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IN THE SUPREME COURT OF FLORIDA

JOSEPH EDWARD JORDAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-2091

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

Contents

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

SUMMARY OF ARGUMENT 36

ARGUMENT I 37

THE STATE'S CLOSING ARGUMENT DOES NOT COMPEL A NEW GUILT OR PENALTY PHASE TRIAL 37

ARGUMENT II 64

THE TRIAL COURT DID NOT ERR IN FINDING THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE APPLIED WHEN APPELLANT'S UNLAWFUL ACTIONS DIRECTLY LED TO THE VICTIM'S AGONY AND DEATH 64

ARGUMENT III 78

THE COURT PROPERLY ADMITTED VICTIM IMPACT STATEMENTS OF EMILEE COPE, MAGDALENE COPE, AND LUCINDA JENKINS 78

ARGUMENT IV 84

THE TRIAL COURT PROPERLY FOUND THAT THE MITIGATING CIRCUMSTANCE THAT JORDAN'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED DID NOT APPLY. 84

ARGUMENT V 90

THE DEATH SENTENCE IS PROPORTIONATE WHEN

COMPARED WITH SIMILAR CASES 90

ARGUMENT VI 97

FLORIDA'S DEATH PENALTY SENTENCING SCHEME IS CONSTITUTIONAL UNDER *RING V. ARIZONA* 97

ARGUMENT VII 99

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION 99

CONCLUSION 100

CERTIFICATE OF SERVICE 101

CERTIFICATE OF COMPLIANCE 101

TABLE OF CITATIONS

Cases

Abdool v. State,
53 So. 3d 208 (Fla. 2010) 80, 96, 98

Aguirre-Jarquin v. State,
9 So. 3d 593 (Fla. 2009) 65

Allen v. State,
137 So. 3d 946 (Fla. 2013) .... passim

Almeida v. State,
748 So. 2d 922 (Fla. 1999) 76

Anderson v. State,
841 So. 2d 390 (Fla. 2003) 90

Ault v. State,
53 So. 3d 175 (Fla. 2010) 84

Bailey v. State,
998 So. 2d 545 (Fla. 2008) 54

Barnhill v. State,
834 So. 2d 836 (Fla. 2002) 67, 74

Belcher v. State,
961 So. 2d 239 (Fla. 2007) 80

Bell v. State,
108 So. 3d 639 (Fla. 2013) 45, 49

Bertolotti v. State,
476 So. 2d 130 (Fla. 1985) 60

Bigham v. State,
995 So. 2d 207 (Fla. 2008) 45, 64

Bonifay v. State,
680 So. 2d 413 (Fla. 1996) 80

Bottoson v. Moore,
833 So. 2d 693 (Fla. 2002) 98

Braddy v. State,
111 So. 3d 810 (Fla. 2012) 47, 63, 79

Bradley v. State,
787 So. 2d 732 (Fla. 2001) 100

Bright v. State,
90 So. 3d 249 (Fla. 2012) 37, 39

Brooks v. State,
762 So. 2d 879 (Fla. 2000) 41, 56, 58

Brooks v. State,
918 So. 2d 181 (Fla. 2005) 63

Brown v. State,
721 So. 2d 274 (Fla. 1998) 67

Brown v. State,
959 So. 2d 218 (Fla. 2007) 62

Bryant v. State,
901 So. 2d 810 (Fla. 2005) 99

Calhoun v. State,
38 Fla. L. Weekly S779 (Fla. Oct. 31, 2013) 91

Campbell v. State,
571 So. 2d 415 (Fla. 1990) 86

Card v. State,
803 So. 2d 613 (Fla. 2001) 42, 43

Chamberlain v. State,
881 So. 2d 1087 (Fla. 2004) 74

Chandler v. State,
702 So. 2d 186 (Fla. 1997) 42, 57

Chaudoin v. State,
362 So. 2d 398 (Fla. 2d DCA 1978)...74

Cook v. State,
542 So. 2d 964 (Fla. 1989) 87

Davis v. State,
136 So. 3d 1169 (Fla. 2014) 50

Dennis v. State,
817 So. 2d 741 (Fla. 2002) 85, 92

Deparvine v. State,
995 So. 2d 351 (Fla. 2008) 78, 79, 80

Dessaure v. State,
891 So. 2d 455 (Fla. 2004) 39, 59

Diaz v. State,
132 So. 3d 93 (Fla. 2013) 86

Douglas v. State,
878 So. 2d 1246 (Fla. 2004) 68, 85, 94

Eaton v. State,
438 So. 2d 822 (Fla. 1983) 61, 62

Evans v. State,
800 So. 2d 182 (Fla. 2001) 67

Fayson v. State,
698 So. 2d 825 (Fla. 1997) 61

Floyd v. State,
913 So. 2d 564 (Fla. 2005) 39, 90

Gonzalez v. State,
136 So. 3d 1125 (Fla. 2014) 41, 63

Gore v. State,
719 So. 2d 1197 (Fla. 1998) 56

Gosciminski v. State,
132 So. 3d 678 (Fla. 2013) 65

Green v. State,
975 So. 2d 1081 (Fla. 2008) 76

Gregory v. State,
118 So. 3d 770 (Fla. 2013) 100

Grossman v. State,
525 So. 2d 833 (Fla. 1988) 97

Guardado v. State,
965 So. 2d 108 (Fla. 2007) 64

Guzman v. State,
721 So. 2d 1155 (Fla. 1998) 72

Hall v. State,
87 So. 3d 667 (Fla. 2012) 99

Hamilton v. State,
875 So. 2d 586 (Fla. 2004) 99

Heath v. State,
648 So. 2d 660 (Fla. 1994) 93

Henyard v. State,
689 So. 2d 239 (Fla. 1996) 52, 59

Hernandez v. State,
4 So. 3d 642 (Fla. 2009) 68

Hildwin v. State,
84 So. 3d 180 (Fla. 2011) 57

Hodges v. State,
55 So. 3d 515 (Fla. 2010) 88

Hudson v. State,
992 So. 2d 96 (Fla. 2008) 68

Huggins v. State,
889 So. 2d 743 (Fla. 2004) 80

Jackson v. State,
127 So. 3d 447 (Fla. 2013) 82, 97

Jackson v. State,
522 So. 2d 802 (Fla. 1988) 59

Jackson v. State,
575 So. 2d 181 (Fla. 1991) 63

James v. State,
695 So. 2d 1229 (Fla. 1997) 68

Johnston v. State,
863 So. 2d 271 (Fla. 2003) 99

Jones v. State,
569 So. 2d 1234 (Fla. 1990) 45, 46

Jones v. State,
963 So. 2d 180 (Fla. 2007) 99

Jones v. State,
966 So. 2d 319 (Fla. 2007) 88

Kalisz v. State,
124 So. 3d 185(Fla. 2013) 78, 80, 95

Kearse v. State,
770 So. 2d 1119 (Fla. 2000) 92

Kight v. State,
512 So. 2d 922(Fla.1987) 87

King v. Moore,
831 So. 2d 143 (Fla. 2002) 98

Kocaker v. State,
119 So. 3d 1214 (Fla. 2013) 71

LaMarca v.State,
785 So. 2d 1209 (Fla. 2001) 88

Larkins v. State,
739 So. 2d 90 (Fla. 1999) 75

Lewis v. State,
711 So. 2d 205 (Fla. 3rd DCA 1998) 60

Maharaj v. State,
597 So. 2d 786 (Fla. 1992) 76

Mansfield v. State,
758 So. 2d 636 (Fla. 2000) 86

McCampbell v. State,
421 So. 2d 1072 (Fla. 1982) 46

McDonald v. State,
743 So. 2d 501 (Fla. 1999) 41, 42

Melton v. State,
949 So. 2d 994 (Fla. 2006) 51

Merck v. State,
975 So. 2d 1054 (Fla. 2007) .... passim

Miller v. State,
42 So. 3d 204 (Fla. 2010) 71, 98

Miranda v. Arizona,
384 U.S. 436 (1966) 16

Morton v. State,
789 So. 2d 324 (Fla. 2001) 75

Muhammad v. State,
782 So. 2d 343 (Fla. 2001) 64

Nibert v. State,
574 So. 2d 1059 (Fla. 1990) 86, 87, 88

Nixon v. State,
572 So. 2d 1336 (Fla. 1990) 37

Offord v. State,
959 So. 2d 187 (Fla. 2007) 91

Oyola v. State,
99 So. 3d 431 (Fla. 2012) 85, 87

Pagan v. State,
830 So. 2d 792 (Fla. 2002) 60

Patrick v. State,
104 So. 3d 1046 (Fla. 2012) .... passim

Paul v. State,
20 So. 3d 1005 (Fla. 4th DCA 2009) 50

Payne v. Tennessee,
501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991) 78, 81

Perez v. State,
919 So. 2d 347 (Fla. 2005) 77

Perry v. State,
522 So. 2d 817 (Fla. 1988) 68

Poole v. State,
997 So. 2d 382 (Fla. 2008) 45, 50

Pope v. State,
441 So. 2d 1073 (Fla. 1983) 46

Porter v. State,
564 So. 2d 1060 (Fla. 1990) 91

Power v. State,
886 So. 2d 952 (Fla. 2004) 42

Profitt v. State,
978 So. 2d 228 (Fla. 4th DCA 2008) 40

Redish v. State,
525 So. 2d 928 (Fla. 1st DCA 1988) 56

Reynolds v. State,
934 So. 2d 1128 (Fla. 2006) 84

Rimmer v. State,
825 So. 2d 304 (Fla. 2002) 76

Ring v. Arizona,
536 U.S. 584, 122 S. Ct. 2428 , 153 L. Ed. 2d 556 (2002) 36

Robards v. State,
112 So. 3d 1256 (Fla. 2013) 41

Robinson v. State,
520 So. 2d 1 (Fla. 1988) 46

Robinson v. State,
684 So. 2d 175 (Fla. 1996) 88

Robinson v. State,
865 So. 2d 1259 (Fla. 2004) 99

Rodgers v. State,
948 So. 2d 655 (Fla. 2006) 91, 92

Rodriguez v. State,
919 So. 2d 1252 (Fla. 2005) 50

Rogers v. State,
511 So. 2d 526 (Fla. 1987) , ...77

Rogers v. State,
783 So. 2d 980 (Fla. 2001) 67

Rogers v. State,
957 So. 2d 538 (Fla. 2007) 55

Ruiz v. State,
743 So. 2d 1 (Fla. 1999) 57

Russ v. State,
73 So. 3d 178 (Fla. 2011) 68, 85

Salazar v. State,
991 So. 2d 364 (Fla. 2008) 41

Schoenwetter v. State,
931 So. 2d 857 (Fla. 2006) 79, 80

Shavers v. State,
86 So. 3d 1218 (Fla. 2nd DCA 2012)..62

Silvia v. State,
60 So. 3d 959 (Fla. 2011) 95

Simmons v. State,
934 So. 2d 1100 (Fla. 2006) 100

Sireci v. Moore,
825 So. 2d 882 (Fla. 2002) 95

Smith v. State,
28 So. 3d 838 (Fla. 2009) 76

Sochor v. State,
619 So. 2d 285 (Fla. 1993) 77

Spencer v. State,
615 So. 2d 688 (Fla. 1993) 1

Spencer v. State,
645 So. 2d 377 (Fla. 1994) 88

Spencer v. State,
691 So. 2d 1062 (Fla. 1996) 93, 94

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986) 64, 77, 83, 90

State v. Hargrett,
72 So. 3d 809 (Fla. 4th DCA 2011)...62

State v. Jones,
867 So.2d 398 (Fla. 2004) 39

State v. Powell,
674 So. 2d 731 (Fla. 1996) 62

Swafford v. State,
533 So. 2d 270 (Fla. 1988) 68

Thomas v. State,
748 So. 2d 970 (Fla.1999) 41, 59, 63

Tibbs v. State,
397 So. 2d 1120 (Fla. 1981) 73, 74

Tillman v. State,
591 So. 2d 167 (Fla. 1991) 91

United States v. Young,
470 U.S. 1, 105 S.Ct. 1038 (1985) 48, 49

Urbin v. State,
714 So. 2d 411 (Fla. 1998) 42

Valdes v. State,
970 So. 2d 416 (Fla. 4th DCA 2008) 40

Valentine v. State,
98 So. 3d 44 (Fla. 2012) 56

Victorino v. State,
127 So. 3d 478(Fla. 2013) 81

Wade v. State,
41 So. 3d 857 (Fla. 2010) 39, 54

Walker v. State,
957 So. 2d 560 (Fla. 2007) 67

Wheeler v. State,
4 So. 3d 599 (Fla. 2009) 83

Willacy v. State,
696 So. 2d 693 (Fla. 1997) 65

Williams v. State,
37 So. 3d 187 (Fla. 2010) 64, 76

Williams v. State,
574 So. 2d 136 (Fla. 1991) 67

Williams v. State,
622 So. 2d 456 (Fla. 1993) 69

Williams v. State,
967 So. 2d 735 (Fla. 2007) 68

Statutes

Florida State Stat. § 921.141(2) 98

Florida State Stat. § 921.141(3) (2007).. 85, 98

Florida State Stat. § 921.141(5)(b) (2001) 75

Florida State Stat. § 921.141(5)(f) 75

Florida State Stat. § 921.141(6)(b) (2001) 76, 95

Florida State Stat. § 921.141(6)(f) 85, 88, 96

Florida State Stat. 921.141(7) (2006).. 78, 81, 82

Rules

Fla. R.App. P. 9.142(a)(5)..99

PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Jordan." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief are italicized; other emphases are contained within the original quotations.

STATEMENT OF THE CASE

On August 26, 2009, Joseph Edward Jordan was indicted by the grand jury of Volusia County, Florida, for the June 2009[1] murder of Keith Cope. (V1, R184).[2] Following various pre-trial proceedings, Jordan's trial began on April 15, 2013. On April 19, 2013, the jury found Jordan guilty of the following: Count One – First Degree Felony Murder; and Count Two – Robbery with a Firearm and/or Deadly Weapon, as charged in the indictment. (V14, R2656). The case proceeded to the penalty phase with respect to the capital conviction. On April 24, 2013, the jury returned an advisory sentence of death by a vote of ten to two (10-2) for the murder of Keith Cope. (V19, R3099). A *Spencer*[3] hearing was held on August 12,

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[1] The indictment indicated the murder occurred "between on or about June 24, 2009, and on or about June 26, 2009." (V1, R184).

[2] Cites to the record are by volume number, "V_" followed by "R_" for the page number. Cites to the supplemental record are "SR" followed by "V_" for volume and "R_" for page number.

[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

2013. (SR, V2, R315-42). The trial court imposed a sentence of death on September 23, 2013. (V1, R154-63). Notice of appeal was filed on October 17, 2013. (V5, R828). Jordan filed his *Initial Brief* on or about June 27, 2014.

STATEMENT OF THE FACTS

Magdalene "Maggie" Cope[4] was formerly married to the victim, Keith Cope. They dated for 27 years and were then married for 10 years. They share parenting responsibilities of their daughter, Emilee. The Copes lived about three blocks apart in Edgewater, Florida. After they divorced, the Copes were still close. (V10, R1846-47). Prior to his death, Maggie saw Cope at her house during Father's Day weekend. Cope ate dinner with Maggie and Emilee on Saturday night. Maggie saw Cope again when he picked Emilee up on Sunday to get ice cream.[5] (V10, R1847-48, 1857). Maggie learned that Jordan had moved in with Cope around December 2008 and that Jordan worked for Cope. (V10, R1850, 1851, 1858). At some point, Cope introduced Jordan to Maggie when she saw them at a local store. (V10, R1858). Cope owned his own construction company. Maggie was aware of Cope's finances. (V10, R1848-49).

Cope owned a green Ford truck which he always parked behind his house. He also owned a Corvette which he sold in June 2009. Cope did not loan his cars to

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[4] Magdalene “Maggie” Cope will be referred to as "Maggie" in order to eliminate confusion.

[5] Emilee was 15-years-old. Cope was 50-years-old, and, according to Maggie, in good health. (V10, R1854).

other people. (V10, R1854-55, 1859). On June 24, 2009, at about 7:00 p.m., Maggie was on her way home and saw Cope's truck parked behind his house. At about 6:30 a.m. on June 25, Cope's truck was gone. (V10, R1856).

Detective Eric Seldaggio, Edgewater, Florida, Police Department, responded with another officer to Cope's home on June 28.[6] (V10, R1860-61). The officers were met by four "anxious, excited" people who brought the officers into Cope's home and then led them to the back bedroom. (V10, R1862, 1863, 1870). Seldaggio observed Cope lying at the foot of the bed with his hands bound behind his back. (V10, R1863). There was duct tape wrapped "multiple times" around Cope's head, mouth, and neck. His ankles were also bound with duct tape and rope. (V10, R1864, 1865). One of the people[7] in the room indicated that he had cut a rope from that was tied to the bed that had also been tied and wrapped around Cope's arm. (V10, R1864). Cope "was suspended in the air by [his] arm." (V10, R1887). Duct tape had been pulled down from Cope's mouth. Cope was conscious. He looked at Seldaggio but was "just moaning" and making "groaning sounds." Seldaggio saw rope embedded in Cope's left arm bicep area which had turned a "greenish color." Cope's arm was "cold to the touch." (V10, R1866). The room contained a strong smell of urine. (V10, R1867). There was rope tied to the four bedposts. (V10, R1869-70). A roll of duct tape was on the bed. (V10, R1870).

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[6] Seldaggio was a road patrol officer at the time. (V10, R1862).

[7] The people in the room were later identified as Mathew Powell, Sadia Haque, Cassandra Castellanos, and Marlon Powell. Haque made the 911 call. (V10, R1989, 1991).

Seldaggio used his pocketknife and cut the rope that bound Cope's hands. (V10, R167). Fire and rescue personnel soon arrived and administered aid to Cope. (V10, R1868). Seldaggio collected some of the rope and tape that had been left behind after medical personnel cut the rope and tape from Cope. (V10, R1869, 1883). Seldaggio interviewed the four acquaintances that met him upon his arrival at Cope's house. (V10, R1871). Jordan was then considered a person of interest. (V10, R1871). Seldaggio went to the hospital, took photographs of Cope, and collected evidence. Medical personnel gave him a piece of duct tape that had Cope's hair stuck to it. (V10, R1869, 1872, 1889).

Emergency Medical Technician Justin Nickels and Paramedic Gregory Swets responded to Cope's house on June 28, 2009. (V10, R1894, 1895, 1906-07). They observed Cope lying on the floor at the foot of the bed when they entered Cope's bedroom. Cope was "bound with some ropes." (V10, R1897, 1908, 1911). Swet saw rope tied to the headboard and footboard of the bed. (V10, R1912). Police officers were cutting away the ropes and "disentangling" Cope. (V10, R1898, 1911). Cope "didn't look good." Cope's arm was suspended "up in the air [and] appeared to be ... livid." Due to the condition of Cope's body, Nickels and Swet initially thought Cope was deceased. There was no "active breathing." However, Swets located "a very weak pulse" in Cope's right arm. (V10, R1898, 1901, 1909, 1912). Nickels immediately focused on securing an airway for Cope but the duct tape wrapped around Cope's head prevented him from doing so. (V10, R1899, 1900). Nickels was eventually successful at removing "multiple layers of tape" wrapped around Cope's head. He tried to peel it away but there was a lot of hair

stuck to it. After removing enough of the tape to create an airway, Cope opened his eyes and made "some noises, but unintelligible sounds ... moans and groans." (V10, R1901, 1910, 1911). Cope was not able to move on his own. (V10, R1911).

Nickels observed that the rope wrapped around Cope's left bicep was embedded in the arm tissue. The limb "was very cold to the touch." Cope's hands were tied behind his back and his feet were tied as well. (V10, R1902, 1903-04). Swet noticed Cope's left arm was "ice cold" and a "purplish" color. (V10, R1912). Due to the way Cope's body was positioned on the floor, Nickels said Cope's hands and feet were "probably" tied together at some point. (V10, R1904). Nickels and Swet both smelled "a very pungent odor of urine ... emanating from the patient." (V10, R1905, 1913). Cope smelled of body odor as well as a strong ammonia smell. (V10, R1913). Swet did not detect a pulse in Cope's left arm or his feet. (V10, R1912).

