IN THE SUPREME COURT OF FLORIDA

RANDALL DEVINEY,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO. SC15-1903
L.T. No. 2008CF012641

DEATH PENALTY CASE

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal shall be referred to by the volume number followed by the appropriate page number; the supplemental record shall be referred to by "SR" and followed by the volume and page number; Appellant's Initial Brief shall be referred to by "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Background

In March, 2010, Appellant was found guilty by a jury for the murder of Delores Futrell. (4:634) The jury subsequently recommended death by a vote of ten to two (4:711), and the trial court sentenced Appellant to death. (5:807-21) This Court overturned that conviction and sentence and remanded the case for a new trial. (5:831-89) On July 17, 2015, Appellant was again found guilty of the first degree murder of Futrell. (12:2154-56) The jury subsequently recommended death by a vote of eight to four (SR 1:1), and the trial court sentenced Appellant to death. (SR 1:88-137) Appellant's sentence was imposed on October 14, 2016 (SR 1:88-136).

Prior to her death, Futrell had suffered from multiple sclerosis (MS) for years, causing balance and coordination issues. (24:571-72) Her long-time, live-in boyfriend, Hartwell

Perkins, would take their dog, Prince, with him when he would travel to New York to work during the summers because she was not strong or healthy enough to take care of the dog by herself. (24:570-74) Her neighbor, Moses Oche, noticed a decline in her health and strength during the five years preceding her death. (25:604-05) One day when he went to help her take her groceries in, he noticed how frail she had become, and that it appeared that she had wet her pants. (25:606-08) Mary Schuller, a neighbor and friend of Futrell's for eight to ten years, also noticed her increasing weakness prior to her death. She testified that Futrell used to do yard projects and walk her dog with Schuller, but was getting "weaker and weaker," and couldn't do those things anymore. (25:750-51) Futrell was social with the neighbors, and the local children would come over to visit. She would often feed the children or let them use her computer. (24:573) She was even known to go pick up the neighborhood children from school when it was raining. (25:751) Mr. Perkins testified that Futrell knew Appellant and he would come over to their house to visit occasionally and she would feed him. (24:577)

Guilt Phase

On the evening of August 5, 2008, Officer Milowicki and Officer Abney, of the Jacksonville Sheriff's Office, responded

to 5618 Bennington Drive in response to an unverified 911 call. (25:614-15) They eventually entered the front door after failed attempts to locate anyone at the residence, and found Futrell lying dead on the living room floor inside the home with a deep cut on her neck. (25:624) She was naked from the waist down, with her underwear sliced at the crotch and pulled up over her hips, and her shirt was pulled up over her torso. Her legs were also sprawled in a sexual manner, showing her genitalia. (25:624) Nearby, a purse was dumped out on the couch (25:674). There was very little blood found inside the residence (25:626), and the living room was relatively tidy, except for the coffee table, which was in "disarray" with items knocked over (25:626). Additionally, a wallet with credit cards was lying on an ironing board nearby. (25:629) It was later determined that the wallet had no cash inside it except for fifty-six cents. (25:681). Officer Milowicki also found bloody blue jeans laying in a corner of the room. (25:627) In the backyard, Officer Milowicki found a huge pool of blood, as well as blood around and on a koi pond and on a lawn chair. (25:629-32)

Detective Dwayne Gray responded to the murder scene around midnight on August 5, 2008. (25:648) He noted that a number of the blood stains found on the koi pond were not from blood droplets, but rather were transferred from another bloody

surface. (25:659) He also found aspirated blood in the backyard near the porch. (25:663) He drained the koi pond looking for a weapon, but was unable to find one. (25:661) However, he was able to locate a piece of a knife blade near the blood in the backyard. (25:690) When he processed Futrell's body for evidence, Detective Gray noted blood on the bottoms of both her feet (25:683, 684), as well as grass in her hair and on her left arm. (25:682) Futrell's bra, shirt, and underwear had all been cut. (25:698) A cordless phone was located on the dining room table that was used to dial 911 at 10:01PM that evening. (25:686-89) They attempted to lift fingerprints off of the phone, but were unsuccessful. (25:686, 709) None of the prints that were successfully lifted at the crime scene matched Appellant. (25:741-742)

Dr. Jesse Giles, the assistant medical examiner assigned to the case, testified to Futrell's injures. She suffered blunt-force and sharp-force injuries. (26:854) She died of a large cut across her neck, which caused blood loss and prevented her from breathing. The cut went from the right to the left, all the way across Futrell's neck, severing veins on the outside of the neck, and partially cutting the jugular on the right side. (26:859-60) Her larynx, trachea, and esophagus were all cut. (26:860) There were a number of jabbing or pricking superficial

cuts, and deeper, but still superficial cuts, on Futrell's upper chest. (26:862, 12:2128) There was also a "pattern injury" on Futrell's upper left chest area that was consistent with a scrape caused by a serrated knife. This injury could have also been caused by a broken knife blade. (26:864)

