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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-02

ROBERT LEE HOBART,

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

.....
ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA,
(CRIMINAL DIVISION)
.....

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Robert Lee Hobart, Defendant below, will be referred to as "Hobart" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record documents will be by "RR," the transcript will be by "RT," the supplemental materials will be by the symbol "S" preceding the type of record referenced followed by the volume and page number(s). Hobart's initial brief will be notated as "IB."

STATEMENT OF THE CASE AND FACTS

On December 26, 2010, Hobart was indicted for the first-degree murders of Robert Hamm and Tracie Tolbert committed on September 22, 2010 (RRv1 15). The jury was sworn on October 15, 2012, and on October 16, 2012, trial commenced (RTv14 403, RTv15). On October 18, 2012, the jury rendered its verdict finding Hobart guilty as charged in the indictment on both counts (RTv19 680-681). The penalty phase commenced on October 23, 2012 and on the following day, the jury recommended death by a vote of seven to five for Tolbert's murder and life for the murder of Hamm. (RTv21 310). The Spencer v. State, 615 So. 2d 688 (Fla. 1993) hearing was held on November 6, 2012 (RTv22) and on November 30, 2012, the court sentenced Hobart to death for Tolbert's murder after a finding of two aggravators and seventeen non-statutory mitigators. (RTv23 21).

On the morning of September 22, 2010, Robert Hamm and Tracy

Tolbert drove to Autumn Pare's house in a gold Explorer (RTv17 348). Tolbert had with her Lortab and Xanax pills and a large sum of money (RTv17 349). Autumn and her friend, Stev Vanaxelson bought Lortabs from Tolbert (RTv17 350, 395). After which, Tolbert and Hamm left for a doctor's appointment (RTv17 365).

At around 9:30 a.m. on September 22, 2010, Robert Hamm and Tracy Tolbert, again driving a gold SUV, arrived at Harold Hobart's ("Harold") house. Harold shared the home with his mother and brother, Robert Hobart (RTv17 320). Harold took Hamm and Tolbert to a doctor's appointment in Pace (RTv17 320). After the doctor's office, Harold took Hamm and Tolbert to a pharmacy in Cantonment to fill Tolbert's prescription (RTv17 321-322). After the pharmacy, Harold brought them back to his house and Hamm and Tolbert left (RTv17 322). They got back to Harold's house from Cantonment at around 12:00 p.m. (RTv17 322).

Sometime between 11:00 a.m. and 2:00 p.m., Hamm and Tolbert arrived at Sandra Bruton's ("Bruton") house in a blazer type SUV (RTv17 342). Harold and Tolbert drove Bruton to Tom Thumb (a convenience store) where she stayed while Tolbert and Hamm went purportedly to get her some Roxicodone (RTv17 343). Bruton gave them \$40 for the Roxicodone, however, they never returned to the Tom Thumb (RTv17 343).

Near 3:30pm on September 22, 2010, Lee Langham was picking

peanuts on his property near Jesse Allen Road when he observed what appeared to be a broken down brown suv-type truck pulled over on the side of the road (RTv15 54-56). There were two white men looking under the hood and a white woman getting into the truck as if she was trying to "crank it" (RTv15 55). Five minutes later, Langham drove past the same area and observed one of the men standing on the passenger side of the vehicle and the woman standing toward the back of it (RT v15 56).

Close to 4:30pm, Kenny Owens ("Owens") was driving down Jesse Allen Road with his wife when he saw a pool of blood on the road (RTv15 59). He observed that something had been dragged to the side of the road (RTv15 59). At his wife's behest, Owens got out of his truck to ensure that no one had hit his dog (RTv15 60). When he approached the bushes, he observed women's feet in the bushes (RTv15 60). After asking his wife to call 911, Owens returned to the bushes to verify that he really saw a body (RTv15 61). On his way back to his truck the second time, Owens noticed a man's body on the other side of the road in a wet weather pond (RT v15 61). Subsequently, these bodies were identified as Tracie Tolbert (RTv18 414) and Robert Hamm (RTv16 118).

During the ensuing investigation, crime scene investigator Marivel Meister found a casing marked 9mm Ruger Wolf on the south side of the road - the same side Hamm's body was located

(RTv18 417, 421, 423). A knife and a wallet were found in Hamm's back right pocket (RTv18 420). There was no money in the wallet nor were any cell phones located near either body (RTv18 420-421). As it was getting dark, Meister suspended his investigation until the next morning. When he returned, Meister found sunglasses with a missing ear piece, an ear piece to sunglasses, a projectile and a hair in a spider web that was above a blood trail which led into the woods (RTv18 422, 425, 427).

The same day the bodies were found, September 22, 2010, the police became aware that Hamm drove a gold Ford Explorer and a records check revealed that he previously had been issued a traffic citation while driving a gold Ford Explorer (RTv15 73). As a result, a BOLO was issued for that vehicle immediately (RTv15 73). While on his way home from the Jesse Allen Road crime scene, Detective Scott Jones spotted a gold Ford Explorer in the parking lot of a Winn-Dixie on Dogwood Drive (RTv15 75). The plates matched Hamm's vehicle (RTv15 75). There was blood on the running boards, driver's seat, and center console steering wheel (RTv15 75).

Crime scene investigator Judy Thomas processed the Explorer and found a black purse and a wallet; both of which were devoid of cash (RTv18 413). Also collected from the vehicle were a metal rod, stick, a bullet casing, projectile, and medication

bottles marked Soma, Lortab and Xanax (RTv18 429-431, RTv8 73-76).

Detective Gary Baney ("Baney") conducted multiple interviews in conjunction with the investigation. Specifically, Baney spoke to Hamm's father who advised that Hamm was involved in doctor shopping (RTv16 120). Baney also learned of the people with whom Hamm associated (RTv16 120). The names Donnie Adams ("Adams") and Vance Mitchell ("Mitchell") kept coming up in the investigation (RTv16 120-121). Baney interviewed both men and Adams provided his cell phone for analysis as well as a DNA sample (RTv16 121).

Detective Jasen Wells ("Wells") analyzed records for Tolbert, Hamm, Hobart, and Adams cell phones (RTv16 200, 203, 217). Generally, a cell phone will use the closest tower with the strongest signal (RTv16 233). Wells generated several maps to demonstrate Hobart and Tolbert's locations based off cell phone tower utilization at the times they made or received cell phone calls (RRv8 90-109, RTv16 233). This report showed multiple phone calls between Hobart and Tolbert on the morning of the murders until about 2:23 p.m. (RTv16 208-212). The report also showed that at 3:00 p.m., Hobart's phone received a call which was relayed through a tower just north of the Point Baker Tom Thumb, a location between the Winn-Dixie on Dogwood Drive and Jesse Allen Road - the road the bodies were found

(RTv16 213, RTv15 103). At 3:25pm, Hobart received a phone call which located him on Jesse Allen Road, which is where the bodies were found (RTv16 214). Finally, the report showed the Tolbert's phone received a call at 4:05 which was relayed through Stewart Street cell phone tower, the tower which covers the Winn-Dixie (RRv8 107). Adams' cell phone usage showed that at the time of the murders, his phone was traveling southbound towards Pace (RTv16 217).

Detective Baney later interviewed Hobart. During the interview, Hobart advised that the last time he saw the two victims was around 1:30pm the day they were killed (RTv16 129-130). He stated he saw them at the cigarette store by the Winn-Dixie on Dogwood Drive where he bought two Roxie pills from them for \$20 each (RTv16 129, 130). He claimed he routinely purchased his pills from Tolbert and Hamm (RTv16 131). Hamm and Tolbert were by themselves and were driving "Little Mack"¹s Ford truck (RTv16 131). According to Hobart, Tolbert called him earlier that day and told him she going to have some pills to sell (RTv16 132). Hobart stated that he had agreed to meet at the cigarette shop and arrived at the meet on foot (RTv16 132-133). Once there, he got in the driver's side backseat of the truck in order to conduct the drug transaction (RTv16 133-135).

Although Hobart reported that he went straight home (across

¹ Robert Hamm was known as "Little Mack" (RTv16 128)

the street) after leaving the cigarette shop drug sale, he was unable to explain why his cell phone was pinging off Point Baker Tower (RTv16 139, 144). He admitted that he has had a Roxicodone addiction since approximately 1998 and as a result needed pills everyday (RTv16 139, 143).

Detective Baney also interviewed Harold Hobart ("Harold"), Hobart's brother (RTv16 175). As to his whereabouts after Tolbert and Hamm left his house, Harold contended that he went to Winn-Dixie and then to Pensacola (RTv17 323)². Harold did not lock his bedroom door while he went to Pensacola despite the fact that he had a number of guns in his room (RTv17 324-325). Upon his return, he learned that the police had searched his room and confiscated his guns (RTv17 325).

Several days after his initial interview, Harold contacted police and surrendered his 9mm pistol that his nephews found in his room after the police left the day of the search (RTv17 326). Harold also provided a DNA sample (RTv17 326). A search of Harold's truck yielded a receipt from Cantonment Pharmacy showing that a prescription for 90 Oxycodone pills was filled for Tolbert at 11:19 a.m. on the day of the murder (RRv8 47-48, RTv16 271).