Philip Niebieski, crime scene officer, responded to Cope's home on June 28. (V10, R1925-26). He photographed Cope's bedroom and collected evidence. (V10, R1927, 1928). Niebieski photographed a green Ford truck parked on the side of the house which contained a parking pass. (V10, R1930, 1932, 1935, 1937).

Mathew Powell is a former co-worker of Jordan's. They worked for one month together in August 2008. (V10, R1953, 1954-55, 1996). In September 2008, Jordan introduced him to Cope when Jordan and Cope lived together in Hollywood, Florida in Cope’s mother’s home. Jordan and Cope "were good friends ... they knew each other for a long time." Powell also lived with them for a while and he also spent a lot of time with Cope. (V10, R1956, 1957, 1997). Powell later learned

that Cope also had a home in the Daytona Beach/Edgewater area. Powell also spent time there. (V10, R1956, 1958).

Approximately three to four weeks before Cope's murder, Powell drove Jordan from Hollywood to Edgewater and dropped him off at Cope's house. (V10, R1958, 1997). He did not see Jordan for the next few weeks. On Friday, June 26, Powell was spending time with his then-girlfriend, Sadia Haque, in South Florida. The two were drinking. Jordan showed up sometime around midnight. (V10, R1959, 1968-69). Jordan was acting "fidgety, very anxious ... jittery." He went off on tangents during their conversations. Powell had not previously seen Jordan act in that manner. (V11, R2002). Jordan mentioned that he had some contact with local police just before arriving at Powell's home. (V10, R1968). Later, after catching up with each other, Jordan told Powell that he "f - - - ed up real bad." Jordan indicated that he wanted to commit suicide. (V10, R1969-70; V11, R2003). Jordan also told him that he was afraid he would go to jail for what he had done. (V11, R2016). Jordan continued to talk into the next morning about what had occurred at Cope's Edgewater home a few days prior. (V10, R1970, 1976). Jordan said he had made bad decisions. (V11, R2003). Initially, Powell asked Jordan, "How come you have [Keith's] truck?" To which Jordan replied, "Keith is tied up right now." (V10, R1970, 1971). Powell assumed that Cope was busy or not feeling well. (V10, R1972; V11, R2004). Powell thought it was odd, however, that Jordan had Cope's truck because he knew Cope "didn't let his vehicles out ... to go to the store, maybe, but not for an extended period of time." (V10, R1971; V11, R2004). Powell thought it was strange that Jordan used the phrase that Cope was tied up

"quite a few" times. (V10, R1972). The next day, Powell, Haque, Cassandra Castellanos, (Powell's children's mother) and Jordan, packed up their belongings in Castellanos' and Cope's vehicles and they went to a hotel. [8] (V10, R1972-73). Jordan paid for that hotel room. (V11, R2006).

Jordan went to several stores during the time period of June 26-27 before checking into the hotel. (V10, R1979; V11, R2017). Jordan bought food and beer and paid with Cope's credit card. (V10, R1976-77; V11, R2017). Powell said Jordan explained that he was using Cope's card because Cope owed him money. (V10, R1978; V11, R2011). Jordan then "elaborated" and told Powell, "Keith's tied up ... there's an opportunity there to hit the safe" which contained guns. (V10, R1974; V11, R2007). Powell said Jordan "basically was telling me that he left the safe open. And if I wanted to, I could go clean it up." (V10, R1974). Although Jordan told Powell about the gun safe, Jordan refused to go back to Cope's house and refused to be anywhere near Cope's truck. (V10, R1975). Jordan never expressed any concern for Cope. (V11, R2017, 2020). Jordan never indicated that Cope's health was in danger. (V11, R2009, 2011, 2013).

Powell decided to drive to Cope's home in Edgewater because it was "an opportunity" (V10, R1981). Powell thought if Cope was tied to the bed he could steal his weapons; if he was not, then he would return Cope's truck and be a hero.

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[8] Powell and Haque had been staying at Richard's Motel, where Haque worked at that time. However, Haque lost her job when the owner smelled marijuana in the motel room. (V11, R2004).

(V10, R1981; V11, R2014).

Powell, Haque, Castellanos, and Marlon Powell drove to Cope's home in two vehicles and arrived at about 6:00 a.m., on June 28. (V10, R1981-82; V11, R2007). Jordan had given Powell the keys to Cope's truck and house. (V10, R1994). After Powell knocked and no one answered, he and Haque entered Cope's home. (V10, R1983). Powell went into Cope's bedroom, where he encountered Cope lying "suspended" by ropes at the foot of the bed. (V10, R1984, 1986). Powell "screamed for a knife." He pulled the tape down as far as he could off of Cope's mouth. Cope started "moaning." When Powell cut the ropes near the headboard, Cope "hit the floor." (V10, R1987, 1988). Powell saw rope embedded in Cope's arm, but, "I didn't want to be around that area right then and there." He tried to cut some of the ropes off around Cope's legs but there "was just so much bounding" that Powell asked someone to get scissors. (V10, R1988).

Powell noticed that the gun safe was closed. Because he thought that Jordan had set him up, he called him. (V10, R1988, 1989; V11, R2014). Powell asked Jordan, "Do you know I'm on probation?" To which Jordan replied, "Yes." Powell told Jordan he was going to call the police. Jordan did not try to talk Powell out of calling the authorities. (V10, R1989; V11, R2014-15).

Powell and Haque attempted to save Cope's life. Although Cope was conscious and "moaning," Powell could not understand anything Cope said. Marlon Powell tried to give Cope water. However, "looking at the way the rope was embedded in his arm, water ... would not go down. He needed an IV." (V10, R1990).

The Powell brothers, along with Haque and Castellanos, remained on the scene

until police and paramedics arrived. (V10, R1991). Mathew Powell gave statements to police. Initially he lied and said that his friends and he went to Cope's house "on a rescue mission," based on statements Jordan had said — that Cope was in trouble and Powell should save him. However, Powell said that Jordan had only encouraged him to steal from Cope. (V10, R1992). In addition, Powell said Jordan had encouraged Haque not to go, "he begged her not to." (V10, R1993).

Karen Nobles, a forensic document examiner, has worked for the Florida Department of Law Enforcement since 1986. (V11, R2023, 2025). She examined seven handwritten letters from December 2009 to January 2010 and opined that Jordan wrote all of the letters. (V11, R2027-28; 2039-2040; 2048-49).

Sadia Haque lived with Mathew Powell in Hollywood, Florida, in 2009. (V11, R2061, 2062). Haque also knew Powell's brother, Marlon, and Cassandra Castellanos. Castellanos and Mathew Powell had children together. (V11, R2063). Haque met Cope and Jordan when Powell worked for Cope in 2008. (V11, R2064, 2084). Haque spent a lot of time with Jordan because of his friendship with Powell. (V11, R2081). On Friday, June 26, 2009, Haque and Powell were at her apartment spending time together and drinking when Jordan showed up. (V11, R2065). Jordan stayed with the couple for the next two days. (V11, R2066).

Haque testified that Jordan acted strangely. He expressed a lot of regret and concern. "He was jittery, nerves on edge. He was saying that he - - he think that he really messed up" and was afraid he would end up in jail. He mentioned committing suicide several times. (V11, R2066, 2088-89). Jordan expressed concern about Cope's well-being and was worried "about getting in trouble." He

was also stressed about money and had been for several weeks. (V11, R2067, 2087). Haque was aware that Jordan and Cope were arguing over money issues and that Cope may have owed Jordan money. (V11, R2080, 2084). She thought it was odd that Jordan had Cope's truck because Cope "doesn't really just loan things out to people." (V11, R2080). The more time passed, the more frantic Jordan became about Cope's well-being. (V11, R2090-91). Jordan told Haque that "he really messed up ... Keith is in a situation. He's in a tied-up situation, that he really needs help, that somebody needs to go check on him, but he refused to do it himself." (V11, R2069). Jordan further revealed that he had taken Cope's truck but that it needed to be returned to Edgewater. Jordan told Powell that Cope's safe was open and Powell could steal the contents. (V11, R2069-70). Jordan insisted that Powell drive Cope's truck back to Edgewater— he put the keys in Powell's hand, and also insisted that Powell check on Cope's well-being. (V11, R2092-93, 2096).

Jordan pleaded with Haque not to go to Edgewater with Powell. (V11, R2071-72, 2099). Although Haque thought she and Jordan were just good friends, she did believe that Jordan was attracted to her. (V11, R2081). Jordan and Powell had a "hushed" discussion about stealing from Cope. (V11, R2071-72, 2096, 2099).

The group left South Florida late on Saturday June 27 and arrived at Cope's home early the next morning. Haque heard the television and assumed Cope was sleeping when he did not answer the door. (V11, R2073). Haque and Powell found Cope tied to his bed in his bedroom. (V11, R2074). Haque testified, " ... it seemed like he went from being tied to the bed to attempting to slide off. He was hanging off the edge of his bed by ropes ... his arms and legs were suspended ... his head

was dangling ... his weight was suspended ... by rope." (V11, R2074). There was duct tape at most points where the ropes were wrapped around him as well tape on Cope's mouth and his legs. (V11, R2074). Cope's head "was slumped. The rope had cut through - - to many parts of his skin. It was embedded in his skin." After they were unsuccessful in freeing Cope, Haque called police.[9] (V11, R2075).

Cope could only slightly nod his head in response to questions. He was only able to make a "mmm" sound or moan. (V11, R2078). Haque and Powell stayed at the scene until police arrived. They gave statements to police and returned to South Florida. (V11, R2078). Haque initially lied to police because she was afraid they would get in trouble. She said, "I felt it was irrelevant. It wasn't something we did ... we got there, and the situation changed ...” (V11, R2079).

Haque spoke with Jordan on multiple occasions after leaving Cope's home. Jordan asked if they had arrived at Cope's house and was Cope "okay." (V11, R2080, 2094-95). Haque told Jordan what they had seen at Cope's house and she urged him to turn himself in to police. (V11, R2080, 2095).

Marlon Powell met Jordan through his brother, Mathew Powell. (V11, R2129-30). Marlon received a call from Mathew on June 27, 2009, that Mathew needed his "help," so Marlon, Mathew, Haque and Castellanos, drove to Cope's home. The four drove in two vehicles — Cope's truck and Castellanos'. (V11, R2130-31,

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[9] In a statement Haque gave to police in South Florida about two or three days after finding Cope, she stated that Cope had bruises on his face, although she did not recall this particular statement at trial. (V11, R2077, 2078).

2132, 2138).[10] After arriving at Cope's home, Mathew and Haque went inside while Marlon remained outside with Castellanos in her truck. Then, "Sadia came back out. She was frantic, asking for a phone." (V11, R2133). Shortly thereafter, Mathew came out of the house and motioned for Marlon and Castellanos to join him. (V11, R2134). When Marlon got into Cope's bedroom, he saw Cope tied to the foot of the bed, slumped over. Marlon thought Cope was dead because he "didn't look too good." (V11, R2134, 2135). After Mathew removed duct tape from Cope's mouth, Marlon "heard a slight yes" when he asked Cope if he wanted some water. After returning to the bedroom with the water, Mathew told Marlon not to give it to Cope because "we don't know his situation." Mathew tried to removed tape and rope from Cope's body with a knife and scissors. (V11, R2136). Police and paramedics arrived shortly thereafter. Marlon eventually learned that Mathew lied about his trip to Cope's house and that he was going to steal from Cope, not help him. (V11, R2142).

Cassandra Castellanos and Mathew Powell have two children together. Castellanos met Jordan and Cope through Powell in 2008. (V11, R2144-45, 2146-47). Late in the evening of June 27, 2009, Mathew called Castellanos and asked to take her truck to Daytona Beach. She told Powell he could not borrow her truck unless she went with him. (V11, R2148). She met Mathew at a friend's house

[10] Marlon gave a statement to police that he knew Jordan had told Mathew Powell that Cope needed help. Further, Marlon also told police that Jordan was "acting crazy or unusual." (V11, R2140-41).

where she, along with Mathew, Marlon Powell, and Sadia Haque, left in two vehicles to drive to Cope's home. (V11, R2149-50). Castellanos thought Mathew wanted to go to Cope's "and find out what's going on with Keith." (V11, R2151).

After the foursome arrived at Cope's, Mathew and Haque went inside while Castellanos and Marlon remained in her truck. Castellanos and Marlon went inside after Haque and Mathew rushed outside and told them to go in. (V11, R2151, 2152). Castellanos saw "the position that [Cope] was in." She found scissors which she gave to Mathew. (V11, R2152). Cope "looked like he was dead." However, "... he groaned at one point." Haque called 911. (V11, R2153). Castellanos got Cope some water and looked through the mail for Cope's address. (V11, R2154).

Edwin Yarrow, gave Jordan a place to stay prior to Jordan's arrest. Jordan told him, "that a man had owed him some money and that they had differences ... they were using drugs together and partying and drinking ... he asked the man for his money ... the man said he didn't have the money ... a drug dealer came by and dropped off a large amount of drugs ... he had the money for drugs, but he didn't have the money to pay Joey." (V11, R2156, 2157-58). Yarrow further testified, "Joey said that they partied up ... they ... got all liquored up and drugged up, and he beat the guy up and robbed him ... he said something about pistol-whipping him ..." (V11, R2158, 2165). Jordan told him that he first tied up a man,[11] "had taken money, and - - guns and drugs ... he had a truck." (V11, R2159, 2161, 2167).

[11] Jordan did not tell Yarrow Cope's name. Yarrow had never met Cope. (V11, R2164).

Jordan kept removing the battery from his cell phone and made phone calls "on the hush-hush." (V11, R2160). Yarrow contacted police when he was unsuccessful in his attempt to get Jordan "to turn himself in." (V11, R2161-62).

Raymond Hill, Jordan's friend for 20 years, also knew Cope. (V11, R2170, 2171, 2178). On June 24, 2009, Hill brought Jordan to a pawn shop so Jordan could pawn his tools. Jordan needed money to buy a bus ticket. Jordan told him that Cope owed him money and he needed to get to the Daytona Beach/Edgewater area. Hill then dropped Jordan off where he was staying. (V11, R2171-72, 2173).

Hill later heard that something happened to Cope. He was unsuccessful in attempts to get in touch with Cope but spoke to Jordan. Jordan told him that police were looking for him. Further, Jordan told him, " ... he went up there ... Keith didn't have the money and wasn't able ... pay him what he owed him, and that he snapped ... took the stuff and left." (V11, R2173-74, 2178). Jordan told him, " ... he tied him up ... he didn't go into details." Jordan took Cope's truck, credit cards, and "maybe some cash." (V11, R2174-75). Jordan expressed suicidal thoughts. (V11, R2180). Jordan never indicated what condition he thought Cope was in. Hill did not see Jordan again after assisting him at the pawn shop. (V11, R2176).

Officer Leonard Tinelli, Hollywood Police Department, encountered Jordan on the night of June 26, 2009, on Federal Highway in Hollywood, Florida. Jordan indicated he had arrived in Hollywood on June 25, had met up with someone, and was meeting with that same person on the night of June 26. (V11, R2184-85).

Kelly May, latent print analyst/crime scene analyst for the Florida Department of Law Enforcement, examined evidence collected from the crime scene that

included pieces of duct tape,[12] a roll of duct tape, a parking pass, a firearm magazine, and several cartridges. (V12, R2204). A comparison of a piece of duct tape taken from the outside of the roll, along with an examination of the inside cardboard section of the roll, yielded two latent fingerprints of value — one of which matched Jordan's right thumb. (V12, R2209, 2210, 2211, 2214). Jordan's thumbprint was located on the outer layer tape roll. (V12, R2212, 2214).

Marta Strawser has been a trace evidence analyst for the Florida Department of Law Enforcement for over twenty-two years. (V12, R2218-19). She examined and photographed pieces of duct tape that had been removed from Cope's head as well as pieces found on the bedroom floor, along with a roll of duct tape found on Cope's bed. Strawser concluded the pieces originated "directly from that roll of tape" found on Cope's bed. (V12, R2227, 2228).

Detective Joanne Winston was the lead investigator in this case. (V12, R2292-93, 2349). She responded to Cope's home on June 28th after Cope had been transported to the hospital. The Powell brothers, Castellanos, and Haque were still on scene. (V12, R2293-94). Jordan became a suspect "almost immediately." (V12, R2295). Winston interviewed the Powell brothers, Castellanos and Haque several times after they had returned to South Florida. (V12, R2296). She also spoke with Jordan numerous times via cell phone; she tried to get Jordan to turn himself in. Winston also informed Jordan that Cope was still alive at that point. (V12, R2297).

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[12] Strawser examined the duct tape prior to May's analysis. (V12, R2221).

Jordan was arrested on July 2, 2009. Cope died on July 13, 2009. (V12, R2298).

Jordan told Winston that Cope owed him money. Jordan admitted taking Cope's truck and debit card in order to satisfy Cope's debt to Jordan. (V12, R2299). Bank records indicated 25 withdrawals from Cope's account between June 25-28, 2009, totaling about $2,345.81. Records also indicated attempts to withdraw additional funds totaling $1600.00 were declined. All of which were made in the South Florida area—where Jordan was located. (V12, R2300-01, 2302).

Winston received several phone calls from Jordan in June 2009 prior to his arrest. (V12, R2350). Jordan said that Cope owed him money for work. (V12, R2351). Winston obtained a search warrant for Cope's home on June 29, 2009, and found a receipt for the sale of a corvette. (V12, R2350-51).

Winston received letters from Jordan subsequent to his arrest in which Jordan requested that Winston come and talk to him at the jail. (V12, R2303, 2304-05). Winston gave the letters to the State Attorney's Office. (V12, R2354-55). On December 21, 2009, Winston met with Jordan at the jail and read him his *Miranda*[13] rights. (V12, R2305, 2317). Jordan initialed a *Miranda* rights form in which he indicated that he had been read his rights and agreed to talk to her. The interview was audio recorded , transcribed, and published to the jury. (V12, R2304, 2305, 2315, 2320, State Exhs. 36, 37).

During the interview, Jordan confirmed that he had written a letter to Winston

[13] *Miranda v. Arizona*, 384 U.S. 436 (1966).

indicating he wished to speak with her. He waived his *Miranda* rights. (V12, R2320-22). Jordan asked why the Powell brothers were not charged with "accessory after the fact." He claimed Mathew had rented a hotel room for him "with the specific intent of hiding me from the police (because of) the situation that was going on in Edgewater" with Cope. Haque also knew what was happening. (V12, R2323, 2324). Jordan claimed his friends' intent when they went to Edgewater "wasn't to go up there for - - to check on Keith. They were going up there to rob Keith." (V12, R2324-25). Haque called her aunt in Tallahassee and asked if she could "bring a trailer full of Keith's stuff over to the property there." Jordan claimed his friends stole some items from Cope's truck which included a radar detector and power tools. (V12, R2325). His friends knew that Cope was tied up and knew he had robbed Cope. (V12, R2326). Jordan was "willing to talk some more" but wanted "something done to them for their part, also." Jordan suggested calling Haque's aunt to verify that Haque had contacted her about storing items on her property. (V12, R2326, 2327). Jordan claimed Haque would "clear everything up" because "she's terrible at lying." (V12, R2327). Jordan said his girlfriend Sanya also tried to hide him from police. She fed and clothed him and checked the neighborhood area to see if police were around before Jordan came to see her. (V12, R2328-29). Sanya also had possession of the firearm that Jordan had used to rob Cope, "a 5.76 handgun ... FNH, fabricated FNH." (V12, R2329). Jordan felt he was "holding the bag for a bunch of crap that I really shouldn't be, but, it doesn't bother me." Jordan suggested police check text messages between himself and his girlfriend to prove "she knows what's going on ... the text-message records reveal

the whole thing." (V12, R2330).

Jordan claimed he did not plan to rob Cope — "other things were, but no, not that." (V12, R2330). His friends were "plotting on going up there and robbing him for a day and a half." His friends "tried to get me to go up there, and I said I wasn't going back up there." (V12, R2332, 2336). All of his friends knew what had happened between Jordan and Cope. (V12, R2334). Although it was his friends' intent to take a trailer of stolen items from Cope and drive to Tallahassee they had not had time. Jordan admitted he had been alone when he robbed Cope. (V12, R2333). "[T]he evidence is in the text messages, the phone records ... it will all tie together." (V12, R2340). At the conclusion of the interview, Jordan said he would talk to Winston again after "something's done" with his friends regarding the possibility of accessory charges. (V12, R2339).

