn and that they have never been inside of her home. Roman also testified that Defendant called him while he was on vacation, and asked him if he had heard in the news about the murder of an old lady who was their customer, which Roman considered unusual because Defendant had always called him to discuss issues related to work only.

Renie's stolen vehicle was discovered in close proximity of Defendant's residence. Defendant's cousin, Rashad Montfort, testified that Defendant gave him the keys of Renie's vehicle and allowed him to use it. In order to attempt to clear his name

and get Defendant talk about the stolen vehicle and Renie's murder, Montfort agreed to talk to Defendant while wearing a wire. Although Defendant did not admit his involvement in the crime, he did ask Montfort about why the police was questioning him regarding the stolen vehicle and told Montfort not to say anything about it.

While executing a search warrant, the police found numerous items and valuables that belonged to Renie in Defendant's apartment. Defendant had pawned the gold bracelet that belonged to Renie.

Defendant was interviewed by the police on two occasions. During the first interview, Defendant admitted that he knew Renie because he maintained her lawn but denied that he ever went inside of her residence. Defendant claimed that he purchased the gold bracelet that he previously pawned from someone he knew as "Budha," and that he found the rest of Renie's stolen property in a vacant apartment close to his home. However, nobody corroborated Defendant's story that he had found stolen items in a vacant apartment. Moreover, Montfort testified that he had never heard of "Budha." The police had found no individual by this nickname.

Defendant's DNA matched the DNA profile that was obtained from the swab of the cantaloupe from Renie's kitchen table, and

only one in 440 trillion Caucasians, one in 770 trillion African Americans, and one in 280 trillion Southeaster Hispanics could have had the same DNA match.

During the second interview at the police station, after he was told that his DNA was found inside Renie's home, Defendant testified that he may have been once in Renie's home and that she used to give him and Roman fruit while they were working on her lawn. This statement directly contradicted the initial statement Defendant gave to the police and Roman's testimony.

Under these circumstances, the State presented sufficient evidence to show that Defendant was guilty of first degree murder. His convictions 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 was furnished by U.S. mail to W. C. McLain, Public Defender’s Office, Leon Co. Courthouse, #401, 301 South Monroe Street, Tallahassee, FL 32301, this ____ day of August 2012.

_____
TAMARA MILOSEVIC
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

_____
TAMARA MILOSEVIC
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