Detective Alvin Bicasan reviewed surveillance video from

² This account was confirmed by Winn-Dixie surveillance video which showed Harold Hobart in the store during the timeframe of the murders (RTv17 336).

the Winn-Dixie parking lot, the Park Avenue Laundry (in the Winn-Dixie plaza) as well as Tom Thumb surveillance from the Baker Point location dating the day of the murder (RTv16 239, 256). The first portion of the Winn-Dixie video showed a gold SUV driving down Saratoga Road to the Winn Dixie lot at around 2:41pm (RTv16 259). During that time, Hobart lived a quarter of a mile down Saratoga (RTv16 257).

The Tom Thumb video placed Tolbert at the store in Baker Point, which is a location between the Winn-Dixie and the crime scene on Jesse Allen Road at 2:56pm (RTv8 44). According to eyewitness testimony, the murders occurred sometime between 3:30 p.m. and 4:30 p.m. - the time between Hamm and Tolbert being last seen alive and their bodies being found (RTv15 56, 61).

The second portion of the Winn-Dixie captured a gold SUV, later determined to be Hamm's Ford Explorer, pulling into the lot around 4 p.m. and being parked in the Winn-Dixie parking lot (RTv16 253). The video also captured an individual walking from the area of the truck towards a wooded area (RTv16 254). Finally, the Park Avenue Laundry video showed an individual emerging from the wooded area and walking down Saratoga Road (RTv16 260).

In the meantime, Detective Baney received ballistics and a DNA report from the Taurus Millennium 9mm recovered by Harold Hobart (RTv16 177). The casing found at the scene was

determined to have been shot from the 9mm pistol provided by Harold Hobart (RTv18 447). Hobart's DNA was identified to be the major contributor from the firearm's grip and trigger (RTv18 463).

Detective Baney re-interviewed Hobart (RTv16 177). Hobart denied having ever touched the firearm (RTv16 182). Hobart also indicated that no reason existed for his DNA to be on Tolbert's arm or his hair to be at the crime scene (RTv16 186). Baney then asked whether the murder was cold-blooded (RTv16 186). Hobart responded, "Well I'm not going to say anything to incriminate myself, you know...I will say no. It was not, you know, it was not in cold blood." (RTv16 187).

Hobart was taken into custody for the murders of Robert Hamm and Tracy Tolbert. While awaiting trial, Hobart was housed with Stev Vonaxelson ("Vonaxelson") (RTv17 397). According to Vonaxelson, Hobart recounted that he drove with Tolbert and Hamm to a secluded area in order to shoot up pills (RTv17 401-402). However once there, he and Hamm got into an argument about money Hamm owed Harold (RTv17 401-402). The argument then developed into a fist fight when Hamm struck Hobart with a pipe that he retrieved from the Explorer (RTv17 401-402). In response, Hobart drew his pistol and shot Hamm twice in the chest (RTv17 401-402). Hobart then shot Tolbert because he was "all in and had to" (RTv17 402). Hobart described driving himself away from

the scene (RTv17 402).

Hobart subsequently changed his account of the crime several days later (RTv17 402). While commiserating over the time that each of them was facing in jail, Hobart told Vonaxelson that he was "bullshitting [Vonaxelson]" with what he told him before (RTv17 403). In fact, he was "dope sick and he needed to come up" (RTv17 403). He said he shot Hamm with a 9mm (RTv17 403).

At Hobart's trial, Dr. Minyard, the medical examiner, testified that Hamm died as a result of a gunshot wound to the back of his head and Tolbert had two gunshot wounds to the head (RTv17 372, 375-376). The shots to Tolbert were from close range, one of which went through the webbing of her left hand before entering her head (RTv17 378-379).

DNA results revealed Tolbert's blood was on the gearshift of the Ford Explorer and its steering wheel (RTv18 458, 461). Hobart's partial DNA profile was found on Tolbert's left arm (RTv18 462). Hobart's DNA was found on the grip and trigger of Harold Hobart's 9mm pistol (RTv18 462). Further, while Tolbert and Hamm could be excluded as being contributors of DNA to the hair strand found over the blood trail in the woods, Hobart could not be excluded (RTv18 492).

On October 18, 2012, the jury rendered its verdict finding Hobart guilty on both counts of first degree under a general

verdict (RTv19 680-681). The penalty phase commenced on October 23, 2012 (RTv20-21).

At the penalty phase, the State entered into evidence Hobart's judgment and sentence for a 1989 Aggravated Battery conviction (RTv20 42).

In his presentation, Hobart called his aunt, Kathy Chavers, who testified that Hobart's father had no interaction with either Hobart or his sisters (RTv20 54). Similarly, Hobart's mother had no interest in taking care of her children (RTv20 51). Hobart's home smelled like garbage and Chavers never saw either of Hobart's parents show any affection to their children (RTv20 56-57).

Melissa Hall, Hobart's sister, testified that when they were growing up, their father stayed outside in the shed and their mother stayed on her bed naked with fans on her (RTv20 67). The kids did all the household chores and suffered both mental and physical abuse for any transgression (RTv20 70-74). Her father began fondling her when she was 11 or 12 (RTv20 75). When Hobart was about 14-16, he moved out of the house (RTv20 73). Hobart subsequently moved to Alabama with their aunt where he was healthy and drug free (RTv20 81-85). However, in response to his mother's request, Hobart returned to Florida, where he once again took up drugs (RTv20 85).

Cindy Hobart, Hobart's other sister, testified that Hobart

started smoking pot when he was 12-13 years old (RTv20 95). As far as physical injuries, Cindy reported that Hobart fell off a roof a couple of times and was also beat up pretty bad at a bar (RTv20 95-96). Their father fondled her and also had sexual intercourse with her (RTv20 99). Hobart began using cocaine, alcohol and heroine (RTv20 102). By 2010, his drug of choice, however, was oxycodone (RTv20 102). He would shoot up oxycodone in front of anyone (RTv20 102).

Hobart's ex-girlfriend, Crystal Worley corroborated the other witnesses' account of drug use as well as testified that she and Hobart were in a car wreck together (RTv20 114). In 1999, she left for South Carolina to sober up as their drug induced lifestyle was taking her down a path to destruction (RTv20 116).

Hobart's children, Robert Hobart, Jr. and Felicia Hobart both testified that they would continue their relationship with their father if he were sentenced to life (RTv20 208, 211).

Licensed psychologist, Dr. Kevin Groom, testified that he reviewed Hobart's medical records, school records, infirmary records, MRI scan, PET scan, as well as interviewed Hobart's sisters and Crystal Worley (RTv20 129). Dr. Groom also interviewed Hobart twice and conducted a battery of tests on Hobart (RTv20 130, 132-140).

Hobart's test results revealed a full scale IQ of 80 which

Dr. Groom offered was in the borderline intellectual functioning range (RTv20 132). Hobart scored "severely impaired" on the stroop word color test and well below average on the verbal learning test (RTv20 139-140). He also displayed deficits on the judgment test (RTv20 131). Although the MMPI indicated questionable validity, it did suggest elevations of demoralizations, low positive emotions and antisocial behavior (RTv20 145-148). The radiologist report for the MRI showed no intracranial abnormality and Hobart's PET scan was normal (RTv20 160-161). Finally, Dr. Groom admitted that he could not say what effect Hobart's cognitive deficits had on the double homicide (RTv20 162).

Neuropsychiatrist Dr. Alan Waldman testified that he ran a series of tests and tasks on Hobart in order to determine how different areas of his brain were functioning (RTv21 175). Such revealed Hobart has some memory deficits as well as significant frontal lobe abnormalities/deficits (RTv21 175). The frontal lobe controls how a person acts/reacts in a fraction of a second (RTv21 177). Deficits in the brain can be caused by drug use as well as head trauma (RTv21 179, 198). Hobart's MRI showed death of brain tissue (RTv21 181). Dr. Waldman diagnosed Hobart with substance induced persisting dementia as well as an unspecified mild neurocognitive disorder (RTv21 183). In Dr. Waldman's opinion, Hobart was suffering from an extreme emotional

"difficulty" at the time of the crimes (RTv21 187). In other words, Hobart is "a brain damaged individual that cannot take a situation, weigh out the options, know the right options. He works on impulses because he has a broken brain" (RTv21 188). Dr. Waldman went on to testify that he formulated this opinion despite not knowing the specifics of Hobart's actions both before and after the shooting of the victims (RTv21 193-194).

On rebuttal, the State provided testimony from neuropsychologist Dr. Brett Turner. Dr. Turner reviewed Hobart's arrest report, probable cause affidavit, Dr. Groom's report and Dr. Waldman's deposition (RTv21 217-219). Dr. Turner also reviewed the raw data from the battery of tests administered as well as met with Hobart (RTv21 219-220).