Jordan "vaguely" indicated in his letters and during the interview that he acted alone and was responsible for Cope's death and related crimes. (V12, R2305-06). Jordan admitted telling "other people" that he left Cope tied up and bound, that Cope had "given" him his own credit cards to use, and that he wanted Cope's truck returned to him. These "other people" had knowledge about the crimes but were not involved. (V12, R2307-08). No charges were initiated against anyone else but Jordan. (V12, R2308).

Jordan continued to write letters to Winston. In a December 21, 2009, letter, Jordan wrote that he would not talk to Winston again until Sanya had been arrested. (V12, R2341, State Exh. 35). "I want to make sure this isn't just about me. I'm not seeking a deal or a lesser sentence in exchange for knowledge of facts

and testimony to such." (V12, R2342). Jordan would "speak openly and freely" to Winston subsequent to Sayna's arrest and his knowledge of it. "If these conditions aren't met, then I will forever remain silent to everyone." (V12, R2343). In a January 1, 2010, letter, Jordan reiterated that he would "reveal every unknown detail concerning the crimes" against Cope if Sanya was arrested. (V12, R2344).

In a January 17, 2010, letter, to Maggie Cope, which she received several months after Jordan was arrested, Jordan informed her he had confessed to police that he had robbed Cope, gave Cope's gun to Sanya (the gun he used to rob Cope), and "gave [Winston] enough information to prove that a girl named Sanya Coday-Rochlin was aiding me to avoid police ..." (V12, R2290; R2345). She gave the letter to law enforcement. (V12, R2291, State Exh. 35). Jordan had given Maggie the details of the robbery and also attempted to implicate Sanya. Jordan wrote, "I will only tell the Courts the whys and whats in this case only after Sanya is charged with what she has done wrong. If not, no one will ever know anything more than what is known ..." (V12, R2346). Winston received a final letter from Jordan dated January 24, 2010, in which he informed her of the contents of his letter to Maggie Cope. (V12, R2347).

Melinda Rullan, M.D., critical care specialist, was Cope's treating physician in the intensive care unit from June 29, 2009, through July 13, 2009, after his hospital admission the prior day. (V12, R2360-61, 2363-64). Cope had arrived in near-death situation. He was unresponsive, had no blood pressure, had multiple organ failures, and was undergoing a cardiovascular collapse. "His body was literally dying." (V12, R2365). As a result of his injuries, Cope had emergency surgery on

the day he was admitted to have his left arm amputated as well as disarticulation—an amputation of the left shoulder. In Rullan's medical opinion, Cope "would die" if emergency surgery had not been performed. (V12, R2366, 2370). The damage to Cope's left arm cause "Compartment syndrome ... a life-threatening illness" that caused Cope's body to create a "barrier with clots" between the part of the body that was dead and the remainder of his body. (V12, R2367, 2378). A CT scan indicated a left-sided stroke on Cope's brain, a clot on his left caratoid, as well as lung clots and lesions. (V12, R2368, 2372). Cope's injuries to his left arm, wrists, and feet could have been caused by the bindings had he either attempted to loosen them, fallen off the bed, or became suspended off the bed. (V12, R2378, 2380, 2381). However, "the manner of how he - - the arm was bound is irrelevant to me. Ultimately that arm was the cause of his compartment syndrome." (V12, R2379). The "position of the bondage do appear to be important in terms of creating pressure like a tourniquet and cutting flow to the arteries and veins." (V12, R2382).

Rullan was aware that prior to admission, Cope had been found bound and gagged for a period of approximately three days. (V12, R2368). Upon arrival, Cope was able to cough and had a gag reflex even though he could not open his eyes or follow any directions. (V12, R2374). Rullan treated him subsequent to the amputations. (V12, R2370). She observed bound marks on his ankles and right wrist. Due to diminished blood flow to his arms and legs, Cope had dead tissue on his right wrist, arm, and on both his feet. (V12, R2370). Rullan summarized Cope's condition as suffering from Compartment syndrome, renal failure, and

respiratory failure. He was placed on life support in an effort to control his breathing "his cardiac arrhythmias... low blood pressure ... multiple clots in his body." (V12, R2371). Due to the stroke, Cope suffered brain damage which worsened over time. Eventually he developed strokes on the right side of his brain, lost his gag reflex, and deteriorated. (V12, R2374). Cope was in a "vegetative state" and remained unresponsive from the time he arrived until his death on July 13th. (V12, R2373, 2375).

Due to the severity of Cope's deterioration, medical personnel were certain that Cope would not regain consciousness or be able to interact with his environment. (V12, R2376). In Rullan's medical opinion, Cope's condition upon arriving at the hospital was attributed to the fact that he was bound and gagged and left alone for a three-day period. (V12, R2377, 2386). "The stress of being bound for three days would have been overwhelming." (V12, R2386). On July 13, 2009, medical personnel discussed Cope's condition with his family who made the decision to remove Cope from life support. (V12, R2376-77).

Dr. Marie Hermann, medical examiner, performed the autopsy on Cope after reviewing his hospital records. (V12, R2387, 2391-92, 2393). She noted that Cope had recently had medical and surgical intervention including the amputation of his arm and shoulder as well as evidence of healing wounds on his ear, nose, back of right hand, wrists, ankles, and mouth. He had pressure sores in the lower portion of his back, bronchopneumonia, bilateral cerebral infarctions (strokes) of his brain, clots in the arteries supplying blood to his brain, and erosions of his esophagus which Hermann attributed to placement of a gastric tube. (V12, R2395). The

medical intervention evidence also indicated placement of intravascular and urinary catheterization. Hermann reviewed Cope's clinical history which included dehydration, acidosis, rhabdomyolysis, renal failure, aspiration pneumonia.[14] (V12, R2396). Hermann was aware that Cope had been found "with the rope around his limb." Several of her findings were consistent with the knowledge that Cope had been suspended in air by his bindings. (V13, R2408, 2409). The injuries to Cope's wrists and ankles could have been exacerbated from struggling. (V13, R2410).

Hermann's findings of injuries to Cope's mouth, ears, nose, wrists, and ankles were consistent with her knowledge that he had been bound and gagged. (V12, R2397-98, 2399; V13, R2408). The aspiration pneumonia could have resulted from Cope being bound and gagged for three days. (V12, R2398-99). In Hermann's opinion, "Cope died as a result of complications of being bound and gagged for days, including ischemic gangrene of the left upper extremity, bilateral cerebral infarctions, and bronchopneumonia." The manner of death was a homicide attributed to the fact that Cope was bound and gagged and left. (V12, R2400).

On April 19, 2013, Jordan was found guilty on all counts of the indictment. (V14, R266). The penalty phase was held April 23-24, 2013. (Vols. 15-16, R2701-3110).

Dr. Tara Wilson, M.D., works in the emergency room at Halifax Hospital in

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[14] Acidosis is the lowering of the PH of the blood; rhabdomyolysis is a breakdown of muscle tissue; renal failure can be due to dehydration; aspiration pneumonia occurs when a person is not able to properly swallow food or liquid so it goes into the lungs. (V12, R2398).

Daytona Beach. (V14, R2750-51). On June 28, 2009, Wilson evaluated Cope upon his arrival. (W14, R2752). Cope was in a semi-conscious state. "His eyes were open and he was moaning." He was "unresponsive in any way." (V14, R2753). Cope's left arm was "mottled." It was obvious Cope's arm did not have "any blood supply whatsoever." An area high up on Cope's left arm had a compression injury that was "very deep." Wilson said, "Obviously, it had been compressed for a significant amount of time." There was a lot of soft tissue injury at the site. (V14, R2754). In Wilson's medical opinion, "it was not viable at all to be keeping that arm." In her experience, Wilson had "never seen anything as deep" as the ligature injury on Cope's arm. (V14, R2755). Wilson also noted that Cope had "significant injuries to his legs" in which she could only locate a pulse with a doppler amplifier. Only Cope's right arm had a detectable pulse. (V14, R2755-56). Due to his injuries, the medical team was concerned "if all those limbs were actually threatened from these ligature marks." Subsequent to medical intervention, however, Cope's remaining arm and legs became viable. (V14, R2756).

In Wilson's opinion, Cope's injuries were consistent with having rope and tape wrapped around his face, head, wrists and ankles, and being bound to bedposts for a period of three to five days. (V14, RF2756). Additionally, a CAT scan of Cope's thorax and chest area indicated Cope had aspirated emesis (vomit) which was attributed to having his mouth blocked for an extended period of time. (V14, R2757). "[W]hen someone is hanging by a limb like that ...[there is] complete loss of any arterial blood supply ... the blood pressure goes up ...heart rate goes up ...limb that's had the blood supply cut off ... start[s] to have some numbness and

tingling ... start[s] to have lactic acid production like ... getting a bad charlie horse ... that will just progress. The aching sensation will just continue." Eventual paralysis will occur in the limb. Coagulation will occur in the rest of the body as a result of the blood supply being cut off to a limb. The "whole body wants to clot" due to the traumatic injury. (V14, R2757-58). Cope's arm area would have been very painful. (V14, R2758). Patients with an acute arterial blockage require high doses of pain medication to control the pain. "And even that doesn't help much. It's really getting the artery opened that stops the pain." (V14, R2759). In Wilson's medical opinion, the pain level on a one to ten scale that Cope would have experienced due to his limb injury "would be a ten. Losing a limb slowly over hours is exquisitely painful." (V14, R2759).

Cope would have experienced extreme thirst while he was bound. Dehydration causes hallucinations and confusion. In Wilson's medical opinion, being without fluids for a period for as long as three days "without a doubt, a person could die simply from that." Cope would have experienced body cramps from dehydration. (V14, R2761). In Wilson's medical opinion, based upon her observation of Cope's injuries, "abrasions around his wrists and ankles" as well as "soft tissue damage directly at the site of the bindings," Cope was conscious for some of the period of time that he was bound. "All of his body weight seemed to be transmitted onto the one arm... [he] was trying to get free - - and struggling." (V14, R2762). It was possible that Cope was in and out of consciousness. "He was awake at some point." (V14, R2763). The stroke in Cope's brain would have affected sensation in the right side of his body. "It shouldn't have mitigated at all the experience that he

was feeling in the left arm." (V14, R2764-65).

The State introduced four victim-impact statements in total. (V14 2785-2801; R15 2802-2806). Prior to delivering the victim impact statements, on the court's own motion, the court read the jury instruction on victim impact statements to the jury, modified to present tense. (V14, R1930, 1938-39). The court properly cautioned the jury that victim impact statements were not to be used as evidence of aggravating circumstances. (V14, R1938-39). Dominick Pologruto, a close friend of Cope's, wrote a short statement and counsel for the State, Ed Davis, read it to the jury from counsel's table. (V14, R1936, 1939). Lucinda Jenkins, Cope's maternal aunt, wrote a statement that was read, in its redacted form, to the jury by the State's victim advocate Holly Inglett from the witness stand. (V14, R1940). Magdalene Cope, Cope's ex-wife, read her redacted statement to the jury. (V14, R2796-97). Magdalene's statement discussed how she and Cope had known each other their whole lives, how Cope loved his family, especially their daughter, and how, despite being divorced, Cope "is the love of [her] life and always will be." (V14, R2797). Emilee Cope, Cope's teenage daughter, read her redacted statement to the jury. (V15, R2802-03). Emilee expressed how it was "difficult to watch [her] father struggle for his last breath" when he was taken off life support. (V15, R2803). Cope was "the love of [her] mother's life. He was a son, a nephew, a brother, a cousin, an uncle and a fiercely loyal friend. He was also an incredibly intelligent, soft-spoken, talented man who tried to help the people around him the best way he could." (V15, R2804). Jordan did not object to the "processes" of these statements or to the photographs depicting Cope and his daughter, after the

lengthy preliminary discussions on admissibility and redactions. (V14, R1938).

The State then entered a certified conviction and sentence for Cope's prior violent felony conviction for False Imprisonment stemming from a "sex charge" from 1992 as State's Exhibit 40. (V14, R1896, 1919-1920, 1932). Jordan did not object. (V14, R1919-1920).

Appellant's mitigation case began with Teresa Dinardi, Jordan's older sister by nine years. (V15, R2807, 2808). She helped raise him. (V15, R2815). Jordan was very ill when he was born and spent the first two years of his life in an oxygen tank. He was "allergic to everything" and had "asthma and things like that." (V15, R2809-10, 2814). Jordan eventually got healthier, his parents divorced, and his mother relocated the family from New York to Coral Springs, Florida. (V15, R2810). Despite the divorce, the family kept in touch. (V15, R2812).

Jordan was in high school when he moved to Florida. Jordan is "very, very, smart." He graduated two years early from high school and was the Valedictorian of his class. (V15, R2812). Jordan "was basically a good kid ... softball with Dad and all that stuff." He did lose his temper "a little bit." Although his behavior fit with bipolar disorder, that term was not used to describe Jordan. (V15, R2813). At age six or seven, Jordan's doctor recommended that he take valium. Jordan's mother, however, refused to allow Jordan to do so. Jordan "was too young at the time." As Jordan aged, his mother thought "he might need to be on something." (V15, R2814). After he was administered medication for his moods "he was very mellow, very calm." (V15, R2815). Jordan is the type of person who provides random acts of kindness. He would help with "anything you need." (V15, R2815).

Dinardi and Jordan spoke daily. “He called me all the time.” (V15, R2817).

Sanya Corday-Rochlin met Jordan about a year before Cope’s murder. (V15, R2818, 2819). Jordan was “very sweet, kind, very nice to me, like a gentleman.” She saw him on a regular basis. She was aware Jordan took medication to stabilize his moods. (V15, R2820). Jordan became “emotional” when he was off his medication. He “really didn’t know how to handle the way he was controlling his moods.” He was “angry - - it wasn’t him, the one I knew. Like a completely different person.” (V15, R2821). Rochlin did not know Cope but knew “of him.” She knew Jordan had gone to see Cope before Jordan’s arrest. Despite her urgings to Jordan for him to take his medication, Jordan was not taking it. (V15, R2821). Jordan contacted her after he had gone to see Cope and had returned to South Florida. Jordan called her and said that “he wanted to kill himself.” Jordan told her “something happened,” but did not give her any details. (V15, R2822). He was “depressed and sad ... even worse than when he was before.” (V15, R2823). Prior to Jordan’s trip back to see Cope, she told Jordan to take his medication because “You get kind of crazy when you’re not on it.” After he returned from his trip, Rochlin said Jordan told her, “I should have listened to you.” (V15, R2824). It was Jordan’s choice whether or not to take his medication. (V15, R2824).

Raymond Hill’s previously recorded testimony was published for the jury. (V15, R2828-2845). Hill had been Jordan's friend for 20 years. They met when they were about 18 years old. They worked together in the construction industry. (V12, R2247). He knew Jordan's two sisters and his parents. Jordan's father was "a very nice guy ... with some troubles, but ... a good person." Hill never saw Jordan,

Sr. discipline the children in any way. (V12, R2250-51). Hill did not know Jordan's mother "really well" but she had "a tendency for violence ... she was a very tough woman ... extremely tough, especially to Joey." (V12, R2251-52). Hill only knew Jordan's mother from the time he and Jordan were about 17 years old to 21 years old, and only saw her about a dozen times. (V12, R2256, 2257). He witnessed her beating and disciplining Jordan. (V12, R2252, 2257). Hill knew this behavior "took place over his whole life" because Jordan's sisters and friends told him about it. (V12, R2257-58). Jordan, however, "certainly did love his mother, and she loved him, but it was just ... an abusive relationship. It definitely had an effect on him." (V12, R2258). He "cowered" to his mother. (V12, R2259).

Jordan was troubled at times. He had "emotional issues ... emotional imbalance." He was on and off medication throughout the years for anxiety or mood swings. (V12, R2253). From "time to time" Jordan self-medicated with drugs or alcohol. (V12, R2254). Jordan was "much more stable - - and focused" when he took his prescribed medication. It "had a positive effect." Jordan always had these issues "the whole time I've known him." Jordan also mentioned he had attempted suicide and thought about it "several times." (V12, R2260, 2261). Jordan is "extremely bright" and certainly knows the difference between right and wrong. (V12, R2255).

Edwin Yarrow and Jordan were childhood friends. (V15, R2851-52). He and Jordan "had a tight relationship. He'd do anything for me, and I'd do anything for him." (V15, R2853). He and Jordan have remained friends and he supported Jordan in any way he could. (V15, R2859). Yarrow knew Jordan's mother but

only met his father one time. (V15, R2854). Jordan's mother was physically abusive toward Jordan. Yarrow recalled a time when he, Jordan, and Jordan's mother were in a car. Jordan, about 16 years old at the time, did "something minor" and Jordan's mother "put a cigarette out on his leg." Jordan "wouldn't even flinch or move "cause he was so used to it." (V15, R2854-55, 2860-61). Yarrow also witnessed Jordan's mother smash a box fan over Jordan's head, "beat [him] with phone receivers, [have] stuff thrown at him, belittled." (V15, R2855). Jordan loved his mother despite the abusive treatment. Both of Jordan's parents died of natural causes at young ages. (V15, R2857). Jordan's mother "definitely had a little temper on her." (V15, R2858). Jordan lived with his mother on and off until she died in the 1990's. (V15, R2861-62).

Mark Pleason lived with the Jordan family almost 30 years ago when he was a teenager. He lived with them for about ten years. He did not see Jordan's mother abuse anyone. (V15, R2863, 2864, 2874). Jordan "was ... my best friend." Jordan's mother and sister helped him out. (V15, R2865). "He's my brother. I love him alot." (V15, R2872). Jordan's mother basically raised him; she did not abuse him. (V15, R2874). Home life was "normal, you know, parents yelling ... we're kids. All kids mess up. Parents yell. That normal kind of stuff. Nothing out of control." (V15, R2875).

Pleason and Jordan formerly worked together. Jordan was "a great worker." (V15, R2866). Jordan struggled with cocaine addiction in addition to bipolar disorder. About three years before Cope's murder, Jordan "was doing very well for quite a while. He was ... working full time ... doing very well." (V15, R2868).

Pleason worked for Cope for a short period of time at the same time Jordan was working for him. (V15, R2868). He was aware that Jordan claimed Cope owed him money for work he had done for him. (V15, R2870). Prior to Cope's murder, Jordan told him he was going to Cope's home to collect money owed to him. (V15, R2870-71). Pleason and both of Jordan's sisters are doing well. (V15, R2875-76). Jordan "was basically kind of homeless" and his finances were in disarray, but there are ways for a grown adult to get medications. (V15, R2877-78).

Ali Goldberg[15] has known Jordan for 17 years. (V15, R2890-91). Jordan is "a good person" and she holds "a big place in [her] heart for him." Jordan "has a very big heart. He's a really good guy. He has problems. And I just think none of this would have happened if he would have tried to stay on his medication for his mental illness and for his drug-addiction problem." (V15, R2892-93).

Dr. Jeffrey Danziger, M.D., psychiatrist, met with Jordan on two occasions. He spent about two and one half hours evaluating Jordan on August 7, 2011. (V15, R2898-99, 2925, 2938). Danziger also reviewed some of Jordan's school records, medical records, jail records,[16] and a report written by Dr. Eric Mings, psychologist.[17] (V15, R2899-2900, 2926, 2938). In addition, Danziger reviewed a

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[15] Goldberg testified telephonically. (V15, R2889-90).

[16] Jordan's initial jail medical records subsequent to his arrest indicated a medical finding of bipolar disorder and "PSD" which Danizger construed as postraumatic stress disorder. (V15, R2951).

[17] Danziger agreed with Mings' asssesment that Jordan suffers from bipolar disorder, chronic substance abuse, and probable mild memory impairment related to the effects of the self-reported head trauma during Jordan's life. (V15, R2945).

letter Jordan wrote from jail in which Jordan referred to Cope's murder as "the hog-tie murder." (V15, R2945).

Jordan discussed his upbringing and family dynamics. Jordan did not report suffering from any physical or sexual abuse. (V15, R2940). Jordan self-reported multiple head injuries he had sustained as a youth from fights or "daredevil expolits." Jordan was hospitalized as a result. Jordan claimed he also sustained a head injury as an adult when he was hit with a two-by-four board. (V15, R2900). Jordan was diagnosed with ADHD when he was a child. He was diagnosed with bipolar in 2001, when he was 31 years old.[18] Jordan reported being administered Ritalin, and antidepressant medications at various times that included Depakote, Paxil, Wellbutrin, Celexa, Effexor and Pamelor. (V15, R2902, 20904). Jordan was also administered Risperdal which is used to treat schizophrenia but is also used as a mood stabilizer. (V15, R2906). Jordan also was administered Neurontin, a pain medication, but some doctors use it to treat bipolar disorder. (V15, R2903-04).

Jordan reported having depression and mania and abusing various drugs including cocaine, his "drug of choice," but that he was "never a big drinker." (V15, R2910, 2913, 2914). Jordan reported that Depakote worked for him in controlling his mood disorder. Jordan denied having any episodes of hallucinations or delusions. (V15, R2911, 2912). Jordan reported periods of depression that lasted five to seven days. (V15, R2906). Jordan's mood was "predominately low. He's

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[18] Jordan was born on March 19, 1970. (V1, R186).

very teary-eyed. He isolates himself. His sleep during depressive episodes is markedly disturbed. He either sleeps too much or hardly at all." (V15, R2906). Jordan hardly ate during these periods. He lost weight, had poor concentration, and little energy. Jordan "feels quite hopeless ... thinks about suicide and believes that he would be better off dead." Jordan reported three suicide attempts at age 15, another at an age undetermined, and a third attempt at age 35.[19] (V15, R2907-08, 2930). Jordan described himself as "bouncing off the walls" during his high manic episodes. During these episodes, Jordan reported acting in a "reckless fashion, drives fast, spends money recklessly, uses drugs." (V15, R2909).

Jordan reported attending an outpatient treatment program at 15-years-old. (V15, R2919). At various times throughout his life, Jordan attended Alcoholics Anonymous or Narcotics Anonymous. Danziger did not review any other medical records from treatment facilities. (V15, R2919).

Jordan was cooperative and pleasant during their initial meeting. (V15, R2920). In Danizger's opinion, Jordan was not malingering during the evaluation. (V15, R2921, 2922). Jordan did not claim any extreme systems or any impairment in his cognitive ability or memory. (V15, R2921). Jordan has an IQ of average intelligence, "his language, his grammar, his ability to interact with me, he's certainly not mentally retarded or slow." Jordan's speech and motor skills were

[19] Jordan attempted to hang himself the first two times and ingested 28 grams of cocaine during his third attempt. He was hospitalized after the drug overdose. (V15, R2930).

normal, as well as his flow of thought. (V15, R2922, 2939). There were no communication issues between them. (V15, R2940). Danizger did not talk to Jordan about the events leading up to Cope's death with the exception of Jordan reporting that "he had been off his medication." (V15, R2922-23, 2939). Jordan stopped taking Depakote due to its sexual side effects. (V15, R2924).

Danizger met with Jordan a second time in November 2012. (V15, R2925). They discussed the same issues as previously discussed. Danizger did not notice any changes in Jordan. (V15, R2925).

In Danziger's opinion, Jordan has "bipolar disorder, type one, rapid cycling" as well as a diagnosis of polysubstance dependence. (V15, R2934-35). Danziger also diagnosed Jordan with Antisocial Personality Disorder—ASPD. (V15, R2935, 2948). Jordan was not suffering from any serious symptoms of being in jail, he was not hallucinating, not suicidal, "no serious or active symptoms of mental illness." (V15, R2935). A diagnosis of ASPD indicates a lifetime pervasive pattern of disregard for and violation of the rights of others. (V15, R2949). In Danizger's opinion, Jordan demonstrated ASPD when he murdered Cope. (V15, R2950).
Jordan knows right from wrong. Jordan has the ability to conform to the laws of society. (V15, R2941). Jordan did not indicate any issues with impulse control during the two meetings Danziger had with him. (V15, R2942). Jordan made the choice whether or not to take his prescribed medications. (V15, R2942-43). In Danziger's opinion, Jordan's bipolar disorder had no connection to Cope's murder, "none that I am offering." (V15, R2947). The majority of those suffering from bipolar disorder "certainly [do] not" murder others. (V15, R2948).

Dr. Eric Mings, psychologist, was contacted by Jordan's counsel to administer a neuropsychological evaluation which he administered on November 18, 2011. (V15, R2995, 2999).

Mings spent about six hours with Jordan at the Volusia County jail. (V15, R2999; V16, R3017). They did not discuss the details of Cope's murder. (V16, R3018). Mings reviewed Jordan's jail medical records, school records (Jordan's "GED"), and an evaluation report written by Danziger. (V15, R2998). Mings was aware that Danizger had diagnosed Jordan with bipolar disorder and Jordan self-reported the disorder, as well. (V15, R2999-3000). Jordan also self-reported a history of head injuries he sustained during childhood. Jordan was "entirely cooperative" with Mings. (V15, R3000; V16, R3018).

Mings administered a series of tests that included the Wechsler Adult Intelligence Scale Test "WAIS," in which Jordan attained a full-scale IQ score of 104, "within the average range." (V16, R3001, 3003). Mings also administered several "frontal-lobe type tests" that included the Trails A and B test, the Wisconsin Card Sorting test, in which Jordan scored within normal range. (V16, R3012). Mings also administered the Test of Memory Malingering in which there was no indicating that Jordan malingered. (V16, R3013, 3014).

In Mings' opinion, Jordan suffers from a history of bipolar disorder, "very severe polysubstance abuse," and from a neuropsychological impairment that Mings attributed to Jordan's childhood head injuries. (V16, R3015, 3016, 3019). Jordan's bipolar disorder and mild mental impairment, is not related to Cope's murder. (V16, R3020). Jordan is not crazy or insane. (V16, R3016). In addition,

Jordan knows right from wrong and had the capacity and ability to follow the law if he choose to do so. (V16, R3019).

On April 24, 2013, the jury returned an advisory sentence of death by a vote of ten to two (10-2) for the murder of Keith Cope. (V19, R3099).

At the *Spencer* hearing, held on August 12, 2013, no further testimony was offered, and counsel submitted sentencing memorandums in lieu of oral argument. (V5, R806).

At the sentencing hearing, the trial court found that 4 statutory aggravators were proven beyond a reasonable doubt: (1) Defendant was previously convicted of a felony involving the use or threat of violence to a person—little weight; (2) The capital felony was committed while Defendant was engaged in the commission of a robbery; (3) The capital felony was committed for pecuniary gain—great weight; and (4) The capital felony was especially heinous, atrocious or cruel—great weight. However, to avoid the doubling effect, (d) and (f), (or (2) and (3)) were considered together as one aggravator. (V5, R807-808). The trial court found that one (1) statutory mitigating circumstance had been established, the capital felony was committed when the defendant was under the influence of extreme mental or emotional disturbance -moderate weight, and 37 nonstatutory mitigating factors, accorded "little," "some," or "minimal" weight. (V5, R809-813). One factor, Appellant's history of mental illness and related hospitalizations, was accorded "moderate" weight. (V5, R810). One factor, that Appellant committed the crime in an unsophisticated manner, was rejected, and accorded no weight. (V5, R813). The trial court imposed a sentence of death on September 23,

2013. (V1, R154-63).

SUMMARY OF ARGUMENT

Argument I: Only one comment was preserved for appellate review by objection. The court properly ruled on that issue. None of the other questioned comments, if in error, rise to fundamental error, either individually, or cumulatively.

Argument II: There was competent, substantial evidence to support a finding of HAC in this case where Cope was attacked in his home, pistol-whipped, duct taped about the head and mouth, tied to his bed, and left to die without food, water, adequate air, or circulation leading to immense pain and medical complications that caused his death.

Argument III: The victim impact statements were properly admitted as they were within the parameters of *Payne*[20] and did not fall within one of the proscribed categories of victim impact evidence delineated in *section 921.141(7)*.

Argument IV: The trial court properly found that the mitigating circumstance that Jordan's ability to conform his conduct to the requirements of the law was substantially impaired did not apply. There was no evidence to support the application of this factor.

Argument V: The death sentence in this case is proportionate.

Argument VI: *Ring v. Arizona*[21] does not apply to this case.

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[20] *Payne v. Tennessee*, 501 U.S. 808, 826, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991).

[21] *Ring v. Arizona*, 536 U.S. 584, 584, 122 S. Ct. 2428, 2429, 153 L. Ed. 2d

Argument VII: There is sufficient evidence in this case to support a conviction for first-degree felony murder.

ARGUMENT I
THE STATE'S CLOSING ARGUMENT DOES NOT COMPEL A NEW GUILT OR PENALTY PHASE TRIAL

Appellant contends that he is entitled to a "new trial, or at least a new penalty phase trial" based on various comments that the prosecutor made during closing arguments in the guilt phase. (*IB* at 33). The comments can be characterized as (1) a comment regarding "case law"; (2) comments on Appellant's "lack of remorse"; (3) extorting the jury; (4) misstating the facts; (5) Golden Rule; (6) denigrating the defense; (7) misstatement of the law; (8) "don't let him get away with this"; and (9) inconsistent verdict. Appellant objected only to the comment regarding "case law." As such, this is the only claim that was preserved for appeal. *See Bright v. State*, 90 So. 3d 249, 259 (Fla. 2012), *cert. denied*, 133 S.Ct. 300, 184 L.Ed. 2d 177 (2012). To preserve a claim based on improper comment, counsel has the obligation to object and request a mistrial. If counsel fails to object or, if after having objected, fails to move for a mistrial, his silence will be considered an implied waiver. *Bright*, 90 So. 3d at 259 (quoting *Nixon v. State*, 572 So. 2d 1336, 1340–41 (Fla. 1990).

The case law comment that was preserved by an objection is reviewed for an abuse of discretion by the trial court. *Merck v. State*, 975 So. 2d 1054 (Fla. 2007.

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556 (2002).

There was no abuse of discretion in the ruling below.

“Case Law”

Appellant takes issue with the following passage of the guilt phase closing argument:

> So let's take a look at the first-degree felony-murder instruction. To prove the crime of first-degree felony murder, the State must prove the following three elements:
>
> Keith Cope is dead. Agreed by both sides and testified to by every witness.
>
> The death occurred as a consequence of and while Joseph Jordan was engaged in the commission or attempting to commit a robbery. **The way the case law interprets that, the way the law –**
>
> MR. NIELSEN: Objection, your Honor.

(*IB* at 28-29).

The parties approached the bench and defense counsel moved for a mistrial and argued that it was improper for the State to support its theory of the case in closing argument with case law, which was the exclusive province of the court. (V13, R2531). The trial court ruled that the prosecutor had not gotten to the point that any damage was done, and cautioned the State to only make the argument that the law upholds a felony murder where the victim dies as a “consequence of” the robbery. (V13, R2532-2533).

Appellant argues now that the prosecutor attempted to sway the jury by giving the impression that his interpretation of felony murder was supported by case law. Appellant points to the fact the prosecutor agreed he did say the words “case law.” However, Appellant admits the prosecutor did not inform the jury about the name,

facts, or holding of this case law. Appellant asserts that trial court abused its discretion in failing to grant the defense's motion for mistrial. However, the mistrial was properly denied because the prosecutor did not engage in improper argument by the mere mention of the words "case law."

Alternatively, even if this comment was not proper prosecutorial argument, it was not so serious or egregious to warrant a mistrial because "[a] trial court should grant a motion for mistrial only when 'the error upon which it rests is so prejudicial as to vitiate the entire trial, making a mistrial necessary to ensure that the defendant receives a fair trial.'" *Bright v. State*, 90 So. 3d 249, 259-60 (Fla.), *cert. denied*, 133 S. Ct. 300 (2012) (quoting *Dessaure*, 891 So. 2d at 464–65); *Floyd v. State*, 913 So. 2d 564, 576 (Fla. 2005); *Wade v. State*, 41 So. 3d 857, 872 (Fla. 2010).

To determine whether or not a prosecutor has engaged in improper argument, it is necessary to evaluate the actions of the prosecutor in context rather than focus on the challenged statement in isolation. *See State v. Jones*, 867 So.2d 398, 400. This Court has outlined the factors to look to in evaluating whether or not a comment vitiates an entire trial in *Bright*, 90 So. 3d at 260, including whether or not the comment is of an isolated nature, the context in which the comment was made, the comment in light of the evidence, and whether or not the trial court instructed the jury properly. *See generally Dessaure*, 891 So. 2d at 465. Here, the prosecutor had no sooner mentioned the words than defense counsel objected. The trial court did not even hear the word "case" prefacing "law" so it is reasonable to assume the jury did not notice it either. The prosecutor did not mention it again, so it is an isolated incident which was given no context. Contextually, the State was

arguing the verdict form, and alternate ways the jury could convict Jordan, which is a perfectly proper basis for argument. Finally, the jury was properly instructed on the law by the court. (V14, R2604-33).

Appellant cites to *Profitt v. State*, 970 So. 2d 416 (Fla. 4th DCA 2008) for the premise that the motion for mistrial should have been granted based on the prosecutor's use of the words "case law," but there is no such case found at that citation; *Profitt v. State*, 978 So. 2d 228, 229-30 (Fla. 4th DCA 2008), rather, is easily distinguishable from the case at bar, as it deals with a prosecutor who:

> [E]xplicitly told the jury that "out of court identification under Florida law is considered to be a stronger identification then [sic] if she can't do it now." A defense objection to this assertion of law was overruled. The prosecutor again stated, "[t]hat-that's what the case law in Florida says. The day of the crime identification"-at which point he was stopped by the court: "Mr. Regan, do not argue case law, please." There were also other improper state arguments to some of which the trial court sustained objections and to some of which no objection was made.

To which the court made the following analysis:

> It was patently a false statement of the law to advise the jury that "under Florida law" an out-of-court identification by a witness is "considered to be a stronger identification" than at a subsequent in-court identification. This incorrect statement of law was then given a stamp of approval by the trial court's overruling the defense objection.

Here, the prosecutor never said what the "case law" was, and was thus not able to make an incorrect statement of the law. The mere mention of the words "case law," had no context in which the jury could possibly infer the prosecutor was bolstering his opinion. The State was not able to bolster its theory of the case, and said theory was not given a "stamp of approval" by the trial court like in *Proffitt*.

This Court reviews the trial court's ruling on a mistrial motion for abuse of discretion. *Salazar v. State*, 991 So. 2d 364, 371 (Fla. 2008). Trial counsel's motion for mistrial was properly denied because the ruling was not arbitrary, fanciful, or unreasonable. *Id*.

None of the other challenged comments were preserved for appeal by timely objection and are grounds for reversal only if they rise to the level of fundamental error. *Brooks v. State,* 762 So. 2d 879, 899 (Fla. 2000). To constitute fundamental error, "improper comments made in the closing arguments of a penalty phase must be so prejudicial as to taint the jury's recommended sentence." *Gonzalez v. State*, 136 So. 3d 1125, 1151-52 (Fla. 2014) (quoting *Thomas v. State,* 748 So. 2d 970, 985 (Fla.1999)). This Court has consistently observed fundamental error as the type of error that "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." *Robards v. State*, 112 So. 3d 1256, 1271 (Fla. 2013) (quoting *Brooks*, 762 So. 2d at 899); *McDonald v. State*, 743 So. 2d 501, 505 (Fla.1999). Each of the challenged comments is discussed in turn below.

Comments on Remorse

Appellant argues that the prosecutor made improper comments regarding lack of remorse during his closing argument. Specifically, "[t]he Prosecutor's comments regarding lack of remorse during the guilt phase was a two-fold improper argument: Find him guilty of felony murder because he lacks remorse for his actions, and consider remorse as an aggravator during penalty phase after you find him guilty." (*IB* at 22). The prosecutor said the following statements during

closing arguments:

> …[The defense theme] seems to be a three-point theme to the State. The first is I'm sorry. The second point is I didn't mean to kill Keith. And the third point is I'm not responsible for the harm that occurred after I left.
>
> …
>
> Let's start with I'm sorry. Nowhere in the evidence, nowhere, is there a single fact that demonstrates the defendant is sorry about anything.
>
> …
>
> Look carefully [in the six letters Jordan wrote] for the words I'm sorry. I'm sorry doesn't appear anywhere. I'm sorry doesn't come up…[t]here is no I'm sorry…not once did he say I'm sorry.
>
> …
>
> You know, nowhere in there was I'm sorry. The most we got was I'm suicidal. I F'ed up. I didn't want to go to jail, but we never heard I'm sorry.

(V13, R2540-2541).

These "remorse" comments, unlike the "case law" comment discussed above, were not objected to; and are therefore, not preserved for appellate review. As such, they are grounds for reversal only if they rise to the level of fundamental error. *Merck,* 975 So. 2d at 1061. Counsel must contemporaneously object to improper comments to preserve a claim for appellate review. *Power v. State*, 886 So. 2d 952, 963 (Fla. 2004) states: "[f]undamental error is the type of error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. *See Card v. State*, 803 So. 2d 613, 622 (Fla. 2001); *see also McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999) (quoting *Urbin v. State*, 714 So. 2d 411, 418 (Fla. 1998)); *Chandler v. State*, 702 So. 2d 186, 191 n. 5 (Fla. 1997). In determining whether fundamental error has occurred, the totality of the circumstances approach applies.

See Card, 803 So. 2d at 622."

The prosecutor's comments, taken in the totality of the argument, were within the permissible bounds of advocacy. The prosecutor was arguing to discredit the defense's theory of the case, and not, as Appellant asserts, to urge the jury to consider a non-statutory aggravating circumstance. This is true because this argument occurs during the guilt phase as opposed to the penalty phase; the prosecutor makes multiple references to the defense theme that has been woven throughout the case in both defense's opening argument and throughout the questioning of witnesses, anticipating the defense's closing argument, and peremptorily, arguing against it.

The prosecutor reasonably anticipated the defense's closing argument and "theme" from defense counsel's opening statement and the questioning of witnesses. Defense counsel was the party to make issue of Jordan's anxiety and emotional state following the murders. This was an attempt to establish that Jordan did not intend to kill Cope, because he was remorseful and upset over the situation he had left Cope in. Defense counsel began by stating in his opening statement, "[th]ese were not strangers. This was not some act of robbery and murder. This was a situation gone horribly bad … what was the intent. What was in the mind at the time." (V10, R1814). Counsel then asked Haque, " … [after the murder] would [Jordan] have these emotional outbursts," "… is this when he started making these comments that he was concerned about ... Mr. Cope, that he was worried about Keith and that Keith was … in trouble … Did he appear to become anxious about that?" Counsel continued to question Haque, "…he became pretty frantic about it

… 'concerned about his well-being' … he's definitely worried about Mr. Cope … he wanted to know, is Keith okay, correct?" (V11, R2090-91). In the cross-examination of Hill, defense counsel asks, "…before he got arrested, did he express to you any suicidal thoughts?" (V11, R2180).

The prosecutor could see the direction the defense was taking and made the aforementioned comments to cut off that line of argument, not to establish improper aggravation. Moreover, the prosecutor makes no mention of aggravation (or mitigation, for that matter) in the totality of its argument.

Appellant asserts that the prosecutor could not comment about the defense "theme" since Appellant didn't testify. (*IB* at 24). This is a meritless argument in light of Appellant's absolute right not to testify, which in no way precludes the defense from mounting a vigorous defense, or the State from presenting a closing argument. Appellant also takes issue with the fact that "defense's argument had not been presented yet." (*IB* at 24). However, Appellant does not cite any authority to say a prosecutor cannot anticipate and address the defense theory prior to the defense closing argument. That is clearly what the prosecutor's closing argument attempted to do in this case. (V13, R2540).

Defense counsel then responded to these comments in his closing by saying "… I appreciate the state attorney getting up here and telling you what the defense theory is and what our argument is, but I really think that's a job for us to do;" (V13, R2554) and "… I know the State wants to present our defense to you." (V13, R2564). Defense counsel then goes on to argue the prosecutor's point, that an element of their defense theory is, in fact, that Appellant did not intend the murder

because he was distraught or remorseful over his crimes against Cope, stating "…he was so upset, mind so screwed up, he was talking about killing himself." (V13, R2561).