During the meeting with Hobart, Turner conducted a clinical interview as well as a mental status examination (RTv21 220). He also conducted a mental state exam which consists of very brief memory tests and tests of attention and concentration built in (RTv21 221). Hobart was able to recount the necessary material during the memory test (RTv21 221). Hobart reported that he liked reading, especially crime stories, and playing cards (RTv21 222). Everyone stopped playing with him, however, because he kept winning (RTv21 222). The fact that he plays poker was significant to Dr. Turner because card play uses frontal lobe functions (RTv21 222). In his opinion, if Hobart

has a traumatic brain injury, it is very minimal (RTv21 223). In fact, defense expert, Dr. Groom reported there is insufficient evidence of frontal lobe syndrome (RTv21 223). Dr. Turner subsequently disagreed with Dr. Groom, instead opining that an IQ of 80 is not borderline intellectual functioning, but low average (RTv21 232). Moreover, "only about three tests out of the number of tests that Dr. Groom gave that are in the impaired range at all" (RTv21 238).

Dr. Turner went on to testify that he did not find that Hobart suffered from extreme mental disturbance in this case (RTv21 226). He was provided the facts surrounding the double homicide; those facts showed that Hobart engaged in forward thinking and planning in his acts - all frontal lobe functions (RTv21 226-227). Drugs may have affected Hobart's reasoning on the day of the murders, but his reasoning was not impaired (RTv21 227). People addicted to opiates have brains that function more normally when they are on the drugs (RTv21 227).

Based on the guilt and penalty phase testimony, the jury recommended death by a vote of seven to five for Tolbert's murder and life for the murder of Hamm (RTv21 310). The Spencer v. State, 615 So. 2d 688 (Fla. 1993) hearing was held on November 6, 2012 (RTv22). On November 30, 2012, the court held a sentencing hearing in which it pronounced its findings. The Court found that the State proved two aggravators beyond a

reasonable doubt: 1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, i.e. the contemporaneous conviction for Robert Hamm's death (RTv23 9) as well as the 1989 conviction for aggravated battery to which it assigned great weight and 2) the capital felony was committed while the defendant was engaged in the commission of a robbery to which it assigned great weight.

The trial court went on to reject Hobart's statutory mitigating circumstance of extreme mental or emotional disturbance as it was not established by the evidence (RTv23 16). As for the non-statutory mitigating circumstances, the trial court made the followings findings: 1) Parents had a dysfunctional marriage (established; slight weight) 2) Hobart suffered physical abuse (established; slight weight) 3) Hobart suffered from substance abuse dependency (established; moderate weight) 4) Hobart has a low IQ (established; moderate weight) 5) Hobart is a good roofer (established; slight weight) 6) Hobart did not receive encouragement from his father (established; slight weight) 7) Hobart has a close bond with his siblings (established; no weight) 8) Hobart was neglected by his custodial parents (established; slight weight) 9) Hobart exhibited good courtroom behavior during trial (established; slight weight) 10) Hobart is haunted by poor impulse control

(established; no weight) 11) Hobart is capable of strong, loving relationships (established; slight weight) 12) Hobart has a special bond with his children (established; slight weight) 13) When Hobart was not on drugs, he was a good son, brother, uncle, father, etc. (established; slight weight) 14) Hobart has a family that loves him very much (established; slight weight) 15) Hobart has a history of of mild traumatic brain injury (established; slight weight) 16) Hobart's father sexually abused his sisters for many years (not mitigating; rejected) 17) Hobart has neuropsychological deficits (established; slight weight) 18) Hobart has brain damage (established; slight weight) 19) Hobart has substance induced dementia (not established) (RTv23 17-20).

The Court independently weighed the aggravating and mitigating circumstances and concluded that the aggravating circumstances outweigh the mitigating circumstances applicable to the murder of Tracie Tolbert. Accordingly, Hobart was adjudicated guilty and sentenced to death. This appeal followed.

SUMMARY OF THE ARGUMENT

Issue I - The trial court did not err in submitting Hobart's charge of First Degree Murder for Robert Hamm's death to the jury. The State presented sufficient evidence to establish each element of the crime charged as well as evidence to refute Hobart's hypothesis on innocence on the issue of intent.

Issue II - There is sufficient evidence to sustain each of Hobart's convictions. The State presented competent, substantial evidence from which the jury could have concluded that Hobart killed Hamm and Tolbert through premeditated design. Further, the State presented competent substantial evidence from which the jury could have concluded that Hobart killed Hamm and Tolbert during the commission of a robbery.

Issue III - The trial court did not err in instructing the jury on and finding as an aggravating circumstance that the murder of Tracy Tolbert was committed during a robbery. As shown in issues one and two, the State presented sufficient evidence to sustain this theory.

Issue IV - The trial court did not err in determining that Hobart had not established that he committed Tolbert's murder while under the influence of an extreme mental disturbance. The State had presented sufficient evidence to refute the mitigator. Moreover, the trial court was not bound to Dr. Waldman's opinion, especially when sufficient evidence existed to contradict it.

Issue V - Hobart's death sentence is proportional.

Issue VI - Florida's death penalty statute is constitutional.

ARGUMENT

ISSUE I

THE MOTION FOR A JUDGMENT OF ACQUITTAL WAS DENIED PROPERLY AS THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH FIRST DEGREE MURDER IN THE DEATH OF ROBERT HAMM (RESTATED)

As his first point on appeal, Hobart contends that the trial court erred in denying his motion for a judgment of acquittal as it pertains to the first degree murder in the death of Robert Hamm (IB 31). According to Hobart, “[t]he trial court’s conclusion that no other motive for the murder appears in the record is not supported by competent, substantial evidence” (IB 39). Instead, Hobart insists that the circumstantial evidence suggests that Hamm died as a result of “a spur-of-the-moment shooting after Hobart and Hamm began fighting” (IB 39). Hobart’s position must be rejected as the State not only rebutted this hypothesis of innocence but introduced direct evidence establishing both premeditated and felony murder thus supporting Hobart’s conviction.

A trial court’s denial of a motion for a judgment of acquittal is reviewed on appeal by the de novo standard of review to determine solely if the evidence is legally sufficient. Pagan v. State, 830 So.2d 792 (Fla. 2002). Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. Pagan.

A court should not grant a motion for a judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. DeAngelo v. State, 616 So.2d 440, 441-442 (Fla. 1993).

In moving for a judgment of acquittal, a defendant admits the facts in evidence as well as every conclusion favorable to the State that the jury might fairly and reasonably infer from the evidence. Darling v. State, 808 So.2d 145, 155 (Fla. 2002). If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. Id.

To prove the crime of First Degree Murder in the case subjudice, the State had to prove the following elements beyond a reasonable doubt:

1. Robert Hamm is dead.
2. There was either a premeditated killing of Robert Hamm or the death occurred as a consequence of and while Hobart was engaged in the commission of Robbery
3. Robert Hobart was the person who actually killed Robert Hamm

(RRv6 1040, 1041); See Fla. Stat. Ann. § 782.04(1)(a) (West)

Premeditation is a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act about to be committed and the probable result of that act." Spencer v. State, 645 So.2d 377, 381 (Fla. 1994); Asay v. State, 580 So.2d 610, 612 (Fla. 1991); Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986). Premeditation can be shown by circumstantial evidence. Woods v. State, 733 So.2d 980, 985 (Fla. 1999). "Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Holton v. State, 573 So.2d 284, 289 (Fla. 1990) (quoting Larry v. State, 104 So.2d 352, 354 (Fla. 1958)). Advance procurement of a weapon and the appearance of a killing being carried out as a matter of course all support a finding of premeditation. Swafford v. State, 533 So.2d 270 (Fla. 1988).

When circumstantial evidence is used to prove defendant's intent, a special standard of review is applied solely to the element of intent. In this special standard of review, "a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every

reasonable hypothesis except that of guilt". Woods v. State, 733 So.2d 980, 985 (Fla. 1999). To that end, the trial court must "review the evidence in the light most favorable to the State to determine the presence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences." Crain v. State, 894 So.2d 59, 71 (Fla. 2004). The State need not "rebut conclusively" every possible theory which could be inferred from the evidence; the State need only introduce evidence inconsistent with the defendant's theory of innocence. State v. Law, 559 So.2d 187, 189 (Fla.1989). Importantly, "[a] reviewing court must assess the record evidence for its sufficiency only, not its weight." Crain, 894 So.2d at 71. Whether the State's evidence fails to exclude all reasonable hypotheses of innocence is a question of fact for the jury. Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). The jury is not required "to believe the defendant's version of the facts when the State has produced conflicting evidence." Spencer v. State, 645 So.2d 377, 381 (Fla. 1994).