Expounding on this point, Appellant argues the phrase "[n]owhere in the evidence, nowhere, is there a single fact that demonstrates the defendant is sorry about anything" to assert that the prosecutor was referencing facts not in evidence. (V13, R2450). However, this is a misunderstanding of facts not in evidence. The prosecutor may properly comment on the evidence, including conflicts in the evidence, or the lack of evidence. *See Bell v. State*, 108 So. 3d 639, 652 (Fla. 2013); *Florida Standard Jury Instructions*. A comment on a lack of evidence is not the same thing as referencing facts that were not admitted into evidence. *See Bigham v. State*, 995 So. 2d 207, 214 (Fla. 2008).

Appellant next cites to *Poole v. State*, 997 So. 2d 382, 394 (Fla. 2008) in support of his assertion that these remorse comments amount to fundamental error. An important distinction, however, is that the comments on Poole's lack of remorse were during the penalty phase, and even then they did not amount to fundamental error. It was only when this Court considered *in toto* the cumulative effect of these remorse comments along with "the error of presenting inadmissible nonstatutory aggravation of Poole's criminal history and the content of his tattoo" did this Court find that Poole was deprived Poole of a fair penalty phase. *Poole*.

Appellant next cites to *Jones v. State*, 569 So. 2d 1234, 1240 (Fla. 1990) in support of his assertion of the impropriety of these remorse comments. During closing argument in the guilt phase, the prosecutor in *Jones* asked the jury, "[d]id

you see any remorse?" However, the State's comment on his lack of remorse was improper in that case because it was "augmented and highlighted during the penalty phase when the state called a Sheriff's Department officer for the express purpose of testifying that Jones showed no remorse." *Jones,* 569 So. 2d at 1240. This line of cases deals with the fact that lack of remorse has no place in the consideration of aggravating circumstances. *Robinson v. State*, 520 So. 2d 1, 6 (Fla. 1988); *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983); *McCampbell v. State*, 421 So. 2d 1072, 1075 (Fla. 1982). This is not the case at bar, where the remorse comment had nothing to do with aggravation, and was instead, meant to factually discredit the defense theory of the case.

Appellant also cites *Pope* in support of his argument. However, in *Pope*, Justice Ehrlich, writing for the Court, was addressing the application of lack of remorse specifically to the heinous, atrocious, and cruel aggravating factor. *Pope*, 441 So. 2d at 1076-1077. The Court was also addressing the broader concern that lack of remorse should not be considered as aggravation or enhancement of an aggravator and that there are overarching due process concerns when a trial court uses lack of remorse against a defendant who has simply maintained a not-guilty plea throughout trial. *Id*. at 1079.

The concerns that were present in *Pope, Jones,* and *Poole* are not present in this case. First, this was during the guilt phase, and there was no "additional, inadmissible, non-statutory aggravation" such as Jordan's arrest record or tattoos admitted. Secondly, the trial court did not consider lack of remorse as an aggravating factor or use it to enhance another aggravating factor. There was no

mention of lack of remorse in the trial court's sentencing order or at the *Spencer* hearing. In fact, the prosecutor's argument in the penalty phase distinctly pointed out the three aggravators the State was seeking and made no mention of lack of remorse. (R14, V2738-2740, 2784). Moreover, the trial court properly instructed the jury on aggravators and mitigators. (V14, R2604-33). Finally, the prosecutor's comments about lack of remorse were intended to address the evidence that the defendant cried after the murders. The jury had heard evidence that Appellant was distraught during the three days Cope was tied in his home left for dead, and the prosecutor simply submitted an argument to suggest to the jury that Appellant was not as concerned about Cope's welfare as the defense theory would have them believe.

The State asserts that there was no *per se* impropriety in the prosecutor's comments. Taken in the totality, the cumulative effect of these comments could not have been so egregious as to have vitiated the results of, or deprived Appellant of a fair trial. *See Braddy v. State,* 111 So. 3d 810 (Fla.), *cert. denied,* 134 S.Ct. 275, 187 L.Ed. 2d 199 (U.S. 2013).

Extorting the Jury

Next, Appellant argues that the prosecutor committed fundamental error when he "extorted" the jury by stating that he wanted them to enforce the law. Appellant takes issue with the prosecutor's following comments:

> I asked you on Monday and Tuesday if you could enforce the law. And in this particular case, you should have no hesitation. The defendant has confessed to the crime, and there is no other explanation. (V13 2529).

> * * *
>
> You see, because the State has given you the facts and evidence necessary to satisfy the elements of the crime, the rest of this stuff doesn't matter so much. We gave you the proof necessary in order to do your job. **And on Monday when I talked to you, and hear me again now, if you think for some reason that we haven't proved our case, then I want you to do your job.**
>
> **You see, I want you to enforce the law no matter which way it comes. I want you to enforce the law and hold him guilty if you find beyond a reasonable doubt that he committed these crimes. And I want you to enforce the law and find him not guilty if for some reason we haven't proven to you by now** that the defendant robbed Keith Cope and that Keith Cope died as a result of that robbery. (V13 2539).
>
> * * *
>
> When a person comes to a jury trial, **it's about asking the members of the community to enforce the law, one way or another. I'm asking you, the State is asking you, to enforce the law** and not to be misled by this argument that he didn't mean to kill Keith Cope. (V13 2542)
>
> * * *
>
> And so the State is asking you to **enforce the law as it's written**. These laws exist for a reason, and we're all bound by them. (V13 2542)
>
> * * *
>
> And it was agreed that it could, so I'm asking you to **enforce it** now. (V13 2580).

(*IB* at 25-26). (Emphasis supplied).

Again, none of these "extortion" comments were objected to. As discussed *supra,* the fundamental error analysis applies.

Appellant offers *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038 (1985) in support of the proposition that it constitutes reversible error for a prosecutor to "exhort the jury to 'do its job.'" *Young*, however, stands for a contradictory

proposition than that which is proposed by Appellant. In *Young*, the Court specifically cautions against looking at a comment, like "do your job," in isolation; instead, urging a reviewing court to look at the statement in the context of the entire trial. In *Young*, defense counsel improperly argued the prosecutor's personal opinion, and invited the rebuttal statement which was also error, though deemed to be "invited." The Prosecutor in *Young* stated his personal opinion that the defendant was guilty and urged the jury to "do its job" to convict the defendant. Even under those facts, the Court found that there was no "plain" or fundamental error. *Id*. The Court in *Young* pointed out that prosecutorial comments, even if in error, did not warrant reversal if "the jury was not influenced to stray from its responsibility to be fair and unbiased," and it pointed out that the weight of evidence against a defendant was also a proper consideration in that analysis. *Id.* As the bolded sections above illustrate, the prosecutor here never asked for a conviction. He did not attempt to exploit the prestige of the government, ask the jury to accept his opinion, or even ask the jury to *convict* Appellant; he merely asks the jury to "follow the law," pointing out that may result in acquittal.

This Court has found related comments where the jury was asked to follow the law and to make a decision based on the evidence to be proper argument. In *Bell v. State*, 108 So. 3d 639, 649 (Fla. 2013), during the guilt phase closing argument, this Court held that the prosecutorial comment "if you feel the evidence has proved the charges beyond and to exclusion of a reasonable doubt[, then] follow the law and ... hold the defendant responsible for the crimes he committed and ... reflect so in your verdict of guilty as charged" was not error because the "the prosecutor was

simply advising the jury to follow the law" (quoting *Rodriguez v. State*, 919 So. 2d 1252, 1283 (Fla. 2005)).

Analogous comments are also not error in the penalty phase. For example, in *Poole v. State*, 997 So. 2d at 395, there was no fundamental error in the penalty phase closing argument when the prosecutor made the comment "[y]ou're just going to find that you did your job just like you promised to do when you raised your right hand and swore to that oath," to inform the jury that they has to do their jobs as they had promised to do when they took the oath, which was to weigh the mitigators and aggravators. Likewise, in *Davis v. State*, 136 So. 3d 1169, 1207-08 (Fla. 2014), it was not improper in the penalty phase for the prosecutor to tell the jury that it had a "responsibility" to recommend the death penalty as long as the prosecutor informed the jury that its recommendation should be "based upon all the evidence in this case." It was not improper for the prosecutor to argue that the jury will "determine whether this defendant will be held fully accountable for the crime that he's committed" or that "[j]ustice demands that [the jury] hold this defendant fully accountable for this murder." *Id.*

In *Paul v. State*, 20 So. 3d 1005, 1008 (Fla. 4th DCA 2009) the court pointed out that a prosecutor who asked a jury to "do its job" was:

> …simply reminded[ing] the jury of its duty to follow the law. The prosecutor's comment concerning reasonable doubt and asking the jury to do its job likewise did not rise to the level of fundamental error. The prosecutor did not tell the jurors that it was their job to convict the defendant. Rather, the prosecutor advised the jury to follow the reasonable doubt standard. The theme of the prosecutor's comments was adherence to the law and abidance to the juror's oaths to follow the law and hold the State accountable to its burden of proof.

Conversely, this Court has reasoned that it is improper for the State to tell jurors that "the only proper recommendation to this court is a recommendation of death" or that the jurors have a legal duty to recommend the "appropriate punishment" of death. *See Melton v. State*, 949 So. 2d 994, 1019 (Fla. 2006). It is clear that the prosecutor here did not extort the jury for a conviction or a particular sentence; rather, he merely asked the jury to follow the law and weigh the evidence.

Misstating the Facts

Appellant claims the prosecutor misstated the facts when he stated Appellant "confessed to the crime." Appellant argues "[t]here is nothing in the record supporting the claim that Mr. Jordan confessed to first-degree murder. Undersigned counsel concedes that Mr. Jordan explained the actions he performed, but never conceded it was first-degree murder." (*IB* at 26). Again, this "misstatement" comment was not objected to. As discussed *supra,* the fundamental error analysis applies.

The prosecutor, however, was making a proper argument on the facts in evidence that Appellant confessed to the crime in "explaining the actions he performed." Several letters written by the defendant expressed the facts of the crime, including using a gun in the robbery to "pistol whip" Cope, tie him to the bed, and steal his truck and debit card, in addition to the testimony. In fact, the defense attorney admitted that perhaps this theory applied when he argued against a first-degree felony murder conviction, stating, "… the evidence is he's using Mr. Cope's credit card, making withdrawals. It's a theft. It's stealing his money, okay?

Just stick with me on that," and "… you could fit in this with the grand theft down in south Florida, third-degree felony murder." (V13, R2566). So even if the described "actions he performed" only related to manslaughter, the fact that there was a confession necessarily enhanced his crime to a felony murder.

Even if the prosecutor had misstated the facts, the analysis would be akin to this Court's reasoning in *Henyard v. State*, 689 So. 2d 239, 250-51 (Fla. 1996), where the prosecutor misstated the fact that the defendant had *never* confessed to the rape, as opposed to failing to confess in the *initial* interrogation, when he stated: " …[y]ou have to look at everything that is going on and see in that same story he is telling them, I never raped anybody." In that case, only the first statement was admitted against the defendant at trial, though in his last statement, Henyard had finally confessed that he had raped the victim. This Court reasoned:

> When the prosecutor's closing argument is read in its entirety and fairly considered, it is clear that the prosecutor was referring to Henyard's lack of candor and failure to be completely forthcoming about his involvement in the offense when he initially confessed, and was not making a bad faith argument which implied that Henyard never confessed to the sexual battery of Ms. Lewis. In essence, the prosecutor argued to the jury that because the state had offered evidence at trial which clearly contradicted and discredited Henyard's initial assertion that he did not rape Ms. Lewis, the jury should not believe Henyard's further assertions that he also did not kill Jasmine and Jamilya Lewis. We find that the prosecutor's argument was a legitimate comment on the truthfulness, or lack thereof, of Henyard's claim of innocence, and, contrary to Henyard's assertion, was not improper.

Henyard v. State, 689 So. 2d 239, 250-51

In this case, there was no prosecutorial bad faith for arguing that Appellant

confessed to the crime when he admitted the actions leading to Cope's death, and not by specifically stating: "I committed first degree murder." As Appellant had confessed to the actions leading up to the murder, this was a fair comment on the evidence.

Golden Rule

Appellant contends that the prosecutor made an improper "Golden Rule" argument by asking the jury to put themselves in the position of the victim. Appellant cites to the passage: " … Joseph Jordan was spending the hard-earned money of Keith Cope and partying with his friends. **And during that time, I'd like to remind you where it was that Keith Cope was, how Keith Cope spent his last hours** (emphasis added in Appellant's brief). And so when you compare and contrast the two, there really is no question in this case whose fault it was that Keith Cope died."

Appellant makes the argument: "[r]eminding the jury about the victim's physical condition—while the Defendant was having a good old time—and then telling them how the victim suffered, was tantamount to imagining themselves in the victim's position in violation of the Golden Rule." (*IB* at 27-28). Again, this "Golden Rule" comment was not objected to. As discussed *supra,* the fundamental error analysis applies.

Here, the prosecutor's comments were not tantamount to asking the jurors to place themselves in the victim's position. He did not describe the victim's suffering or ask the jury to imagine what the victim was experiencing. Rather, he simply noted contrasted the actions of the defendant and the victim over the period

of time leading to Cope's death.

This Court explains what constitutes an improper Golden Rule argument in *Wade v. State*, 41 So. 3d 857, 872 (Fla. 2010) (holding prosecutor's argument "[w]hen you are done I ask you to walk out not into the darkness of greed, into the terror of the night drive in the back of a trunk but into the light of justice" did not invite the jury to put themselves in the position of the victim), stating, "[a]s we explained previously, an impermissible "golden rule" argument invites jurors to put themselves in the victim's position and then imagine the victim's suffering." (citing *Bailey,* 998 So. 2d at 555; *Merck,* 975 So. 2d at 1062).

This comment was a fair comment on the evidence, and does not come close to a golden rule argument. The prosecutor in *Bailey v. State*, 998 So. 2d 545, 555 (Fla. 2008), properly made the following statement during closing arguments:

> I ask that as you sit down in the jury room to deliberate you do two things before you reach time to take a vote. I want you all just to put your finger 18 to 24 inches away from each other's face and see how close you are when your eyes are meeting, as his met those eyes on an Easter night in our community and in 18 to 24 inches away firing once, twice, and three times.

Also in *Merck*, this Court determined an argument was proper where the prosecutor timed one minute and then said:

> Now. That's one minute. How many thoughts went through your mind in that one minute? Did he live two minutes? Did he live three minutes? Four minutes? Enough time for his life to go, roll his eyes, to think about the people that he would never see again. Was that an unnecessarily torturous way for the man to lose his life that night for no good reason?
>
> … Defendant jabbed this into his throat and twisted it. Twisted it until

> blood squirted out of his neck, as the Defendant described it, like a squirt gun …
>
> ... [I]sn't this among the worst ways to die that anyone can imagine?
>
> ... How did that feel to have a knife penetrate his skull?....

Additionally, in *Rogers v. State*, 957 So. 2d 538, 549 (Fla. 2007), this Court held “this is not a case in which the prosecutor made an improper ‘golden rule’ argument by attempting to place the jury in the position of the victim” when prosecutor argued in the penalty phase:

> … [S]he remained conscious and she could feel the pain of the knife going through her body and could feel the pain of the knife as it was twisted and pulled out of her body, and then he did it again … [w]hat weight do you give to the ten, twenty minutes where she was there in that bathroom reflecting back on her life, on the things that she hadn't done that she wished she could, the opportunities that had never been presented to her, on her children that she would never see again ...

This Court found that these arguments were not improper because they were based upon facts in evidence and attempting to establish the HAC aggravator. *Id.* This Court further explained in *Merck* that “a common-sense inference as to the victim's mental state may be the basis of proper argument.”

All of these comments were much closer to a golden rule argument than here, and all were held to be proper arguments because they were fair comments on the evidence and did not attempt to place the jury in the position of the victim. None of these comments fit the narrow confines of a golden rule argument, and neither does the comment here.

Denigrating Jordan’s Defense/
Attempt to Ridicule Defense Counsel

Appellant argues that the prosecutor attempted to “ridicule” defense counsel

during his closing argument when he stated "[i]f only he has stayed in the middle of the bed" and "if only these guys had come from South Florida earlier." (*IB* at 30). Jordan asserts "Defense counsel never said it was everybody else's fault except the Mr. Jordan's [sic]. The Prosecutor's improper argument on that point, which was not in evidence, would only be offered to mislead the jury by denigrating Mr. Jordan's defense." (*IB* at 31). Again, these "denigration" comments were not objected to. As discussed *supra,* the fundamental error analysis applies.

This Court discusses improper closing arguments in *Brooks v. State*, 762 So. 2d 879, 900 (Fla. 2000) (citing *Gore v. State,* 719 So. 2d 1197, 1201 (Fla. 1998)) for the premise "[i]t is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant or witness." And in *Merck*, stating:

> [It] is correct that we and the district courts have held that such prosecutorial comments are improper. … *Redish v. State*, 525 So. 2d 928, 931 (Fla. 1st DCA 1988) (holding verbal attacks on personal integrity of opposing counsel are unprofessional and inconsistent with prosecutor's role).

Merck, at 1064

Appellant then cites to *Valentine v. State,* 98 So. 3d 44, 55–56 (Fla. 2012) for the proposition that while a prosecutor may "not ridicule or otherwise improperly attack the defense's theory of the case," a prosecutor is permitted to suggest to the jury that "based on the evidence of the case, they should question the plausibility of the defense's theory." However, *Valentine* also reasons that the prosecutor in that case did not ridicule or otherwise improperly attack the defense's

theory of the case; and merely described the defense's theory of the case when she stated that the defense wanted the jury to "somehow" believe that theory.

Valentine also stands for the premise that "[i]ndicating to the jury that, based on the evidence of the case, they should question the plausibility of the defense's theory of the case is within a prosecutor's role of assisting the jury to consider and to evaluate the evidence presented." (citing *Hildwin v. State*, 84 So. 3d 180, 191 (Fla. 2011). This is what the prosecutor did below. Accordingly, his comments were not improper.

This is not a case like *Ruiz v. State,* 743 So. 2d 1, 5–6 (Fla. 1999), where the Prosecutor's argument was improper when she said "[t]here's no way, no stretch of the imagination because let me tell you one thing, if [the defendant] were Pinocchio, his nose would be so big none of us would be able to fit in this courtroom" (emphasis omitted). In *Braddy*, the prosecutor stated that defense counsel must have been "in a different trial" because "[t]heir arguments make absolutely no sense," and this Court held that these comments—either individually or cumulatively—did not rise to the level of fundamental error. Likewise, in *Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997) the prosecutor's reference to defense counsel's conduct as "cowardly" and "despicable" and to the defendant as "a brutal rapist and conscienceless murderer," still did not rise to the level of fundamental error. The comments at bar are much less questionable than others that did not constitute fundamental error.

The prosecutor's comments in this case did not improperly express his personal belief as to Appellant's guilt, did not improperly ridicule the theory of defense, and

did not engage in vitriolic or pejorative argument toward defense counsel. Here, like in *Merck*, these were not the sort of pervasive comments that compromise the integrity of the trial and thus did not constitute fundamental error.

Misstate the Law

Appellant argues that the prosecutor committed fundamental error when he made the comment:

> Premeditated murder handles intentional killings. There's a large vacuum in the law for dangerous crimes where people die. This law, first-degree felony murder, is the one that holds people responsible for committing inherently dangerous crimes and people dying as a result even though it was an accident or unintentional. (V13, R2583)

Again, this "misstatement of the law" comment was not objected to. As discussed *supra,* the fundamental error analysis applies.

Appellant argues that is a misstatement of the law, stating "[i]f the Prosecutor inferred to the jury that *unintentional* or *accidental* killings are the basis for creating felony murder, then that is completely inaccurate. Unintentional and accidental killings fall under third-degree murder and manslaughter (emphasis in Appellant's brief)" (*IB* at 32). Appellant ignores the comment immediately preceding the characterization of "accidental or unintentional," where the prosecutor states "committing inherently dangerous crimes and people dying as a result," which is a fair explanation of felony murder.

However, even if this comment was a misstatement of the law, the trial court properly instructed the jury on the law. (V14, R2604-33). In *Brooks*, 762 So. 2d at 902, defense counsel objected to a misstatement of the law made by the prosecutor,

but because the trial court correctly informed the jury concerning the law, this Court reasoned that the prosecutor's initial misstatement of the law, by itself, was harmless error. Also, in *Henyard*, 689 So. 2d at 250, this Court held that, because the jury was advised that the statements of the prosecutor and defense lawyer were not to be treated as the law or the evidence upon which a decision was to be based, and because the jury was instructed properly on the law, the prosecutor's misstatements of the law were no more than harmless error.

"Don't let him get away with this"

Appellant alleges that the prosecutor engaged in improper argument when he stated, during the State's closing argument, "[d]on't let him get away with this." Again, this comment was not objected to. As discussed *supra,* the fundamental error analysis applies.

This Court discussed what is proper closing argument in *Patrick v. State*, 104 So. 3d 1046, 1064 (Fla. 2012) *cert. denied*, 134 S. Ct. 85 (2013), when it stated:

> Closing arguments allow the State and defense to review the evidence and to explicate those inferences that may reasonably be drawn from the evidence. *Dessaure*, 891 So. 2d at 468. This Court has stated that "courts of this state allow attorneys wide latitude to argue to the jury during closing argument. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999) (citations omitted). However, counsel may not urge the jury to consider facts not in evidence. See *Jackson v. State*, 522 So. 2d 802, 808 (Fla. 1988). The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence

in light of the applicable law. *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985).

Appellant argues that the prosecutor committed fundamental error by asking the jury to punish Appellant. However there was nothing objectionable in this comment. Similarly, in *Pagan v. State*, 830 So. 2d 792, 812 (Fla. 2002) this Court held that the prosecutor's comments "[h]e wanted to get away with it. Now he wants to get away with them now. You are the only force on earth that can prevent that from happening" did not warrant a mistrial because it was neither a golden rule violation nor an assertion that the defendant would kill again.

Appellant cites *Lewis v. State*, 711 So. 2d 205 (Fla. 3rd DCA 1998) in support of this sub-claim, but it is not applicable to the case at bar because it deals with blatant and unambiguous prosecutorial "vouching for, and bolstering his witness' testimony," followed by a personal attack on the defense theory by calling it "lame." In *Lewis*, the specific prosecutor was chastised for his habit of improper argument, including, improper vouching, saying his witness was "a super honest guy," and in all his years in the courthouse, this defense theory stood out as especially poor. These two cases are nothing alike, except for the fact that *Lewis*, like the case at bar, was a case where the evidence against the defendant was strong, which was the reason cited by the Court in affirming *Lewis* in the face of such blatant improper prosecutorial argument.

Inconsistent Verdict

Appellant argues that the prosecutor committed fundamental error by stating: "[y]ou cannot find him guilty of grand theft and first-degree murder. You cannot do it. Do not do that. It's what's called an inconsistent verdict, and there will

be problems. You cannot do it." (*IB* at 32). Appellant claims the prosecutor misstated the law, and also intended to preclude the jury from considering leniency.

First, to address the issue of whether the prosecutor misstated the law, *Fayson v. State*, 698 So. 2d 825, 826-27 (Fla. 1997) states the standard for inconsistent verdicts, and it was likely this line of cases to which the prosecutor was referring when he made the comment:

> [a]s a general rule, inconsistent jury verdicts are permitted in Florida. (quoting *Eaton v. State,* 438 So. 2d 822 (Fla. 1983)). Inconsistent verdicts are allowed because jury verdicts can be the result of lenity and therefore do not always speak to the guilt or innocence of the defendant ...
>
> This Court has recognized only one exception to the general rule allowing inconsistent verdicts. This exception, referred to as the "true" inconsistent verdict exception, comes into play when verdicts against one defendant on legally interlocking charges are truly inconsistent. As Justice Anstead explained when writing for the Fourth District Court of Appeal in Gonzalez, true inconsistent verdicts are "those in which an acquittal on one count negates a necessary element for conviction on another count." 440 So. 2d at 515. For example, this Court has required consistent verdicts when the underlying felony is a part of the crime charged-without the underlying felony the charge could not stand. The jury is, in all cases, required to return consistent verdicts as to the guilt of an individual on interlocking charges. (citing *Eaton*, 438 So. 2d at 823.)

The prosecutor's theory, in this case, was felony murder based on the underlying Armed Robbery with a Firearm. He did not misstate the law when he told the jury that a verdict returning a finding of guilt on felony murder but reducing the robbery to grand theft would "cause problems." While factually

inconsistent verdicts may stand, legally inconsistent verdicts do not. A true, or legally inconsistent, verdict is based on legally interlocking charges wherein an acquittal on one count negates a necessary element for conviction on another count. *See State v. Powell,* 674 So. 2d 731, 733 (Fla. 1996). "Consistent verdicts are required when 'the underlying felony was a part of the crime charged—without the underlying felony the charge could not stand. The jury is, in all cases, required to return consistent verdicts as to the guilt of an individual on interlocking charges.'" *State v. Hargrett*, 72 So. 3d 809, 811 (Fla. 4th DCA 2011) (citing *Brown v. State*, 959 So. 2d 218, 220-221 (Fla. 2007); *Eaton*, 438 So. 2d at 823)).

A First Degree Felony Murder conviction cannot be sustained on a conviction for Grand Theft. So, the prosecutor's comment was, in fact, a correct statement. Here, the State was not proceeding under a theory of premeditated murder, so if, the jury had rejected the underlying robbery charge, there would have been no underlying felony to support first degree felony murder. Like in *Shavers v. State*, 86 So. 3d 1218, 1222 (Fla. 2nd DCA 2012), had the jury decided in that way, "such legally inconsistent verdicts would require reversal or vacation of the felony murder conviction," the "problem" the prosecutor warned of.

The jury was not deprived of the opportunity to exercise leniency. The jury was provided with lesser included offenses and properly instructed as to those options. (V4, R730-31; V14, R2604-33; R2656). Jury leniency is, by definition, a miscarriage of justice, and the prosecutor does not err in cautioning a jury against such a result.

Additionally, some of the comments Appellant complains of, specifically the

line of argument dealing with the interlocking charges, was delivered in the State's rebuttal closing, and was merely responsive to what defense counsel argued in closing when defense counsel told the jury that Grand Theft fit the State's theory. (V13, R2566).

Whether or not a verdict is legally inconsistent is a pure issue of law, the jury was properly instructed on the law, and there is no indication, based on the overwhelming evidence of Appellant's guilt, that the prosecutor's comment was such that Appellant could not have been convicted without it.

Cumulative Fundamental Error

Appellant contends that many of the "improper" statements amounted to fundamental error in and of themselves, and if they did not, individually, then they cumulatively affected the jury's vote. (*IB* at 33).

This Court has set forth the analysis for cumulative error in the recent case of *Gonzalez v. State*, 136 So. 3d 1125, 1166-67 (Fla. 2014). *Gonzalez* states: "[r]elief can only be granted if the errors cumulatively constitute fundamental error, meaning they 'must be so prejudicial as to taint the jury's recommended sentence.'" (quoting *Thomas*, 748 So. 2d at 985 n. 10.) The cumulative effect of multiple harmless errors does not amount to fundamental error where the errors share three decisive factors: (1) none of the errors are fundamental; (2) none go to the heart of the State's case; and (3) the jury would still have heard substantial evidence in support of the defendant's guilt. *See Braddy*, 111 So. 3d at 860–61; *Brooks*, 918 So. 2d at 202 (*receded from on other grounds* by *State v. Sturdivant*, 94 So. 3d 434 (Fla. 2012)); *Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991). *Id*.

The State asserts that there was no error, and thus, nothing to cumulate. Even if the comments had been improper, they could only be harmless error, as there is no reasonable possibility the comments complained of could have contributed to the verdict. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986); *cf. Muhammad v. State,* 782 So. 2d 343 (Fla. 2001) (holding the prosecutor argued improperly but that the record as a whole showed there was no reasonable possibility that the improper argument contributed to the jury's guilty verdict); *Bigham v. State*, 995 So. 2d 207, 214 (Fla. 2008).

ARGUMENT II

THE TRIAL COURT DID NOT ERR IN FINDING THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE APPLIED WHEN APPELLANT'S UNLAWFUL ACTIONS DIRECTLY LED TO THE VICTIM'S AGONY AND DEATH

Appellant argues that the HAC aggravator should not apply to him because Jordan "was not the actual killer." In what can only be read as a tenuous attempt to apply co-defendant law to the victim, Appellant argues Cope contributed to his own death by trying to escape the ropes. Appellant asserts that he did not "direct" the death of the victim as required for HAC to apply which was, in part, defense's theory of the case. However, this specific objection was not made to the trial court so it is not preserved for appeal.

The State has the burden to prove beyond a reasonable doubt each and every aggravating circumstance that it alleges. *Williams v. State*, 37 So. 3d 187, 194-95 (Fla. 2010). The standard of review this Court applies to a claim regarding the sufficiency of the evidence to support an aggravating circumstance is that of competent, substantial evidence. *Guardado v. State*, 965 So. 2d 108, 115 (Fla.

2007). When reviewing a trial court's finding of an aggravating circumstance, this Court has stated: "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 trial court's job. Rather, [this Court's] task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." *Gosciminski v. State*, 132 So. 3d 678, (Fla. 2013), (quoting *Willacy v. State*, 696 So. 2d 693, 695-96 (Fla. 1997)); *Aguirre-Jarquin v. State*, 9 So. 3d 593, 608 (Fla. 2009).

The State contends that the evidence in this case and the law of the State of Florida support the trial court's ruling. The trial court found:

> . . .
>
> **3. Florida Statutes, Section §921.141(5)(h): The capital felony was especially heinous, atrocious, or cruel.**
>
> Several witnesses testified for the State as to the circumstances of the **victim's torturous death**. The evidence showed that the victim was found, hanging from his own bed by ropes and duct tape, **drifting in and out of consciousness**. The Medical Examiner and treating physicians testified to the jury as to the **especially painful process** leading to the victim's death. Those witnesses testified as to the **terrible pain and the psychological anguish the victim would have suffered leading up to his slow death.**
>
> The evidence did show clearly that the victim was robbed on June 25, 2009, by the defendant and the **victim was beaten, held at gun point, and pistol-whipped by the defendant**. **The victim had duct tape wrapped numerous times around his head, covering his mouth and part of his nose. His wrists and ankles were also bound by tape and rope. Further, he was tied to the four corners of his bed and left there alone to struggle.**
>
> Prior to his discovery, **the victim was left alone tied to his bed for three days.** During that three days, his body slowly shut down, and his arms and legs turned cold and circulation was slowly lost. **The evidence showed that he had abrasions on his wrists and**

> **ankles as he struggled to get free from the ropes.**
>
> **He was found three days later still partially on the bed soaked in his own urine.**
>
> The medical testimony showed the victim suffered from dehydration, acidosis, and rhabdomyolysis, renal failure, aspiration pneumonia, lower right lobe bronchopneumonia, splenic infarctions, abrasions from being bound and gagged, lacerations to his mouth, and bilateral cerebral infarctions. The medical testimony clearly showed that these injuries were the direct result from being bound and gagged for the three days before the victim's discovery.
>
> In addition to the above described injuries, the victim had an acute injury to his left arm which was created during his failed attempt to free himself. Gangrene had started in one of his arms, because of the **tight ropes**, which led to his arm and part of his shoulder being amputated at the hospital prior to his death.
>
> Though it was unknown how long the victim was left hanging partially off the bed and suspended by the ropes, the medical evidence suggested that it probably was **at least 6 hours**. Testimony before the jury by one of the doctors indicated that, in the doctor's opinion, on a scale of 1 to 10 for pain, **the pain suffered by the victim would have been a 10.**
>
> The Court finds that this aggravator has been proved beyond all reasonable doubt, and the Court gives it great weight.
>
> . . .

(V5, R807-808). (emphasis added).

The trial court applied the correct rule of law as evidenced by the bolded portions of its order, *supra*. The court described, in detail, the facts that laid out how Appellant's actions caused Cope to suffer a long, torturous death that evinced an extreme degree of pain and conscious suffering in the three days leading up to his discovery. These facts underscore the trial court's understanding of HAC because the competent, substantial evidence the trial court relies on in finding HAC ties the victim's suffering directly back to the Appellant's actions. Thus, the only questions on appeal are whether or not there is competent, substantial evidence in the record to support the trial court's consideration and finding of

HAC, and whether the Appellant is the one responsible for Cope's manner of death. *See Walker v. State*, 957 So. 2d 560, 580 (Fla. 2007). The State asserts that the sole person responsible for Cope's manner of death is Jordan. There was no other perpetrator, and no question that it was Jordan's actions that directly resulted in Cope's horrible death.

In *Russ* This Court has explained the HAC aggravator as follows:

> In order for the HAC aggravator to apply, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim. *See Rogers v. State*, 783 So. 2d 980, 994 (Fla. 2001). The HAC aggravator applies in physically and mentally torturous murders which can be illustrated by the desire to inflict a high degree of pain or **utter indifference to** or enjoyment of **the suffering of another**. *See Barnhill v. State*, 834 So. 2d 836, 850 (Fla. 2002) (citing *Williams v. State*, 574 So. 2d 136 (Fla. 1991)). **HAC concentrates "on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant,** where a victim experiences the torturous anxiety and fear of impending death." *Barnhill*, 834 So. 2d at 850 (citing *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998)); *Evans v. State*, 800 So. 2d 182, 194 (Fla. 2001). **Thus, there does not need to be a showing that the defendant intended or desired to inflict torture; the torturous manner of the victim's death is evidence of a defendant's indifference.** *See Barnhill*, 834 So. 2d at 850 (citing *Brown*, 721 So. 2d at 277).

Appellant argues that Jordan is not responsible for the suffering and ultimate death of the victim because he merely bound and left Cope to die, and it was Cope's struggles that exacerbated his death. However, the torture undergone by Cope from being bound is evidence of Appellant's indifference and callous disregard for Cope's well-being. Appellant's actions directly caused Cope's death.

To support HAC, the evidence must show that the victim was conscious and

aware of impending death. *Hernandez*, 4 So. 3d at 669 (citing *Douglas v. State*, 878 So. 2d 1246, 1261 (Fla. 2004)). Here, it is uncontested that the victim was conscious when Jordan's associates arrived, as he asked for water. (V10, R1990).

The victim's mental state is also evaluated in accordance with common-sense inferences from the circumstances. *See Hernandez v. State*, 4 So. 3d 642, 669 (Fla. 2009) (citing *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988)). In *Hudson*, this Court observed that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *Hudson v. State*, 992 So. 2d 96, 115 (Fla. 2008) (quoting *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997)); *Russ v. State*, 73 So. 3d 178, 196-97 (Fla. 2011). In the present case, the victim's death was certainly not quick; rather, he was tortured by Appellant's cruelty for three long days. The trial court made a factual finding, based on testimony of the victim's treating physicians and the medical examiner, of the "especially painful process leading to the victim's death," the "terrible pain and psychological anguish the victim would have suffered," and his "slow death." (V5, R808). The trial court found, based on the medical opinion of a physician, that "on scale of 1 to 10 for pain, the pain suffered by the victim would have been a 10." (V5, R808). Additionally, this Court has held that the fact that the attack occurred within the supposed safety of the victim's own home "adds to the atrocity of the crime." *Williams v. State*, 967 So. 2d 735, 763 (Fla. 2007) (quoting *Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988)).

The victim suffered countless indignities and injuries in the three days in which he was at Appellant's mercy. He was forced to lay in his own urine. He

suffered abrasions on his wrists and ankles and an acute injury to his left arm from struggling to get free from the ropes and gangrene due to the tightness of the ropes. Medically, he suffered a loss of circulation, compartmentalization syndrome, dehydration, acidosis, and rhabdomyolysis, renal failure, aspiration pneumonia, lower right lobe bronchopneumonia, splenic infarctions, abrasions from being bound and gagged, lacerations to his mouth, and bilateral cerebral infarctions. (V5, R808). But most importantly, the trial court made a factual finding, that "[t]he medical testimony clearly showed that **these injuries were the direct result from being bound and gagged for the three days** before the victim's discovery." (V5, R808) (emphasis added).

Appellant argues that under *Williams v. State*, 622 So. 2d 456, 463-64 (Fla. 1993), the State must prove beyond a reasonable doubt that Jordan knew or ordered the particular manner in which the victim was killed. The obvious difference is that *Williams* and its progeny deal with co-defendants in a murderous plan, where one of them is the ultimate perpetrator; as opposed to here, where a single perpetrator acted alone to set a murderous chain of events into action.

Appellant asks this Court to overturn the trial court and find that Jordan did not plan to murder the victim in a torturous manner because he did not intend to murder Cope. However, it stands to reason that Appellant knew, or at least showed callous disregard for Cope's life, by his actions of pistol-whipping the victim, tying him to the bed, taping his mouth and part of his nose closed with duct tape, and leaving him tied to a bed for days on end with no access to water and no way to even call for help. Thus, Appellant was fully aware that Cope would suffer, and

die. It is irrational to believe that this is not a cruel, torturous, and agonizing way for the victim to waste away only because Appellant didn't "finish the job," before leaving him to die.

This Court has consistently affirmed the HAC aggravator in cases such as this one, where the murderer assaulted the victim, but left them for dead instead of killing them themselves. In *Patrick v. State*, 104 So. 3d 1046, 1067 (Fla. 2012) *cert. denied*, 134 S. Ct. 85 (2013), this Court points out "[n]othing in the record indicates how long he lived after he was beaten, hog-tied, and left in the bathtub on his stomach, but it is likely that he was aware of his impending death. The finding of HAC is consistent with this Court's holdings …"

Appellant argues that this case is akin to cases in which HAC was not attributed vicariously to a co-defendant, in which "the defendant in some way did not agree that the murder would be committed in a torturous manner. Even more poignant is the fact that Mr. Jordan did not anticipate Mr. Cope's death." (*IB* at 35). This Court has recognized that leaving a helpless victim trapped in circumstances where the natural and logical consequence will be death is a sufficient basis to find the murder was premeditated.

> While still alive, Stanton was placed in the trunk of the cab he was driving. Cut seatbelts from the front of the cab were found in the trunk, and investigators presumed they had been used to tie up Stanton. The cab was set on fire. Stanton was eventually able to free himself from the trunk through the backseat of the vehicle, but ultimately died from a combination of his stab wounds and carbon monoxide poisoning. **Leaving a wounded, living victim trapped in a burning vehicle is sufficient evidence from which to infer premeditation. Additionally, the location of the stab wound which would have been fatal without medical treatment would also**

> **support a finding of premeditation.** *See Miller v. State*, 42 So. 3d 204, 228 (Fla. 2010) (concluding that the location of the stab wounds to the victim's vital organs can support a finding of premeditation), *cert. denied*, —— U.S. ——, 131 S.Ct. 935, 178 L.Ed.2d 776 (2011). **Therefore, the manner in which the homicide was committed is evidence from which premeditation could be inferred.** Moreover, the evidence of the burning vehicle sufficiently demonstrated that the murder had occurred during an enumerated felony—arson. *See* § 782.04(1)(a) 2., Fla. Stat. (2004). There was no dispute that Stanton died during, and as a result of, the gasoline-fueled fire that had been purposefully set.

Kocaker v. State, 119 So. 3d 1214, 1226 (Fla.) *cert. denied*, 133 S.Ct. 2743, (2013).

In *Kocaker*, it is clear that the methods used to effectuate the murder may be used to infer the intent to kill the victim. Binding a victim and leaving him in a burning car is very similar to binding a person and leaving him to starve and thirst to death, albeit in a more slow process. In *Kocaker*, like the case at bar, the victim dies from the injuries inflicted by Appellant. Therefore, it is irrelevant whether Appellant "intended" Cope to die from complications of his actions; his actions were such that it was inevitable that he would.