Contrary to Hobart's position this special standard applicable to the intent element of the first degree murder charge, i.e. the mandate that the State produce evidence inconsistent with Hobart's reasonable hypothesis of innocence, is not applicable to all the elements of first degree murder in determining whether sufficient evidence existed to submit the

cause to the jury. That is because in proving their case, the State presented Hobart's admission to VonAxelson. A confession is direct, not circumstantial, evidence. Hardwick v. State, 521 So.2d 1071, 1075 (Fla.1988). As the State presented not only circumstantial evidence of Hobart's guilt but also direct evidence in the form of his admissions to Vonaxelson, the special standard of review is only applied to the intent element of first degree murder. See e.g., Mosley v. State, 46 So.3d 510, 526 (Fla. 2009) ("If the State presents both direct and circumstantial evidence, courts do not apply the special standard of review applicable to circumstantial evidence cases."); Meyers v. State, 704 So.2d 1368, 1370 (Fla. 1997) ("We disagree that the case was entirely circumstantial. Meyers' former cellmates testified that Meyers confessed to the murder. Because confessions are direct evidence, the circumstantial evidence standard does not apply in the instant case.").

At bar, the State presented sufficient evidence for the jury to determine whether Hobart murdered Robert Hamm under either a premeditated design or while in the course of committing a robbery. To begin, the State provided sufficient evidence to prove that it was Hobart that actually killed Hamm. At trial, the State elicited evidence that Hobart was, per his own admission, addicted to oxycodone (RTv16 139). On the day of the murder, Hobart was aware that Hamm and Tolbert would have a

number of Oxycodone pills to sell (RTv16 132). As such, Hobart arranged to meet the two at the cigarette shop located in the same plaza as the Winn-Dixie on Dogwood Drive (RTv16 132). The location is within walking distance of his house (RTv16 132-133).

Video surveillance placed Tolbert at the Point Baker Tom Thumb at 2:56 p.m. (RTv8 44). Cell phone records placed both Hobart and Tolbert by the Point Baker Tom Thumb at 3:00 p.m. (RTv16 212-213). Point Baker is located between the Winn Dixie where Hobart admitted to meeting Hamm and Tolbert and Jesse Allen Road, the road where their bodies were found. The records also placed Hobart at Jesse Allen Road at 3:25 p.m. (RTv16 214). A woman and two men in a gold SUV were seen alive on Jesse Allen Road at around 3:30 p.m. (RTv15 54-56).

At 4:30 p.m. that same day, Kenny Owens, who was on his way home, found Hamm and Tolbert's bodies in the bushes of Jesse Allen Road (RTv15 59-60). Later, Hamm's gold SUV was found at the Winn-Dixie parking lot on Dogwood Drive near Saratoga Road (RTv16 257-259). Surveillance video taken from the Winn-Dixie lot showed the SUV being parked and an individual emerging from the vicinity of the vehicle and walking down Saratoga Road (RTv16 253-260). At that time, Hobart lived a quarter of a mile down Saratoga (RTv16 257).

Hamm died of a gunshot wound to the back of the head.

Tolbert suffered two gunshot wounds: one that went through her hand and into her ear and one that only went through her ear area (RTv17 372-376). The firearm identified to be the firearm used in the crime was Harold Hobart's 9mm pistol (RTv18 447).

Despite the fact that the 9mm had been handled by Harold, Harold's mother, Harold's nephews, and Harold's friend, only Hobart's DNA was identified to be the major contributor from the firearm's grip and trigger (RTv17 314-315, RTv18 463). A foreign partial DNA profile found on Tolbert's left arm matched Hobart's DNA profile (RTv18 462). Further, while Tolbert and Hamm could be excluded as being contributors of DNA to the hair strand found over the blood trail in the woods by Hamm's body, Hobart could not be excluded (RTv18 492).

During his interview, Hobart denied involvement in the crime. However, after being confronted with the evidence in law enforcement's possession, he posited, "Well I'm not going to say anything to incriminate myself, you know...I will say no. It was not, you know, it was not in cold blood." (RTv16 187). While in jail, however, his story changed. As he was being held for this crime, Hobart told Stev Vanaxelson that he drove with Tolbert and Hamm to a secluded area in order to shoot up pills (RTv17 401-402). He and Hamm got into an argument about Hamm owing Harold Hobart money (RTv17 401-402). They started fist fighting when Hamm got a pipe from his truck and struck Hobart (RTv17

401-402). Hobart drew his pistol and shot Hamm twice in the chest (RTv17 401-402). He shot Tolbert because he was "all in and had to" (RTv17 402). He drove the truck back himself (RTv17 402).

Several days later, Hobart gave a different account of the murder to Vonaxelson (RTv17 402). At that point, Hobart told Vonaxelson that he was "bullshitting [him]" previously and then admitted that he committed the murders because he was "dope sick and he needed to come up" (RTv17 403). He said he shot Hamm with a 9mm (RTv17 403). This evidence was certainly sufficient to establish the first and third element of the first degree murder charge, i.e. that Hamm was dead and that Hobart was the person that actually killed Robert Hamm.

Moreover, the circumstances surrounding the murder of Robert Hamm was sufficient to establish Hobart's intent when he killed Hamm under both theories advanced by the State - Hobart committed the murders during the course of a robbery (felony murder) and with premeditated design. The evidence showed that Hobart was "dope sick" and knew that Hamm and Tolbert would be in possession of Oxycodone pills available for sale, thus he arranged a meet with them. Despite the fact that Hamm was never a bully to Hobart (RTv16 151), Hobart brought a gun to the meet.

Hamm, Tolbert, and Hobart were observed at the side of Jesse Allen Road working on Hamm's SUV which seemed to be broken

down at 3:30 p.m.. Other than the appearance of car trouble, the witness did not observe any signs of distress. With no evidence of provocation, Hobart shot Hamm in the back of the head. The object of his addiction, the Oxycodone, disappeared with Hobart when he left the scene after dragging Tolbert's body into the bushes. Hobart admitted to Vonaxelson that he killed Hamm and Tolbert with a 9mm firearm because he was "dope sick" and "needed to come up".

In sum, the State submitted sufficient evidence from which Hobart's intent may be inferred. Specifically, the State showed that Hobart procured a firearm in advance of the meet. Hobart, Hamm and Tolbert arrived to a secluded location where, with no evidence of provocation, Hobart shot Hamm execution style - once in the back of the head.³ This evidence is sufficient to establish that Hobart arrived to the meet fully intending to rob Hamm of Oxycodone and kill him.

Notwithstanding the evidence, Hobart contends that the trial court erred in denying his motion for a judgment of acquittal where the State failed to refute his reasonable hypothesis of innocence that "Hobart shot Hamm reflexively during a physical fight and that if he took anything, he did so

³ These facts are especially probative of Hobart's intent where they have previously been considered by this Court sufficient to sustain a finding that such a murder was committed in a cold, calculated and premeditated manner. Eutzy v. State, 458 So.2d 755 (Fla. 1984).

as an afterthought" (IB 32). However, the State presented sufficient evidence to refute this reasonable hypothesis of innocence.

Recall, in his initial confession to Vonaxelson, Hobart contended that he shot Hamm during a physical altercation over money Hamm owed Hobart's brother, Harold Hobart. (RTv17 401-402). According to Hobart, Hamm got a pipe from his truck and struck him (RTv17 401-402). In response, Hobart drew his pistol and shot Hamm twice in the chest (RTv17 401-402).

As observed by this Court, "[t]he state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events". Orme v. State, 677 So. 2d 258, 262 (Fla. 1996). At bar, the State presented sufficient evidence to refute Hobart's theory of events. First, the State presented evidence that, contrary to Hobart's theory, Hamm did not owe Harold Hobart money (RTv17 328-329). Further, Hamm did not have two gunshot wounds to the chest, but one wound in the back of his head (RTv17 372). There were no signs of a struggle on either Hamm's body or Tolbert's body, although Tolbert did have injuries consistent with being dragged perimortem (RTv 382).

Inasmuch as Hobart tried to suggest at trial, contrary to his statement to Vonaxelson, that Hamm was shot in the back of

the head during a hand to hand altercation as Hamm turned his head after trying to swing at Hobart, again, the evidence refuted such a theory (RTv17 386). Indeed, the medical examiner testified on re-direct that the lack of gunpowder on the gunshot wound suggested that Hamm was probably shot at a distance (RTv17). Based upon this evidence, the jury reasonably could have concluded that Hobart aimed and pulled the trigger from a distance when he shot a fleeing Hamm in the back of the head.

Although a pipe was found, it was not found on the ground by Hamm's body but in Hamm's SUV (RTv18 429). This fact supports the inference that, contrary to Hobart's version of the events, Hamm did not strike Hobart with a pipe as the pipe found was nowhere near Hamm's body. Finally, the State submitted Hobart's subsequent admission to Vonaxelson that he killed Hamm and Tolbert because he was "dope sick and he needed to come up" (RTv17 403). The State's evidence sufficiently refuted Hobart's hypothesis of innocence that that he shot Hamm in the midst of a fist fight and any intent to steal arose after the fact. Accordingly, the case was properly submitted to the jury.