It is a common understanding that human beings need food, water, and the adequate ability to breathe to survive. Appellant left Cope unattended and bound so as to deprive him of these life-giving necessities. Appellant was of average intelligence, was the valedictorian of his high school class, and was a fully-functioning adult who knew his actions would lead to Cope's heinous, atrocious, and cruel death. Cope's suffering was reasonably foreseeable. Therefore, having set the circumstances in motion, Appellant was fully responsible for the manner of Cope's death. It is inconsistent for Appellant to assert that Jordan did not cause

Cope's untimely death when his actions evidence such an utter indifference to Cope's well-being. "The intention of the killer to inflict pain on the victim is not a necessary element … the HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another." *Guzman v. State*, 721 So. 2d 1155, 1160 (Fla. 1998)

Cope would have had countless hours to reflect on his predicament; to feel pain and terror as he went without food, water, or enough air. He would have felt great pain and suffered physically and emotionally when he bore witness to his own body begin to lose blood, shut down, and turn greenish-black. The victim was conscious when Jordan's associates entered the home, and would have experienced all the sensations of pain, thirst, hunger, lack of adequate air, aspiration of his own vomit, being forced to eliminate on himself, and finally, of his multiple strokes resulting in pain, disorientation, and confusion. He would have had a distinct foreknowledge of his own death, which likely led to his desperate actions to save himself. The emergency life-saving attempts of medical personnel in amputating his arm and shoulder and placing him on life support, or even more insultingly, the victim himself,[22] being analogous to a co-defendant who decides to commit the HAC torturous act on a victim without the defendant's knowledge is incongruous.

Archer and *Omelus* and the cases Appellant cites to in his brief are completely

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[22] "The injuries Mr. Cope sustained while attempting to escape from his bindings caused his death; does not involve a co-defendant *per se*, Mr. Cope contributed to his own demise." (*IB* at 36).

irrelevant to this case. For example, in *Archer* when the Court says "one who arranges for a killing but *who is not present* and who does not know how the murder will be accomplished cannot be subject to HAC" it is meant to apply to a co-defendant or murder for hire. This is not a circumstance of a contract killing or a co-defendant. This is a situation where Jordan set the dominoes up and waited for nature to take its course. There was no intervening murderous act to allay his culpability. Cope died from injuries sustained from Jordan binding him and leaving him for dead, after having been beaten and robbed. Appellant showed callous disregard for Cope's well-being and suffering. He set a method of death in motion, and left him to die by "nature." He is obviously not in the same position as a defendant who hires another individual to kill someone without any knowledge of the particular manner of death to be used. Appellant concedes in his brief that "there is no factual dispute that Mr. Jordan tied Mr. Cope to his bed and left for approximately three days." (*IB* at 36).

Appellant misstates the law when he asserts that this Court reviews the application of the HAC aggravator under *de novo* review. (*IB* at 37). Appellant states, "[t]he sufficiency of the evidence to support an aggravating circumstance is subject to de novo under this Court's independent appellate review: it is an appellate court's function "to determine sufficiency as a matter of law" (citing *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla. 1981)). While this quote was not able to

be found at this citation,[23] what *Tibbs* is actually saying in this passage is noting the distinction between an appellate review of legal sufficiency and evidentiary weight for double jeopardy purposes, and states nothing about *de novo* review, or aggravators, for that matter. The closest passage, in context, states:

> As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981).

However, it is clear that *Tibbs* does not compel a *de novo* standard of review, and the law is well-settled that the appropriate standard of review as to whether or not an aggravator exists is competent, substantial evidence. "[T]he trial judge's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent, substantial evidence in the record." *Chamberlain v. State*, 881 So. 2d 1087, 1106 (Fla. 2004) (quoting *Barnhill v. State*, 834 So. 2d 836, 850–851 (2002).

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[23] The quote Appellant cites to is actually found in footnote 10 of the *Tibbs* opinion, which is a cite to *Chaudoin v. State*, 362 So. 2d 398 (Fla. 2d DCA 1978), reading "*See, e. g., Chaudoin v. State*, 362 So. 2d 398 (Fla. 2d DCA 1978) (weight and credibility solely within province of jury; appellate court's only function to determine sufficiency as a matter of law) …"

Assuming *arguendo*, even if the court were to find that the HAC aggravator was erroneously applied, it can only be harmless error in this case. The sentence of death is still appropriate in this case and resentencing is not required. In its sentencing order, the trial court found:

> This Court has discussed all of the aggravating circumstances and mitigating circumstances. This Court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances. This Court does agree with the jury's recommendation that in weighing the aggravating circumstances against the mitigating circumstances, death is the appropriate sentence.

(V5, R813).

Even though significant weight has historically been accorded to the HAC aggravator, *see Morton v. State*, 789 So. 2d 324, 331 (Fla. 2001) ("CCP and HAC ... 'are two of the most serious aggravators set out in the statutory sentencing scheme.'") (quoting *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999)), the trial court's finding of HAC, if erroneous, did not contribute to the recommended sentence of death.

Even without the HAC aggravator, two (2) aggravating circumstances remain—the defendant having been previously convicted of a felony involving the use or threat of violence to a person, *see* § 921.141(5)(b), Fla. Stat (2001); [24] and the combined aggravator of the capital felony having been committed while Jordan was engaged in the commission of a robbery and Florida Statutes, Section

[24] A certified conviction was entered into evidence proving Jordan had been convicted of False Imprisonment in 1996.

921.141(5)(f): The capital felony was committed for pecuniary gain. The trial court accorded the former, little weight, and the latter, great weight. (V5, R807).

The trial court only found that one (1) statutory mitigating circumstance had been established, the capital felony was committed when the defendant was under the influence of extreme mental or emotional disturbance, see § 921.141(6)(b), Fla. Stat. (2001), which was accorded "moderate" weight. The trial court then found (37) nonstatutory mitigating factors, the majority of which were accorded "little" weight. (V5, R809-813). Those not accorded little weight were accorded "some" or "minimal" weight. (V5, R809-813). One factor, Appellant's history of mental illness and related hospitalizations, was accorded "moderate" weight. (V5, R810). One factor, that Appellant committed the crime in an unsophisticated manner, was rejected, and accorded no weight. (V5, R813).

Thus, the court weighed three (3) heavy aggravators against minimal mitigation. In cases with weighty aggravation and minimal mitigation, striking any given aggravator still results in a death sentence, and any error is harmless. *See Smith v. State*, 28 So. 3d 838, 868 (Fla. 2009); *Rimmer v. State*, 825 So. 2d 304, 330 (Fla. 2002); *Maharaj v. State*, 597 So. 2d 786, 791-92 (Fla. 1992). Striking HAC would have still resulted in a death sentence.

This Court has explained that "death is not indicated in a single-aggravator case where there is substantial mitigation." *Williams v. State*, 37 So. 3d 187, 206 (Fla. 2010); *Green v. State*, 975 So. 2d 1081, 1088 (Fla. 2008) (quoting *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999)). However, even without HAC, this is not a single-aggravator case. Moreover, there is no *substantial* mitigation in this case.

There is no reasonable probability that, if the trial court erred in applying HAC, it contributed to the sentence of death entered in this case. *See State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986); *see also Perez v. State*, 919 So. 2d at 381. The trial court carefully weighed the aggravating factors against the mitigating factors in concluding that death was warranted. As stated in *Sochor v. State*, 619 So. 2d 285, 293 (Fla. 1993) (quoting *Rogers v. State*, 511 So. 2d 526, 535 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988)); "[e]ven after removing the aggravating factor of cold, calculated, and premeditated, three valid aggravating factors remain to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing because, '[i]f there is no likelihood of a different sentence, the error must be deemed harmless.'

Cope died, after suffering in agony for three days then undergoing emergency attempts to save his life (after which he remained on life support for two weeks), because of the callous, barbaric actions taken against him by Appellant. But for those actions, the victim would not have been tied to a bed until he lost blood to his appendages and died from complications of being bound. Even if the victim had not tried to escape his bindings, the murder would have still been HAC based on Jordan's actions in beating him, binding him, taping over his mouth and part of his nose, and leaving him for three days without food, water, adequate air, or bathroom facilities. He was bound so tightly he had abrasions on his wrists, ankles, and face. There was no error in the trial court's finding of HAC.

There can be no doubt that the murder was conscienceless, pitiless and

unnecessarily torturous to the victim with a foreknowledge of death and indeed, heinous, atrocious and cruel. The trial court's findings are supported by competent, substantial evidence. Having applied the proper rule of law, the trial court did not err in finding that this aggravator was proven beyond a reasonable doubt.

ARGUMENT III

THE COURT PROPERLY ADMITTED VICTIM IMPACT STATEMENTS OF EMILEE COPE, MAGDALENE COPE, AND LUCINDA JENKINS

Appellant argues that the trial court erred in admitting victim impact evidence from the victim's daughter, Emilee Cope; ex-wife, Magdalene Cope; and aunt, Lucinda Jenkins.

Section 921.141(7), Florida Statutes (2006), provides that in a capital case, once the prosecution has provided evidence of one or more aggravating factors, the prosecution may present victim impact evidence and that:

> Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This Court spells out the purpose of victim impact statements in *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008), stating, "[v]ictim impact evidence is designed to show 'each victim's 'uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be,'" quoting *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991). A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. *Kalisz v. State*, 124 So. 3d 185, 211 (Fla.

2013), *cert. denied*, 134 S.Ct. 1547 (2014); *Braddy*, 111 So. 3d at 857; *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008); *Schoenwetter v. State*, 931 So. 2d 857, 869 (Fla. 2006).

In this case, the victim impact statements went through multiple redactions to adequately ensure they contained no inflammatory, overly sympathetic, or objectionable language. The State redacted the victim impact statements first "quite a bit" before trial. (V14, R2713). There is an extensive discussion about what to redact from the statements. (V14, R2717-2732; 2767-2775). The court, in its discretion, ordered that several redactions be made. The State redacted everything ordered by the court, and redacted other portions without being ordered to do so. (V14, R2773). Next, the court, on its own motion, delivered a preliminary cautionary instruction warning the jury of the limited purpose of the statements (V14, R2784). Also in an abundance of caution, the court redacted language from the last edit on its own motion. (V14, R2731).

Appellant argues that the statements became a "focus of the penalty phase," which is clearly not the case. There are a total of 20 transcript pages devoted to victim impact statements. This is contrasted against a penalty proceeding spanning approximately 409 pages (R2701-3110); the majority of which are devoted to presenting Appellant's mitigation. Clearly the "focus" of this penalty phase proceeding is on Appellant's mitigation.

In analyzing whether victim impact statements become the focus of a penalty phase, this Court held that four witnesses to a victim was perfectly acceptable, stating in *Deparvine*, "[i]n terms of numbers, this Court has affirmed up to four

witnesses for one victim and consistently upheld three." *Deparvine*, 995 So. 2d at 378, (citing *Belcher v. State*, 961 So. 2d 239, 257 (Fla.) *cert. denied*, 128 S.Ct. 621 (2007)); *citing also Schoenwetter*, 931 So. 2d at 870; *Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004).

The fact that statements from four members of the victim's family were admitted is not superfluous or redundant because "[f]amily members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family." *Bonifay v. State*, 680 So. 2d 413, 420 (Fla. 1996).

Even if one family member discusses the impact the victim's death had on another member of the family, it is acceptable, from this different perspective. In *Abdool v. State*, 53 So. 3d 208, 222 (Fla. 2010), this Court affirmed the trial court's admission of a father's victim impact statement wherein he discussed his fear of losing his son to anger and pain because it was "directly related to the impact the victim's death had on her family." Furthermore, the statement was admissible because "it did not offer any opinion about the crime, the defendant, or the appropriate sentence." *Id*.

In *Kalisz v. State*, 124 So. 3d 185, 211 (Fla. 2013) *cert. denied*, 134 S. Ct. 1547 (2014), This Court further articulated what factors to look for in evaluating whether or not a victim impact statement complies with the guidelines articulated in *Payne* and under Florida law when it stated:

> The statements [admitted in *Kalisz*] were not overly emotional and did not mention Kalisz. The daughters did not implore the jury to impose the death penalty or to seek revenge on Kalisz for their mother's death.

> Consequently, because the statements complied with the guidelines articulated in *Payne* and under Florida law, we affirm the trial court's decision to allow introduction of the victim impact statements.

Similarly, here, the statements of Jenkins and Pologruto were read into the record, and were not even delivered by those family members. A board displaying photographs of Cope and Emilee throughout her life was not objected to.

Appellant's argument that "[t]here is nothing unique about a deceased person's inability to watch his child drive her first car" (*IB* at 45) is offensive to the sensibilities and misses the mark. In fact, this type of statement is perfectly appropriate, and expresses exactly the sentiment a victim impact statement is intended to express. Not all murder victims are involved fathers who leave minor children behind. Cope was a loving father, whose daughter missed out on having her father teach her to drive because Jordan took his life. His relationship with his daughter and the experiences they would have shared together is part of his uniqueness as a human being. "Evidence of a family member's grief and suffering due to the loss of the victim is evidence of 'the resultant loss to the community's members by the victim's death' permitted by *section 921.141(7)*, and the admission of such evidence is consistent with the Supreme Court's decision in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)." *Victorino v. State*, 127 So. 3d 478, 496 (Fla. 2013), *cert. denied*, 134 S. Ct. 1893 (2014) (quoting *Section 921.141*(*7*), *Florida Statutes* (*2006*)). This statement expresses the loss the victim's daughter, Emilee, feels at not being able to share the milestone of driving with her father.

The three questioned statements were completely within the parameters of

Payne and suited the specific purpose of victim impact statements under Florida Law. As stated in *Jackson v. State*, 127 So. 3d 447, 473 (Fla. 2013), permissible victim impact statements do "not fall within one of the proscribed categories of victim impact evidence delineated in *section 921.141(7)*. These proscribed categories are characterizations and opinions concerning (1) the crime, (2) the defendant, or (3) the appropriate sentence." None of the four statements (including the three questioned statements) made any mention of Jordan. None asked for a specific sentence or punishment. None was overly emotional and none made mention of revenge or retribution. None of the statements discussed the crime. Each statement merely sought to express the specific loss that individual felt at losing her father, ex-husband, nephew, and friend, respectively. Emilee's statement included a redacted mention of her experience having to see her father on life support in the hospital, which is not discussing the crime or HAC, but merely recounting her experience of the loss of her "strong, tall, …proud" father. Maggie's statement included a redacted mention of the feelings of pain and loss from watching Emilee say goodbye to her dying father, which is also not a comment on the crime, but merely a mother's perspective on the loss of her child's father and the effect it had on Emilee. Her statement "[d]riving by Keith's house several times a day, a roll of duct tape, a bedpost, a passing ambulance, a dark cloud or even a beautiful rainbow, and sometimes just a certain word" is likewise not a comment on the crime or on HAC, but merely an expression of the loss of peace Maggie feels in being reminded of Cope's death by these things that trigger her feelings of grief; it is these feelings, and not the implements of the crime, that

are being expressed in Lucinda's victim impact statements.

There was no mention of these statements in the trial court's sentencing order or at the *Spencer* hearing. In fact, the prosecutor's argument in the penalty phase distinctly pointed out the three aggravators the State was seeking and made no mention of victim impact statements. (R14, V2738-2740, 2784). Moreover, the trial court, in abundance of caution and on its own motion, modified the Florida Standard Jury instruction on victim impact statements to the present tense and read it to the jury prior to the delivery of any victim impact testimony; stating specifically, "…you may not consider this evidence as an aggravating circumstance," thereby foreclosing the possibly the jury would've relied on it for that impermissible purpose. (V14, R2777, 2784).

Therefore, there was no error in admitting these statements, but even if there was error, it could only be harmless under these facts. *See DiGuilio*, 491 So. 2d at 1138. The jury vote was 10-2 for death. There is no reasonable probability of a life sentence had these statements not been read. The jury would have still heard details of the victim's condition from the parties who found him, his physical condition upon arriving at the hospital, and the emergency amputation that was required to save his life, albeit unsuccessfully. These statements did not run afoul of this Court's admonition as stated in *Wheeler v. State*, 4 So. 3d 599, 609 (Fla. 2009) where this Court "remind[ed] prosecutors of the admonition in *Payne* that when presentation of victim impact evidence 'is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief'" *quoting Payne*. Here, the proper

balance was struck between the victim's family members' right to be heard and to assist the jury in understanding the loss of Cope, and Jordan's right to a fair trial.

There was nothing inadmissible in the victim impact statements read into the record. The three questioned statements were entirely appropriate for the express purpose of victim impact testimony. Any unfair prejudice to the defendant was eradicated by the extensive redaction agreed upon by the Appellant, the fact that the statements were read into the record as opposed to being presented live, and the fact that any potentially questionable passages were sanitized before being presented to the jury, even though defense counsel maintained his objections. Therefore, the trial court did not err in allowing these redacted victim impact statements to be read into the record.

ARGUMENT IV

THE TRIAL COURT PROPERLY FOUND THAT THE MITIGATING CIRCUMSTANCE THAT JORDAN'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED DID NOT APPLY.

Appellant argues that the trial court erred in rejecting the statutory mitigating circumstance that Jordan's ability to conform his conduct to the requirements of the law was substantially impaired.

> A trial court must find a proposed mitigating circumstance when the defendant has established that mitigator through competent, substantial evidence. *See Reynolds v. State*, 934 So. 2d 1128, 1159 (Fla. 2006). However, 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. *See Ault*, 53 So. 3d at 186.

Allen v. State, 137 So. 3d 946, 964 (Fla. 2013).

Pursuant to section 921.141(3), Florida Statutes (2007), the trial court is required to make independent findings on aggravation, mitigation, and weight, "supported by specific written findings of fact." § 921.141(3), Fla. Stat. (2007). *See Russ v. State*, 73 So. 3d 178, 198 (Fla. 2011). There is no abuse of discretion when the trial court thoroughly considers the aggravating and mitigating circumstances at issue and supports each with specific written findings of fact. *See Dennis v. State,* 817 So. 2d 741, 763 (Fla. 2002); *Russ*, 73 So. 3d at 198. When there is no abuse of discretion, this Court does not re-weigh the aggravating or mitigating factors found by the trial court. *Allen*, 137 So. 3d at 967; *See Douglas v. State*, 878 So. 2d 1246, 1257 (Fla. 2004).

In this case, there was no direct evidence to support this mitigator. There was no testimony that Appellant's ability was impaired, let alone substantially. Neither of the mental health experts in this case testified that Appellant's health condition substantially impaired his ability to conform his conduct to the requirements of law, as mandated in the express language of section 921.141(6)(f). *Allen*, 137 So. 3d at 966; s*ee Oyola,* 99 So. 3d at 445. In rejecting this mitigator, the trial court stated:

> Dr. Danziger and Dr. Mings were examined and cross-examined regarding this mitigating factor, but based on the evidence presented during the guilt phase and the penalty phase, this Court finds that no credible evidence was presented to substantiate this mitigating circumstance even by the preponderance of the evidence, and this court finds that this mitigator was not established. (V5, R809).

In *Allen*, this Court specifically stated that a "lack of evidence" to support a mitigator constitutes competent, substantial evidence for the trial court to reject

that mitigator. Appellant concedes in his initial brief that "neither of the two defense experts specifically stated that 'Jordan's ability to conform his conduct with the law was substantially impaired,'" and yet, he goes on to argue that that trial court's finding that this mitigator was not proven is reversible error.

Moreover, in *Allen,* this Court considered there to be a "total lack of evidence" to support this mitigating factor when Dr. Wu testified that "it would be difficult for her to consistently conform her conduct to the requirements of society," and Dr. Gebel testified that "she would have difficulty conforming her conduct to the requirements of the law." *Id* at 965-66. Because neither of these experts testified that Allen's health condition *substantially* impaired her ability to conform her conduct to the requirements of law, this Court affirmed the trial court's rejection of the statutory mitigator.

The standard of proof for the Appellant to prove a mitigating factor, such as Jordan's ability to conform his conduct to the requirements of that law having been substantially impaired, must be reasonably established by the greater weight of the evidence. *Diaz v. State*, 132 So. 3d 93, 116 (Fla. 2013); *Mansfield v. State*, 758 So. 2d 636, 646 (Fla. 2000); *Campbell v. State,* 571 So. 2d 415, 419 (Fla. 1990); *Nibert v. State*, 574 So. 2d 1059, 1061-62 (Fla. 1990). Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. *Id.* at 1062.

Competent, substantial evidence is, rather, the standard by which the trial court can *reject* a proposed mitigating circumstance; precisely the case at bar.