In an attempt to dismantle the State's evidence proving his guilt, Hobart argues that certain facts, in and of themselves, do not dictate guilt. For example, Hobart questions the probative value of the fact that he brought a gun to the meet (IB 34) as well as the probative value of the fact that the

money and Oxycodone went missing (IB 37). However, guilt is not determined by a consideration of each fact in a vacuum. Instead, the jury must consider ALL circumstances surrounding the murders of Hamm and Tolbert.

At bar, the State provided competent evidence to sustain the first degree murder conviction as well as sufficient evidence to refute Hobart's hypothesis of innocence as to his intent, i.e. the proposition that he shot Hamm after Hamm struck him with a pipe during a fight over money. Accordingly, there was no error in the trial court's decision to submit the case to the jury where the only real issue of contention at trial was Hobart's intent. See Asay v. State, 580 So.2d 610, 612 (Fla. 1991) ("Whether a premeditated design to kill was formed prior to a killing is a question of fact for the jury that may be established by circumstantial evidence.").

Finally, even assuming that the trial court erred in denying Hobart's motion for a judgment of acquittal as to premeditation, reversal is not warranted. At bar, Hobart was charged with committing the murders under either a premeditated design or during the commission of a robbery (RRv1 15). The jury returned a general guilty verdict. The law is clear that "[w]hile a general guilty verdict must be set aside where the general verdict may have rested on...a legally inadequate theory, reversal is not warranted...when there was an alternative theory

of guilt for which the evidence was sufficient.” Mungin v. State, 689 So.2d 1026, 1030 (Fla. 1995). Should this determine that the evidence as described above and in the statement of facts was not sufficient to establish premeditation, it is certainly sufficient to establish that the murder was committed in the course of a robbery.

ISSUE II

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN
HOBART’S FIRST DEGREE MURDER CONVICTIONS FOR
BOTH THE MURDERS OF ROBERT HAMM AND TRACIE
TOLBERT

Although Hobart has not raised the issue of the sufficiency of evidence to sustain his convictions, Appellee will address this issue as this Court is required to conduct an independent review to determine whether sufficient evidence exists to support the conviction. See Fla. R.App. P. 9.142(a)(6); Phillips v. State, 39 So.3d 296, 308 (Fla.), cert. denied, --- U.S. ----, 131 S.Ct. 520, 178 L.Ed.2d 384 (2010). The evidence in a capital case is judged to be sufficient when it is both competent and substantial. See Phillips, 39 So.3d at 308. This Court must “view the evidence in the light most favorable to the State to determine whether ‘a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.’” Rodgers v. State, 948 So.2d 655, 674 (Fla. 2006) (citing Bradley v. State, 787 So.2d 732, 738 (Fla. 2001)).

In this case, Hobart was charged with, and the jury was instructed on, both the first-degree premeditated murder and first-degree felony murder of Robert Hamm and Tracie Tolbert. The jury returned a general verdict of guilty as to both counts. As discussed above, “[a] general guilty verdict rendered by a jury instructed on both first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation.” Crain v. State, 894 So.2d 59, 73 (Fla. 2004).

Significant evidence was presented in support of the convictions for both Hamm and Tolbert’s murder. With regard to Hobart’s conviction for the murder of Robert Hamm, Appellee relies on the facts featured in the statement of facts and issue one of the instant brief in support of its position that a rational trier of fact could have found the elements of first-degree murder on both the theories of premeditated murder and felony murder beyond a reasonable doubt. See Rodgers, 948 So.2d at 674.

Turning to Hobart’s conviction for the murder of Tracie Tolbert, again, significant evidence was presented to sustain his convictions on both theories advanced by the State. The State submitted evidence that per his own admission, Hobart was addicted to Oxycodone pills. As a result of his addiction, he needed Oxycodone pills on a daily basis. On the day of the

murders, Hobart arranged to meet Hamm and Tolbert to purchase Oxycodone pills as Tolbert "said she was going to have some to get rid of" (RTv16 132).

Although Hamm was never violent with Hobart, Hobart armed himself with a 9mm pistol before arriving to the meet. Hobart, Hamm and Tolbert went to a secluded wooded area on Jesse Allen Road. Although Hobart claimed that he and Hamm got into a physical altercation which led to the shooting of Hamm, the State refuted this contention with physical evidence as well as Hobart's subsequent admission that he killed Tolbert and Hamm because he was "dope sick and he needed to come up" (RTv17 403).

Further bolstering its case that Hobart had a fully formed conscious purpose to kill when he shot Tolbert, the State presented evidence that Tolbert was shot at close range while seated in the driver's seat of the Ford Explorer. One of the gunshot wounds went through the webbing of her hand before entering her head. This type of wound suggests that Tolbert saw Hobart coming with the gun and took the defensive posture of attempting to shield her head prior to being shot. This scenario is consistent with a portion of Hobart's initial admission to Vonaxelson that he killed Tolbert after killing Hamm because "he was all in [and]..had to"(RTv17 402), again, conceding premeditation. Finally, the State presented evidence that although Tolbert, by all accounts, was in possession of

Lortab and Xanax pills in addition to Oxycodone pills and a large amount of cash, the only items recovered from Tolbert's purse was the pills that Hobart was not addicted to: Lortab and Xanax. The Oxycodone and money were never recovered.

As the jury could have found the elements of first-degree murder on both the theories of premeditated murder and felony murder beyond a reasonable doubt based on these facts, substantial evidence was presented to support Hobart's convictions.

ISSUE III

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON AND FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF TRACY TOLBERT WAS COMMITTED DURING A ROBBERY (RESTATED)

Next, Hobart argues that the trial court erred in instructing the jury on the felony murder/robbery aggravation and in finding same as for the murder of Tracie Tolbert. According to Hobart, "the circumstantial evidence did not prove a robbery was committed because it was plausible that the murders were triggered by a physical fight between Hobart and Hamm and that any pills Hobart took were taken as an 'afterthought' following the killings" (IB 40). He suggests that absent the felony murder aggravation, the jury may not have recommended death. Again, Hobart's position is wholly without merit as the evidence presented at trial was sufficient for the provision of the

instruction as well as the finding.

A court may give a jury instruction on aggravators if there is credible and competent evidence to support it. Hunter v. State, 660 So.2d 244, 252 (Fla. 1995); Welch v. State, 992 So.2d 206, 215-216 (Fla. 2008). Whether an aggravator exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So.2d 148, 160 (Fla. 1998), reiterated the standard of review, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the court's job. Rather, our task on appeal is to review the record to determine whether the court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So.2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997); see also Boyd v. State, 910 So.2d 167, 191 (Fla. 2005); Gore v. State, 784 So.2d 418, 432 (Fla. 2001).

A court may give a jury instruction on aggravators if there is credible and competent evidence to support it. Hunter v. State, 660 So.2d 244, 252 (Fla. 1995); Welch v. State, 992 So.2d 206, 215-216 (Fla. 2008). It is not error for a court to give a proper instruction on the aggravator even if it could not have

existed as a matter of law. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993) (trial court instructed on HAC, but later found it unproved). Simply because the State does not prove an aggravating factor does not mean that there was insufficient evidence of the factor to allow a jury to consider it.

The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know. The judge should not in any manner inject his preliminary views of the proper sentence into the jurors' deliberations, for after the jury has rendered its advisory sentence the judge has the affirmative duty to decide the sentence in the context of his exposure to the law and his practical experience. As we acknowledged in Dixon, "to a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality" can serve as a buffer where the jury allows emotion to override the duty of a deliberate determination.

Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976); Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bowden v. State, 588 So.2d 225, 231 (Fla. 1991), cert. denied, 503 U.S. 975 (1992) (where evidence of robbery presented, court must instruct

on the relevant aggravator even if the court later finds it unproved).

In the case subjudice, evidence of robbery was presented by the State so as to require the trial court's instruction on the aggravator that the murder was committed during that robbery. As explained above, Hobart, a self-admitted Oxycodone addict confessed he was "dope sick and needed to come up" (RTv17 403) to explain why he killed Tolbert and Hamm. Per his own admission, he was well-aware that Hamm and Tolbert, a couple from whom he routinely purchased pills, would be obtaining pills on the morning of September 22, 2010 so he arranged to meet them. Prior to that meeting, however, Hobart armed himself with his brother's 9mm pistol despite the fact that Hamm was never violent to Hobart.

As reported by Hobart and supported by cell phone records, he, Hamm and Tolbert went to Jesse Allen Road to shoot up pills. Hobart, however, had other plans in mind. Hobart killed both Hamm and Tolbert. He shot Hamm in the back of the head in the woods, leaving his hair caught in a spider web by the body. Hobart shot Tolbert twice on the left side of the face as she sat in her vehicle. Although by all accounts, Tolbert was seen in possession of Lortabs, Xanax, Oxycodone, and a large amount of money but the only items found in Tolbert's possession after her death were Lortabs, Xanax, and Soma. The Oxycodone pills

and the money were never recovered. This evidence was certainly sufficient to demonstrate that the murder was committed during the course of a robbery. Accordingly, there was no error in the trial court's instruction to the jury that they consider the aggravating circumstance that the murder occurred during the commission of a robbery.

There was also no error in the trial court's finding that Tracie Tolbert's murder was committed during the commission of a robbery. In sentencing Hobart to death, the trial court explained:

The second aggravating circumstance offered by the state is that the capitol felony was committed while the defendant was engaged in the commission of a robbery. The defendant admitted during an interview with law enforcement that he was addicted to Roxicodone, and he knew the victims were going to have Roxicodone to sell on the day of the murders. He also acknowledged that he planned to meet with them once they had actual possession of the pills. Phone records show that after Tracie Tolbert filled a prescription for 90 Roxicodone pills at a pharmacy in Escambia County, several calls were made between the victim's phone and the defendant's phone that same day. No money and no Roxicodone was found on the victims anywhere inside the SUV or inside Tracie Tolbert's purse which was located inside the SUV. At the request of the defense, the court gave the following instruction to the jury during the guilt phase of the trial. "The taking of property after a murder where the motive for the murder was not the taking of the property, is not robbery." Where an after-thought argument is raised, the defendant's theory

is carefully analyzed in light of the entire circumstances of the incident. If there is competent, substantial evidence to uphold the robbery conviction and no other motive for the murder appears from the record, the robbery conviction will be upheld. Conversely, in those cases where the record discloses that in committing the murder, the defendant was apparently motivated by some reason other than a desire to obtain the stolen valuable, a conviction for robbery or the robbery aggravator will not be upheld. Steven Von Axelson testified that the defendant first told him he had gone to a secluded area with the victims where he and Robert Hamm argued about \$2000 that Hamm supposedly owed to the defendant's brother. They got into a fight. Hamm removed the metal pipe from the SUV and struck the defendant two or three times with it. The defendant said he then shot Hamm twice in the chest. However, this version is inconsistent with the other evidence and testimony in the case. For example, Robert Hamm was not shot in the chest two times. He was shot once in the back of the head. No evidence was presented that a metal pipe was found at the murder scene or inside the SUV. No evidence was presented that the defendant had any injuries consistent with having been struck by an object of any kind, and finally the defendant's brother testified that neither of the victims ever owed him anything, and they did not owe him \$2000 on September the 22nd, 2010. Mr. Von Axelson testified that the defendant later recanted this story and said the real reason he shot the victims was because he was dope sick and had to come up. Based on the entire circumstances of the incident, the court finds that no other motive for the murder appears from the record other than robbery. The defendant was addicted to Roxicodone. The victims were in possession of 90 Roxicodone pills within hours of the murder. No Roxicodone pills were found on the victims or in their SUV after the

murders. The defendant told Steven Von Axelson he killed the victims because he was dope sick and had to come up. This indicates that the motive for the murders was dope...In this case, the instant case, no Roxicodone was left at the scene of the crime or in the victim's SUV. Therefore the court finds that this aggravator has been proven beyond a reasonable doubt and is entitled to great weight.

(RTv23 10-13)

As explained above and in the statement of facts featured in this pleading, the record is replete with competent, substantial evidence to support these findings. As the trial court's findings are supported by the record, Hobart is not entitled to relief.

Moreover, even if this Court struck the aggravating circumstance that Tolbert's murder was committed during a robbery, the harmless error standard test is applied to determine whether there is a reasonable possibility that the error affected the sentence. Douglas v. State, 878 So.2d 1246, 1268 (Fla. 2004) ("Striking [an] aggravator necessitates a harmless error analysis."). In addition to finding that the capital felony was committed while Hobart was engaged in the commission of a robbery, the trial court also determined that Hobart was previously convicted of another capital felony (the murder of Robert Hamm) or of a felony involving the use or threat of violence to the person (a 1989 aggravated battery

conviction) (RRv7 1229).

Appellee acknowledges that generally a death sentence is not proportionate when supported by a single aggravator and the mitigation is substantial. Almeida v. State, 748 So.2d 922, 933 (Fla. 1999); Jones v. State, 705 So.2d 1364, 1367 (Fla.1998) (noting that "death is not indicated in a single-aggravator case where there is substantial mitigation"). On the other hand, when the mitigation is not substantial, this Court has found death sentences to be proportional even when there is but a single aggravator. Almeida, 748 So.2d at 933 (noting that "this Court has affirmed the death penalty in single-aggravator cases where a prior murder was involved"); Ferrell v. State, 680 So.2d 390 (Fla. 1996) (affirming death sentence where sole aggravator was prior second-degree murder); Duncan v. State, 619 So.2d 279 (Fla. 1993) (affirming death sentence where sole aggravator was prior second-degree murder); LeDuc v. State, 365 So.2d 149, 152 (Fla. 1978).

Should this Court decide to strike the aggravating circumstance that the capital felony was committed while the defendant was engaged in the commission of a robbery, the sentence would still be proper. At bar, the trial court determined that the majority of the 17 non-statutory mitigators were considered to be of slight weight. On the other hand, the remaining aggravator - prior violent felony conviction - was

given great weight (RRv7 1229). This Court has previously stated that this aggravator is one of the "most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002). The trial court had two prior violent felonies to choose from in establishing this aggravator - Hobart's 1989 aggravated battery conviction and Robert Hamm's contemporaneous murder. This Court has specifically found no abuse of discretion in a trial court's assignment of great weight to the prior violent felony aggravator when it is based on a contemporaneous murder. See, e.g., Winkles v. State, 894 So.2d 842, 846 (Fla. 2005). Accordingly, should the felony murder/robbery aggravator be stricken, the death sentence remains proper as Hobart's mitigation was minimal. Butler v. State, 842 So.2d 817, 832-34 (Fla. 2003); Blackwood v. State, 777 So.2d 399 (Fla. 2000).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN REJECTING THE MITIGATING CIRCUMSTANCE THAT HOBART COMMITTED THE MURDER WHILE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE (RESTATED)

Next, Hobart contends that the trial court committed error in finding that his statutory mitigating circumstance - that the crime was committed while under the influence of extreme mental or emotional disturbance - was not established by the penalty phase evidence and rejecting it accordingly. Hobart further

contends that the mitigating circumstance was indeed established by his expert, Dr. Waldman and the trial court abused its discretion in finding the State's expert, Dr. Turner's testimony more credible. Again, Hobart's position is without merit.

Trial courts must observe the following standards when evaluating mitigating circumstances during capital sentencing:

A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection. Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case. Finally, even where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case.

Ault v. State, 53 So.2d 175, 186-187 (Fla. 2010) (citing Coday v. State, 946 So.2d 988, 1003 (Fla. 2006)).

In its written sentencing order, the trial court must expressly evaluate each statutory and nonstatutory mitigating circumstance proposed by the defendant. Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995). Where it is clear that the trial court has considered all evidence presented in support of a mitigating factor, the court's decision as to whether that circumstance is established will be reviewed only for abuse of discretion. Harris v. State, 843 So.2d 856, 868 (Fla. 2003).

The trial court's findings will be upheld where there is competent, substantial evidence in the record to support each finding. Ault v. State, 53 So.3d 175, 186-87 (Fla. 2010) (citing Lebron v. State, 982 So.2d 649, 660 (Fla. 2008)).

At bar, the trial court's written sentencing order explained in depth its reasoning for rejecting the statutory mitigator offered by Hobart:

The statutory mitigator offered by the defense is that the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance...In support of this mitigator, the defense presented the testimony of Dr. Alan Waldman, a forensic neuropsychiatrist, and Dr. Kevin Groom, a clinical psychologist. Dr. Waldman testified that the defendant has memory deficits and frontal lobe deficits. He ordered an MRI and a PET scan which he asked Dr. Groom to evaluate. According to Dr. Groom, no acute abnormality was detected on the MRI and the PET scan was normal. Dr. Groom admitted that he did not know the cause of the defendant's deficits or how his deficits caused him to commit the murders. Dr. Waldman admitted that he did not know the details of the murders or what the defendant was doing on the day of the murders or the defendant's actions after the murders. He also acknowledged that he did not know the manner in which the defendant disposed of the bodies or how he parked the SUV near his home and walked away.

There was no testimony from anyone including the defendant's mother and brother as to his mental or emotional condition on the day of the murders. Nobody said he appeared to be mentally or emotionally disturbed. In spite of this lack of testimony, Dr. Waldman

offered his opinion that the defendant was under the influence of extreme mental or emotional disturbance when he committed these murders. A trial court may reject a mitigator if the defendant fails to prove the mitigating circumstance or if the record contains competent, substantial evidence supporting that rejection [citation omitted]. "Even expert opinion evidence may be rejected if the evidence cannot be reconciled with other evidence in the case." [citation omitted]. A mitigator may also be rejected if the testimony supporting it is not substantiated by actions of the defendant or if the testimony supporting it conflicts with other evidence [citation omitted]. Dr. Brett Turner, a neuropsychologist testified in his opinion the defendant was not under the influence of extreme mental or emotional disturbance when he committed the murders. Dr. Turner reviewed the reports of Dr. Waldman and Dr. Groom as well as their depositions. He was also in the courtroom and heard the testimony of the defendant's family and friends. Unlike Dr. Waldman, Dr. Turner said he was familiar with the facts of the case. The court finds the opinion of Dr. Turner to be more credible than the opinions of Dr. Waldman and Dr. Groom. The defendant planned the meeting with the victims, there were several phone calls back and forth between the defendant and the victims. After killing both victims, he dragged their bodies from the road and placed them in the woods. He then took their SUV, drove it to a location near his home, parked it and walked away. The court finds that the mitigating circumstance of extreme mental or emotional disturbance has not been established by the evidence. Therefore it is rejected.