> Appellant contends that where this mitigator is supported by competent and substantial evidence anywhere in the record, the trial court must consider and weigh it. However, counsel is confused …

(*IB* at 56-57).

Because the trial court *rejected* the mitigator, the correct analysis is whether competent, substantial evidence appears in the record to support that rejection. *Nibert v. State,* 574 So. 2d 1059, 1062 (Fla. 1990); *Kight v. State,* 512 So. 2d 922, 933 (Fla.1987), *cert. denied,* 108 S.Ct. 1100 (1988). A trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance. *Cook v. State,* 542 So. 2d 964, 971 (Fla. 1989).

Furthermore, Appellant identifies no evidence on which the trial court could have relied, nor does he point to any error in the trial court's analysis of the witnesses. Instead, he quarrels with the trial court's sentencing order and makes the confounding argument that Appellant was accorded the benefit of the extreme mental or emotional disturbance mitigator even though "no expert testified to an opinion of such a mitigator, yet the trial court found that mitigation was proven." (*IB* at 57). He then argues that if the trial court found this mitigator without direct support, that the other mitigator should have been found as well, even though there was no evidence to support it.

See Oyola, 99 So. 3d at 445 (holding that a trial court did not abuse its discretion in finding that this mental health mitigator did not apply where an expert presented unchallenged testimony that the defendant's mental illness impaired his ability to conform his conduct to the requirements of the law but did not specific

that it *substantially* impaired that ability, as mandated in the express language of section 921.141(6)(f)). Here, Danzinger specifically testified that Jordan *could* conform his conduct to the requirements of the law, stating "I did not see anything to indicate that he lacked such impulse control …" (V15, R2942). Mings further testified that Jordan knows right from wrong and had the capacity and ability to follow the law if he chose to do so. (V16, R3019).

Appellant cites to *LaMarca v.State,* 785 So. 2d 1209, 1215 (Fla. 2001) (quoting *Robinson v. State,* 684 So. 2d 175, 177 (Fla. 1996)), for the proposition that "mitigating evidence must be considered and weighed when contained 'anywhere in the record, to the extent it is believable and uncontroverted.'" (*IB* at 56). "This Court will not disturb a trial court's rejection of a mitigating circumstance if the record contains competent, substantial evidence to support the trial court's rejection of the mitigation." *Patrick v. State*, 104 So. 3d 1046, 1066 (Fla. 2012) *cert. denied*, 134 S. Ct. 85, 187 L. Ed. 2d 65 (U.S. 2013) (citing *Spencer v. State*, 645 So. 2d 377, 381, 385 (Fla. 1994); *Nibert v. State*, 574 So. 2d 1059, 1062 (Fla. 1990)). In *Patrick*, this Court holds that the lack of evidence satisfies this standard. Here, the trial court states neither Mings nor Danziger could establish this mitigator. The competent, substantial evidence the trial court relies on to reject this mitigating circumstance is the fact that none was presented.

It is Appellant's burden to prove to prove a mitigator exists. The court does not and cannot assume that it does. Had it been adequately presented, the trial court still had discretion to reject expert testimony. *Allen v. State*, 137 So. 3d 946, 965 (Fla. 2013); *Hodges v. State*, 55 So. 3d 515, 536 (Fla. 2010); *Jones*, 966 So. 2d at

327.

Furthermore, the evidence presented supports the rejection of the theory that Appellant's mental condition substantially impaired his ability to conform his conduct to the requirements of the law. Specifically, the events surrounding the crime included Jordan's anger at not being paid money he was owed, pistol-whipping Cope, tying him to the bed, duct-taping his head and mouth, taking his debit card and truck keys and fleeing to south Florida where he emptied the victim's bank account of $2300, attempted $1600 in declined charges, enlisted help to dispose of the firearm, and lied to associates about an opportunity to rob Cope to trick them into taking Cope's vehicle back to his home.

The Judge also considered 38 factors as non-statutory mitigation, including several factors directly related to Appellant's "mental mitigation," including: his history of mental illness and hospitalizations (moderate weight); a closed-head injury or injuries as a child (little weight); bipolar and takes prescription medication to stabilize his moods (some weight); tried to commit suicide on three occasions (some weight); IQ score within the average range (little weight); memory impairment related to the effects of multiple head trauma (some weight);verbal memory weakness from mild traumatic brain damage (little weight); diagnosed as a juvenile with ADHD and was prescribed Ritalin (little weight); multiple prescription drugs to help with his mental health problems (some weight); suffers from depression (little weight); suffers from panic attacks (little weight); severe substance abuse history (some weight); acts differently when he is on his medications as compared to when he is off his medications (some weight);

was not taking his bipolar medications at the time of the crime (some weight); along with several other non-statutory mitigating factors not directly related to mental health. (V5, R809-813).

Lastly, even if the trial court erred in failing to find this mitigator, such error could be nothing but harmless given the substantial aggravation and minimal mitigation in this case. *See DiGuilio*, 491 So. 2d at 1138. There can be no likelihood of a different outcome at trial given the jury heard the testimony of Danziger and Mings and the trial court found the theory of mitigation to be unpersuasive, so there is no reasonable likelihood of a life sentence even if the mitigator had been found.

Thus, the trial court did not err in finding this mitigator had not been established, because Jordan failed to offer any evidence to support it. The trial court properly considered testimony of the defense experts, and ultimately rejected this mitigating circumstance. (V5, R809).

ARGUMENT V
THE DEATH SENTENCE IS PROPORTIONATE WHEN COMPARED WITH SIMILAR CASES

This Court conducts a qualitative analysis and comparison of other capital cases to determine whether the death sentence is proportionate.

> [T]o ensure uniformity in death penalty proceedings, 'we make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.'" *Floyd v. State*, 913 So. 2d 564, 578 (Fla. 2005) (quoting *Anderson v. State*, 841 So. 2d 390, 407–08 (Fla. 2003)). This Court has described the "proportionality review" as involving "a thoughtful,

> deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991) (quoting *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990) (emphasis omitted)). "This entails 'a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.' In other words, proportionality review 'is not a comparison between the number of aggravating and mitigating circumstances.'" (citing *Offord v. State*, 959 So. 2d 187, 191 (Fla. 2007) (citations and emphasis omitted)).

Calhoun v. State, 38 Fla. L. Weekly S779 (Fla. Oct. 31, 2013).

Appellant asks this Court to undermine the trial judge's order and assign less weight to the aggravating circumstances. Appellant states "[e]ach of the three aggravating factors found by the trial judge has a devaluing characteristic that must be considered for the proportionality analysis." (*IB* at 58). However, this Court has repeatedly stated that it is not its purview to re-weigh the aggravators and mitigators found by the trial court. In *Rodgers v. State,* 948 So. 2d 655, 669 (Fla. 2006), *cert. denied,* 128 S.Ct. 59 (2007), this Court stated "[a]gain, we do not reweigh the aggravating and mitigating factors. We defer to the trial court's determination 'unless no reasonable person would have assigned the weight the trial court did.'" In conducting proportionality review, this Court has stated that in the absence of "demonstrated legal error," the trial court's findings on the aggravating and mitigating circumstances are accepted. In *Merck v. State*, 975 So. 2d 1054, 1065 (Fla. 2007) this Court held that a trial court's assignment of the weight accorded to aggravation and mitigation will be upheld on appeal unless it is shown to be unreasonable or arbitrary given the entirety of the evidence presented. Similarly, this Court reiterated this idea in *Patrick*, holding, "[a]s with the weight assigned aggravating factors; the weight assigned mitigation is within the sole

discretion of the trial court." 104 So. 3d at 1066.

The trial court thoroughly considered the aggravating and mitigating circumstances at issue and supported each with specific written findings of fact, finding that the aggravators outweigh the mitigators. The court "gave all mitigating circumstances careful and deliberate consideration" and made a written finding of fact as to each, concluding that death was the appropriate sentence. (V4, R718). *Rodgers v. State*, 948 So. 2d 655, 670 (Fla. 2006); *See Dennis v. State*, 817 So. 2d at 763.

This Court considers the totality of the circumstances of the case at bar in comparing it to other capital cases in determining whether the death sentence is proportionate. *Kearse v. State*, 770 So. 2d 1119, 1134 (Fla. 2000). A qualitative review of the totality of the circumstances in this case and a comparison between this case and other capital cases reveals that the death penalty here is proportionate. This Court has consistently found a death sentence proportionate in comparable cases which are discussed *infra*. The three[25] aggravating circumstances proven by the State were given, in the first case, little weight, and in the latter two, great

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[25] The trial court found that 4 statutory aggravators were proven beyond a reasonable doubt. (1) Defendant was previously convicted of a felony involving the use or threat of violence to a person—little weight; (2) The capital felony was committed while Defendant was engaged in the commission of a robbery; (3) the capital felony was committed for pecuniary gain—great weight; and (4) The capital felony was especially heinous, atrocious or cruel—great weight. However, to avoid the doubling effect, (d) and (f), (or (2) and (3)) were considered together as one aggravator. (V5, R807-808).

weight. The aggravation far outweighs the mitigating circumstances.

This case is factually similar to *Patrick,* where the death sentence was ruled proportionate. In *Patrick*, the defendant beat the victim then covered his mouth, face, and head with tape before leaving him conscious and hog-tied in the bathtub for an indeterminate amount of time before he died. This Court upheld five aggravating factors "and only gave little to some weight to Patrick's mitigation." *Patrick*, 104 So. 3d at 1068.

This Court has found the death sentence proportionate when the aggravation was just a prior violent felony and during the course of a robbery like in *Heath v. State,* 648 So. 2d 660, 666 (Fla. 1994). In *Heath*, the defendant and a co-defendant robbed the victim and then stabbed and shot him before they fled to use his credit cards. The death sentence was proportionate when balanced against the statutory mitigator of extreme mental or emotional disturbance. *Id.*

This Court has also upheld death sentences as proportionate in cases involving two aggravators of prior violent felony and HAC and substantial mitigation, like in *Spencer v. State*, 691 So. 2d 1062, 1065 (Fla. 1996), where the defendant killed his wife. In *Spencer,* the court found three mitigating circumstances: 1) the murder was committed while Spencer was under the influence of extreme mental or emotional disturbance; 2) Spencer's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and 3) the existence of a number of nonstatutory mitigating factors in Spencer's background. These additional mitigating factors included drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable

military record, good employment record, and ability to function in a structured environment that does not contain women. *Id* at 1063.

Here, three aggravating circumstances; HAC, during the commission of a robbery/pecuniary gain, and prior violent felony, were all proven beyond any reasonable doubt.[26] The trial court points out several factors substantiating the jury's verdict that Appellant was guilty of Arm (sic) Robbery with a Firearm, and affirming that conviction in its sentencing order. This included the statements of the Appellant, in which he admits to collecting money he felt was owed to him, arming himself with a firearm and pistol-whipping the victim to take the ill-gotten gains. The trial court further stated:

> The evidence also showed that the defendant gagged the victim with duct tape and bound him to a bed with rope and then took the victim's truck, US currency, and debit card.

(V5, R807).

Both HAC and during the commission of a robbery/pecuniary gain were accorded **great weight**. Here, two of the three aggravators are considered to be especially weighty. HAC is one of the most serious aggravators in the statutory sentencing scheme. *See, e.g., Douglas v. State*, 878 So. 2d at 1262. Additionally, the prior violent felony aggravator of a sex-related False Imprisonment was given

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[26] Despite Appellant's assertion that the "robbery aggravator" should not be included in the proportionality analysis "because the evidence was insufficient to show that the perpetrator was engaged in a robbery," (*IB* at 58) the robbery merged with the pecuniary gain aggravator to be considered as one aggravator by the trial court, and is absolutely relevant to the proportionality analysis. (V5, R807).

little weight (V5, R807). *Kalisz,* 124 So. 3d at 213; *Silvia v. State*, 60 So. 3d 959, 974 (Fla. 2011); *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002). In this case, two serious aggravators are bolstered by a third aggravator, commission for pecuniary gain/during the commission of a robbery, which aggravates this case even more.

The mitigation offered in this case pales by comparison to the 3 aggravating circumstances which were proven by the State. Jordan's assertion that his case is among the most mitigated is without merit. Appellant asserts: "the mitigating factors are numerous and substantial." (*IB* at 60). The trial judge accepted Appellant's mitigation that the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance as established through the testimony of Drs. Mings and Danziger. The judge considered Jordan's diagnosis of anti-social personality disorder, and borderline personality disorder. As outlined in the sentencing order:

> 1. Florida Statutes, Section 921.141(6)(b): The capital felony was committed when the defendant was under the influence of extreme mental or emotional disturbance.
>
> Dr. Danziger and Dr. Mings testified at the penalty phase regarding the defendant's mental and emotional condition. The doctors testified that the defendant was bipolar and dependent on several different types of drugs and had an anti-social personality disorder. The evidence also indicated that at the time of the crime, he was not taking his prescribed medications. Dr. Mings also testified that the defendant was suffering from some mild memory impairment which was due to traumatic brain injury.
>
> The Court finds that this aggravator has been proven and gives it moderate weight.

(V5, R809).

The trial court next considered the capacity of Appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and states:

> 2. Florida Statutes, Section 921.141(6)(f): The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
>
> Dr. Danziger and Dr. Mings were examined and cross-examined regarding this mitigating factor, but based on the evidence presented during the guilt phase and the penalty phase, this Court finds that no credible evidence was presented to substantiate this mitigating circumstance even by the preponderance of the evidence, and the Court finds that this mitigator was not established.

(V5, R809).

The Judge also considered 38 factors as non-statutory mitigation as discussed on pages 93-94, *supra*. (V5, R809-813).

The mental mitigation was not compelling in this case because there was no link to Appellant's actions during the murder. Both Danziger and Mings agreed that Appellant's Bipolar disorder had no connection to Cope's murder. (V15, R2947; V16, R3020). Danziger agreed that the facts of this case were consistent with traits of Anti-social Personality Disorder. (V15, R2950). *See Abdool v. State*, 53 So. 3d 208, 225 (Fla. 2010) (finding no abuse of discretion where the trial court afforded minimal weight to mental mitigation so that, "even when combined with the nonstatutory mitigating circumstances, [the mitigating factors] could not be linked to the crime committed and are otherwise not weighty enough to overcome the aggravating factors.")

Appellant relies primarily on *Allen v. State*, 137 So. 3d 946 (Fla. 2013), for

the premise that "[m]itigating evidence must be considered and weighed when contained 'anywhere in the record, to the extent it is believable and uncontroverted.'" (*IB* at 56). However, Allen is easily distinguishable from this case in that, here, there was no evidence that Appellant's mental illness impaired his ability to conform his conduct to the law.

The mental health mitigation was carefully considered by the trial court and the specific findings of fact for each were documented in the sentencing order. Thus, there is no abuse of discretion in sentencing Jordan to death. The jury in Appellant's case recommended death by a vote of 10 to 2, and that recommendation must be given great weight by the court. *Grossman v. State* , 525 So. 2d 833 (Fla. 1988) *receded from on other grounds by Franqui v. State,* 699 So. 2d 1312 (Fla. 1997), *cert. denied,* 118 S.Ct. 1337 (1998), *and cert. denied,* 118 S.Ct. 1582 (1998). The aggravating circumstances proven by the State clearly establish that the death penalty is appropriate. The State asks that this Court affirm the sentence of death because it is proportionate.

ARGUMENT VI

FLORIDA'S DEATH PENALTY SENTENCING SCHEME IS CONSTITUTIONAL UNDER *RING V. ARIZONA*

Jordan's argument as to the unconstitutionality of Florida's capital sentencing scheme, like those considered by this Court in the past, is meritless. Despite Jordan's attempts to cast a colorable claim, this is a well-settled area of law. Recently, in *Jackson v. State*, 127 So. 3d 447 (Fla. 2013), this Court stated that it has repeatedly upheld Florida's capital sentencing scheme. Furthermore, that scheme does not violate the United States Constitution under *Ring v. Arizona*. *See*

also 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.").

Furthermore, *Ring* does not apply here because Appellant was convicted of a contemporaneous felony involving the use or threat of violence; specifically, Robbery with a Firearm and/or Deadly Weapon, as charged in the indictment. (V14, R2656). The State also introduced, with no objection, a 1992 certified judgment and sentence conviction for a crime of False Imprisonment for which Jordan was sentenced to 10 years incarceration. (V5, R807).

This Court addressed Jordan's specific argument in *Miller v. State*, 42 So. 3d 204, 219 (Fla. 2010), holding: "Miller's contention that a unanimous jury did not find sufficient aggravating circumstances is unavailing because several aggravating circumstances stemmed from his prior and contemporaneous violent felonies." This Court goes on to state:

> Lastly, this Court has repeatedly rejected the assertion that *Apprendi* and *Ring* require that aggravating and mitigating circumstances be found individually by an unanimous jury. Miller's attempt to distinguish his argument from those previously rejected by this Court is attenuated and unpersuasive. Under Florida's bifurcated capital proceeding, the jury considers the sufficiency of the aggravators and the insufficiency of the mitigating circumstances when issuing an advisory sentence under section 921.141(2). The plain language of section 921.141(3) refers to the duty of *the trial court* with regard to the required written findings for imposing a death sentence. (emphasis in original) (citations omitted).

Id. at 219.

This Court has consistently held that *Ring* does not apply when the prior violent felony aggravator is found. *Hall v. State*, 87 So. 3d 667, 671 (Fla.), *cert. denied*, 133 S.Ct. 537 (2012) (*Ring* claim "is without merit because the prior violent felony aggravator is present in this case"); *Bryant v. State*, 901 So. 2d 810, 823 (Fla. 2005); *Robinson v. State*, 865 So. 2d 1259, 1265 (Fla. 2004) ("This Court has held that the aggravators of murder committed 'during the course of a felony' and prior violent felony involve facts that were already submitted to a jury during trial and, hence, are in compliance with *Ring*."); *Hamilton v. State*, 875 So. 2d 586, 594 (Fla. 2004) (prior violent felony aggravator "need not be found by the jury"); *Johnston v. State*, 863 So. 2d 271, 286 (Fla. 2003) (The "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt.").

The jury unanimously convicted Jordan of Robbery with a Firearm and/or Deadly Weapon in the guilt phase. (V14, R2656). He was also previously convicted of False Imprisonment in 1992. Because the prior violent felony aggravator was proven, Jordan's *Ring* claim must fail.

ARGUMENT VII

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION

Although Jordan does not challenge the sufficiency of the evidence in his brief, this Court has a mandatory obligation to review the sufficiency of the evidence in every case in which a sentence of death has been imposed, even when not challenged. *See Jones v. State*, 963 So. 2d 180, 184 (Fla. 2007); *Fla. R.App. P*. 9.142(a)(5) ("On direct appeal in death penalty cases, whether or not insufficiency

of the evidence or proportionality is an issue presented for review, the [C]ourt shall review these issues and, if necessary, remand for the appropriate relief."). "In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Simmons v. State*, 934 So. 2d 1100, 1111 (Fla. 2006) (quoting *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001)).

The record in this case contains sufficient evidence to support Jordan's conviction for Cope's murder under the theory of First Degree Felony Murder. Jordan went to Cope's home in order to obtain money, using violence and physical force before terminally incapacitating Cope. He then took Cope's truck and debit card, and drained Cope's bank account. These facts establish Jordan's guilt and support the jury's verdict.

Based on a review of the evidence presented in this case, a "rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Gregory v. State*, 118 So. 3d 770, 785 (Fla. 2013) (quoting *Simmons*, 934 So. 2d at 1111). This Honorable Court should conclude that there was sufficient evidence to support Jordan's conviction and affirm his sentence of death.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

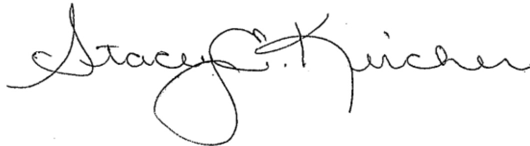
CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Michael Reiter, Esq., Attorney for the Appellant, Office of the Criminal Conflict and Civil Regional Counsel, 5th Dist., 307 N.W. 3rd Street, Ocala, Florida 34475, rccmarion@rc5state.com, and mreiter@rc5state.com, by e-portal service on this 5th day of September.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL

/S/ 

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