(RTv7 1233-1235)

The trial court's findings are supported by competent,

substantial evidence. During the penalty phase, Dr. Kevin Groom, a licensed psychologist, testified that he administered a number of neuropsychological tests on Hobart, he only showed "some" deficits (RTv20 131-135). Indeed, Hobart scored average on several of the tests (RTv20 144). Hobart's MRI showed no intracranial abnormality (RTv20 160) and his PET scan was normal (RTv20 161). Dr. Groom conceded that he was unaware of what effect Hobart's cognitive deficits had on the double homicide that he committed (RTv20 162).

Hobart also presented the testimony of Dr. Alan Waldman (RTv21 171). Contrary to Hobart's expert Dr. Groom's testimony that Hobart's MRI showed no intracranial abnormality, Dr. Waldman opined that the MRI showed death of brain tissue (RTv21 181). Dr. Waldman went on to testify that in his opinion Hobart was suffering from an extreme emotional difficulty, i.e. he works on impulses because he has a broken brain (RTv21 187). The fact that he did not know Hobart's activities prior to the crime, during the crime or after the crime did not affect his opinion (RTv21 192-194). Such testimony flew in the face of the facts elicited at trial clearly showing non-impulsive behavior by Hobart such as bringing a gun to the meet with Tolbert and Hamm, killing both Tolbert and Hamm, hiding the bodies, taking the Oxycodone and money, and abandoning the SUV within walking distance of his house.

In rebuttal, the State presented the testimony of neuropsychologist Dr. Brett Turner (RTv21 217). Dr. Turner reviewed the arrest report, probable cause affidavit, Dr Groom's report, Dr. Waldman's deposition and the raw data from all testing (RTv21 219). Additionally, Turner met with Hobart for mental status examination and an interview (RTv21 220). Hobart was able to satisfactorily complete the mental status examination (RTv21 221).

During the interview, Hobart indicated that he liked reading, especially crime stories, and playing card games (RTv21 222). The fact that he plays Poker was especially interesting as it uses frontal lobe functions like forward thinking, bluffing, etc. (RTv21 222). In fact, Hobart reported that the other inmates stopped playing him because he would always win (RTv21 222).

Based on his examination of Hobart's documentation and Hobart, himself, Turner opined that if he has a traumatic brain injury, it is very minimal (RTv21 223). This opinion is supported by the fact that even Dr. Groom's reported insufficient evidence of frontal lobe syndrome (RTv21 223). Indeed, only three of the battery of examinations administered by Groom indicated impairment (RTv21 238).

Dr. Turner did not believe that Hobart was suffering from an extreme mental disturbance at the time of the crimes (RTv21

226). His opinion was influenced by the facts of the case which suggest forward thinking and some planning - all frontal lobe functions (RTv21 227). Turner further opined that although drugs may have affected his reasoning on day of murder, his reasoning was not impaired (RTv21 227). When people are addicted to opiates, their brain functions more normally when they are taking the drugs (RTv21 227). Finally, Turner testified that Hobart understood the difference between right and wrong on day of murder as well as understood consequences of his actions that day (RTv21 228).

Notwithstanding this evidence, Hobart argues the trial court abused its discretion because, in his view, Dr. Waldman's testimony was more credible. In support of this argument, Hobart points out that Dr. Waldman's testimony was based on the testing administered by him, while Dr. Turner "based his conclusion on a one-hour meeting with Hobart, which included only a partial mini mental exam" (IB 44-45). Such an argument is wholly inaccurate as Dr. Turner testified that in addition to other documentation, he reviewed the raw data from Hobart's battery of tests to formulate his opinion (RTv21 219).

Hobart then challenges the trial court's finding that Dr. Groom found no abnormality on Hobart's MRI and PET scan (IB 46). Hobart attacks his own expert's testimony as hearsay and of little value. However, the weight of such evidence is entirely

within the trial court's discretion. Easkold v. Rhodes, 614 So.2d 495, 498 (Fla. 1993) ("Moreover, the finder of fact is free to determine the reliability and credibility of expert opinions and, if conflicting, to weigh them as the finder sees fit.").

Hobart further argues that the trial court erroneously considered Dr. Groom's testimony that he did not know the cause of Hobart's brain damage. Such a consideration, Hobart, continues was improper as causation is irrelevant. Although the trial court did indeed note that Dr. Groom did not know the cause of Hobart's alleged brain damage, Hobart's argument ignores the rest of the trial court's reasoning. Specifically, Hobart ignores the trial court's continued explanation that Dr. Groom admitted that he did not know how Hobart's deficits caused him to commit the murders (RTv21 1223). This factor is clearly relevant to the determination of whether the mitigator was applicable.

Hobart next contends that the trial court erred in considering the lack of evidence of Hobart's demeanor on the day of the murder as a factor in rejecting the mitigator that he was extremely emotionally disturbed at the time of the murders (IB 47). Citing White v. State, 616 So.2d 21 (Fla. 1993), Hobart contends that such a lack of evidence has no bearing to the consideration as to whether an individual is under the influence

of an extreme mental disturbance. However, Hobart's reliance on White is unavailing.

In White, White's expert offered that White murdered his ex-girlfriend while under the influence of extreme internal distress because of his emotional problems, drug addiction, and his obsession with her. White, 616 So.2d at 22. However, testimony was admitted that White did not appear to be under the influence of alcohol or drugs immediately before the murder and seemed to be in a very good mood afterwards. Notwithstanding this evidence, the trial court found that "[t]he capital crime for which the Defendant is to be sentenced was committed while he was high on cocaine and while he (questionably) was under the influence of extreme mental or emotional disturbance" was a mitigating circumstance. White, 616 So.2d at 23. Obviously, this finding was not challenged by White on appeal. Accordingly, there was no judgment as to the sufficiency of evidence, or lack thereof, to support the finding.

On the other hand, this Court's decision in Hoskins v. State, 965 So.2d 1 (Fla. 2007) is instructive. In Hoskins, the trial court rejected the "under the influence of extreme mental or emotional disturbance" mitigator. In affirming the trial court's rejection, this Court noted that there was no testimony that "Hoskins was under the influence of **any** mental or emotional disturbance **at the time of the murder**". Hoskins, 965 So.2d at

17. As in Hoskins, there was no evidence introduced by an expert or eyewitness as to Hobart's behavior at the time of the murder. As this factor was clearly relevant to the trial court's application of the mitigator, no error occurred.

Finally, Hobart challenges the trial court's rejection of Dr. Waldman's testimony based on the fact that he was unaware of Hobart's actions before and after the murder. Although Hobart concedes that this Court upholds the rejection of the mitigator where the crime involves an element of planning (IB 47), he argues that "making phone calls to buy drugs cannot be characterized as a well-thought out plan" (IB 47). Such a cursory summary of Hobart's actions does not adequately describe the circumstances of the double homicide he committed. Indeed, Hobart knew he was addicted to Oxycodone and needed to come up as he was "dope sick". Knowing that the victims would be in possession of a refill of Oxycodone, he arranged a meet with the duo to which he brought his brother's gun. He drove with the victims to a secluded wooded area where he shot Hamm in the back of the head and shot Tolbert twice point black on the side of her head. He dragged Tolbert's body to some bushes off the side of the road and drove Hamm's SUV back to town where he left it at the Winn-Dixie by his home. He did not take the Lortabs or the Xanax in Tolbert's purse - he only took his drug of choice - Oxycodone - and the cash. These facts clearly reflect at least

some "element of planning" undercutting Dr. Waldman's opinion that Hobart suffered from frontal lobe damage. Ault v. State, 53 So.3d 175, 189 (Fla. 2010) (upholding the trial court's rejection of the mitigator that Ault was under the influence of an extreme mental or emotional disturbance at the time of the offenses where Ault planned the abduction); Philmore v. State, 820 So.2d 919, 936 (Fla. 2002); Hoskins, 965 So.2d at 17 (upholding the trial court's rejection of same factor based in part on the fact that the crime involved an element of planning).

The totality of Hobart's challenges to the trial court's findings center upon the belief that because his expert, Dr. Waldman testified that he was under the influence of an extreme mental disturbance at the time of the crime, than it is so. However, even assuming that the State had not presented an expert to rebut this opinion, the trial court was not bound to credit Dr. Waldman's opinion. Philmore v. State, 820 So.2d 919 (Fla. 2002) ("[E]xpert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case.")

A review of the record at bar reveals that it is replete with competent substantial evidence supporting the trial court's rejection of Hobart's mitigating circumstance that he was under

the influence of an extreme mental disturbance at the time of the murders. Accordingly, the trial court properly rejected the statutory mitigator.

Assuming arguendo that the trial court erred in determining that Hobart failed to establish that he committed the crimes while under the influence of an extreme mental disturbance, the error would be harmless. The trial court found two aggravators, one of which is considered the "most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002). Although the trial court rejected Hobart's statutory mitigator, it did find that 17 non-statutory mitigators had been established albeit of minimal weight. Therefore, even if Hobart's tenuous statutory mitigator had been considered, the mitigating evidence would still not have outweighed the aggravators. Accordingly, Hobart is not entitled to relief on this claim. See Singleton v. State, 783 So.2d 970, 977 (Fla. 2001) (holding that trial court's error in failing to address nonstatutory mitigation was harmless because the mitigators would not outweigh the aggravation in the case); see also Bates v. State, 750 So.2d 6 (Fla. 1999).

ISSUE V

THE DEATH SENTENCE IS PROPORTIONAL (RESTATED)

At bar, Hobart, an Oxycodone addict, arranged a buy with the two victims, Robert Hamm and Tracey Tolbert. Hobart arrived at the meeting with a gun and subsequently killed both of them: Hamm with a gunshot to the back of the head and Tolbert with two gunshots to the side of the head as she sat in the driver's side of Hamm's SUV. The trial court gave great weight to two aggravating circumstances: 1) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person and 2) The capital felony was committed while the defendant was engaged in the commission of a robbery. The trial court found 17 non-statutory mitigators and gave them varying degrees of weight, most of which were slight weight: 1) Parents had a dysfunctional marriage (slight weight) 2) Hobart suffered physical abuse (slight weight) 3) Hobart suffered from substance abuse dependency (moderate weight) 4) Hobart has a low IQ (moderate weight) 5) Hobart is a good roofer (slight weight) 6) Hobart did not receive encouragement from his father (slight weight) 7) Hobart has a close bond with his siblings (no weight) 8) Hobart was neglected by his custodial parents (slight weight) 9) Hobart exhibited good courtroom behavior during trial (slight weight) 10) Hobart is haunted by poor impulse control (no weight) 11)

Hobart is capable of strong, loving relationships (slight weight) 12) Hobart has a special bond with his children (slight weight) 13) When Hobart was not on drugs, he was a good son, brother, uncle, father, etc. (slight weight) 14) Hobart has a family that loves him very much (slight weight) 15) Hobart has a history of mild traumatic brain injury (slight weight) 16) Hobart has neuropsychological deficits (slight weight) 17) Hobart has brain damage (slight weight) (RTv23 17-20). In light of the strength of the aggravating circumstances compared to the mitigators provided, Appellee contends that the death sentence is proportional.

It is axiomatic that the death penalty is reserved for only the most aggravated and the least mitigated of first degree murders. Booker v. State, 773 So.2d 1079, 1092 (Fla. 2000); see also Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). This Court has stated: “[t]o determine whether death is a proportionate penalty, we consider the totality of the circumstances of the case and compare the case with other capital cases where a death sentence was imposed”. Pearce v. State, 880 So.2d 561, 577 (Fla. 2004); Boyd v. State, 910 So.2d 167, 193 (Fla. 2005); Fitzpatrick v. State, 900 So.2d 495, 527 (Fla. 2005). This Court’s function is not to re-weigh the factors, but to accept the jury’s recommendation and the judge’s weighing of the evidence. Bates v. State, 750

So.2d 6 (Fla. 1999); see also Ellerbee v. State, 87 So.3d 730 (Fla. 2012) (announcing Court will not disturb sentencing judge's determination as to the weight assigned to aggravators and mitigators where ruling is supported by competent, substantial evidence.).

The death sentence has been imposed in other cases that have had similar aggravators as well as similar mitigation as the present case. For instance, the death sentence was held to be proportionate in Lebron v. State, 982 So.2d 649 (Fla. 2008). Lebron was convicted of first degree murder and robbery of a firearm. The trial found two aggravators present 1) Lebron was previously convicted of a felony that involved the use or threat of violence and 2) Lebron committed the capital felony while he was engaged in the commission of a robbery. Lebron, 982 So.2d 666. The trial court also found seven non-statutory mitigators. Lebron, 982 So.2d at 667.

In upholding the sentence imposed as proportionate, this Court explained that although "neither the heinous, atrocious or cruel (HAC) nor the cold, calculated and premeditated aggravator was found, both the strength of the aggravation findings and the little value provided by the mitigation findings warrants a death sentence". Lebron, 982 So.2d at 668. The facts of this case warrant the same conclusion. Although the trial court did find 17 non-statutory mitigators, these mitigators were given at

most moderate weight. The two statutory aggravators, however, were afforded great weight. One of the statutory aggravators - prior violent conviction - is considered by this Court to be one of "the most weighty in Florida's sentencing calculus". Sireci v. Moore, 825 So.2d 882, 887 (Fla. 2002). As the mitigators here were, like in Lebron, given little weight, a death sentence is warranted.

In support of proportionality, Appellee also relies on Melton v. State, 638 So.2d 927 (Fla. 1994) (death sentence held proportionate for a murder committed during a robbery where the trial court found two aggravating factors - prior violent felony and committed for financial gain- and two nonstatutory mitigating factors); Freeman v. State, 563 So. 2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991) (death sentence held proportionate for a murder committed during a burglary where the trial court found two aggravating factors - prior violent felony and committed for financial gain/murder occurred while Freeman was committing a burglary - along with four nonstatutory mitigating factors); Miller v. State, 770 So.2d 1144 (Fla. 2000) (death sentence held proportionate for a murder committed during an attempted robbery where the trial court found two aggravating factors - prior violent felony and homicide was committed during an attempted robbery/for pecuniary gain and ten nonstatutory mitigating

factors including the mitigator that Miller had a frontal lobe defect that affected inhibition and the ability to control impulses).

The death sentence imposed upon Hobart is proportional.

ISSUE VI

FLORIDA'S CAPITAL SENTENCING IS CONSTITUTIONAL (RESTATED)

Finally, Hobart argues that the trial court erred in sentencing him to death where Florida's death penalty statute is unconstitutional as it is in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002) (IB 59). As Hobart's position has been consistently rejected by this Court, it is of no merit.

The constitutionality of a statute is a question of law subject to de novo review. See Crist v. Ervin, 56 So.3d 745, 747 (Fla. 2010). This Court has repeatedly held that Florida's capital sentencing scheme does not violate the United States Constitution under Ring v. Arizona. See, e.g., Abdool v. State, 53 So.3d 208, 228 (Fla. 2010) ("This Court has also rejected [the] argument that this Court should revisit its opinions in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), and King v. Moore, 831 So.2d 143 (Fla.2002), and find Florida's sentencing scheme unconstitutional.").

As this Court explained in State v. Steele, 921 So.2d 538, 545-47 (Fla. 2005):

... the standard jury instructions require the jury to determine whether one or more aggravating circumstances exists, and if so, to weigh any aggravators against any mitigating circumstances. See Fla. Std. Jury Instr. (Crim.) 7.11, at 132-33. The instructions also provide that the jury's advisory sentence need not be unanimous, that a majority vote is necessary for a death recommendation, and that a vote of six or more jurors is necessary for a life recommendation. See *id.* at 133.

Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist.

...

The requirement of a majority vote on each aggravator is also an unnecessary expansion of Ring. . . Even if Ring did apply in Florida—an issue we have yet to conclusively decide—we read it as requiring only that the jury make the finding of “an element of a greater offense.” Id. **That finding would be that at least one aggravator exists—not that a specific one does. But given the requirements of section 921.141 and the language of the standard jury instructions, such a finding already is implicit in a jury's recommendation of a sentence of death.** Our interpretation of Ring is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute. In Jones v. United States, 526 U.S. 227, 250-51, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the Court noted that in its decision in Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), in which it concluded that the Sixth Amendment does not require

explicit jury findings on aggravating circumstances, "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved."

Moreover, "[t]his Court has repeatedly held that Ring does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable." Hodges v. State, 55 So.3d 515, 540 (Fla.2010), cert. denied, --- U.S. ----, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011). A prior violent felony conviction includes a conviction for a contemporaneous felony. Frances v. State, 970 So.2d 806, 816 (Fla.2007) ("[T]he contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes" (quoting Pardo v. State, 563 So.2d 77, 80 (Fla.1990))). At bar, the jury unanimously convicted Hobart for the murder of Robert Hamm in addition to convicting him for the murder of Tracie Tolbert.

As Hobart's position on the constitutionality of Florida's capital sentencing statutes is patently without merit, it must be, again, rejected. This Court should affirm.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the convictions and death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email to: Nada M. Carey, Esq., Office of the Public Defender, 301 South Monroe Street, Suite 401, Tallahassee, FL 322301 at nada.carey@flpd2.com on December 16, 2013.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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