Futrell also had injuries that evidenced a struggle. She had bruises and contusions around her left eye (26:856), some abrasions around her mouth and forehead, and a contusion on her hairline. (26:857) Several of the injuries around her mouth and around her right eye were during the time she was dying, (26:858-59) but the superficial cuts on her upper left chest clearly occurred while she was alive. (26:864-65) A blunt-force abrasion was found on Futrell's left shoulder, and four sharp-force injuries were found inside her left upper arm. (26:866-67) There was also a bruise on her right hand that could have been a defensive wound. (26:870) Dr. Giles opined that it would be difficult to sustain the sharp-force injuries to the inside of the arm if Futrell's arm was flat against her body. (26:867) Based on the totality of the injuries, Dr. Giles stated, "In my opinion, there definitely was a struggle involved in this death." (26:868) There was a bruise on Futrell's upper right back, right arm, and several sliding abrasions on her back. (26:869-70) A major crushing injury was inflicted on Futrell's

neck, after her throat was sliced, but very close to the time she died. (26:875) This injury included her larynx, broken in three places, and a fracture on the right side of her hyoid bone. (26:873)

In addition to Futrell's physical injuries, her shirt had three cuts in it, one of which was inflicted while the shirt was rolled up. (26:877) Her bra was cut just right of the middle of the bra, and her underwear was cut across the middle of the crotch. (26:878-79) Dr. Giles clipped Futrell's fingernails and collected them for evidence analysis, and performed a rape kit because he considered sexual assault to be a possibility. (26:882-83) Dr. Giles did not find any physical signs of an attempted sexual battery, but stated that it still could have occurred. (26:885)

Dr. Giles could not give an exact estimate for how long it took for Futrell to die from her neck wound, but said, "I can only give a vague forensic range of seconds to minutes." (26:865) In Dr. Giles' opinion, the death was a homicide, (26:853) and had someone been there to treat her immediately, she may have survived. (26:866)

The fingernail clippings that Dr. Giles collected were tested for DNA by the Florida Department of Law Enforcement (FDLE). A preliminary match to Appellant's DNA profile was found

in the fingernail clippings. (26:924) Leigh Clark, an FDLE DNA analyst, testified that a cheek swab from Appellant was needed to do a direct DNA comparison and confirm the preliminary DNA match. (26:924) Appellant's DNA was not located in any other samples that were tested. (26:922-26) Detective Craig Waldrup obtained a voluntary DNA sample from Appellant. (25:792) Ms. Clark conducted DNA analysis on the DNA sample provided by Appellant and confirmed the preliminary DNA match found in Futrell's fingernail clippings. (26:928)

Nancy Mullins, Appellant's mother, testified that he was living with her at the time of Futrell's murder, one street over from Futrell's house. (25:758, 760) The night of the murder, Appellant asked her if she had scissors or a knife he could borrow, and she told him there was one in the camping gear. (25:761) The one she told Appellant about was a fish fillet knife with a straight blade. (25:762) Both Ms. Mullins and Ms. Schuller testified that after the murder, they heard Appellant say that he heard Futrell had been "violated." (25:753-54, 763) At the time Appellant made this statement, no information had been released to the public about specific details of Futrell's murder, the crime scene, or the condition of Futrell's body when discovered by police. (25:785)

The State admitted into evidence a redacted video of a police interrogation, during which Appellant was questioned on the murder of Futrell. (25:794-842) During the interrogation, Appellant acknowledged that Futrell "had MS real bad and it was hard for her to handle that big dog." (26:815) Appellant also recounted that two weeks before Futrell's murder, Appellant was in need of money and went to Futrell to ask her for $20. They agreed for him to mow her lawn in exchange for $20. (26:812, 816)

During the guilt phase of the trial, Appellant was the sole defense witness. He testified that he had known Futrell since he was seven years old and she had always been very kind and caring. He described her house as a safe place. (26:992) He detailed childhood hardships, including sexual abuse by "Uncle Mike," his mother's friend and drug dealer, physical abuse from his mother, and neglect. (26:994) Defendant admitted that he killed Futrell. He went to her house around 9:30PM on the night of the murder, and was carrying a fish fillet knife with him. (26:997-98) He admitted that at the time, he knew Mr. Perkins and their dog would not be home, and that Futrell was in declining health. (27:1019) He testified that he went into the backyard with Futrell to look at a leak in her koi pond, and they discussed his childhood abuse. He stated that she pressured

him to report it and when he walked away, she grabbed his arm. He then turned and "hit" her in the throat with the knife to get her arm off of him. (27:1007) While he claimed that he was not trying to kill her, he admitted that he still "hit" her in the chest with the knife three more times, with such force that the knife broke. (27:1007-08) Appellant did not provide an explanation for why he continued stabbing Futrell if he did not intend to kill her. He then testified that he put pressure on her neck, but she died anyway, so he dragged her inside, cut her garments with the knife he used to kill her, and staged the scene to make it look like a stranger had come in, leaving her naked from the waist down. (27:1008-09) He testified that he then searched for the broken pieces of the knife blade, threw the remnants of the knife in the sewer drain, went home, showered, disposed of his clothing, and socialized with his mother and her friends the rest of the evening. (27:1009-11)

On cross-examination, Appellant admitted that he lied to police repeatedly when interviewed for Futrell's murder. (27:1012) He also admitted that Futrell was alive and looking at him when he killed her, and she knew she was dying throughout the thirty to forty-five seconds it took for her to die. (27:1055-56) It was a terrible way for her to die, (27:1056), and she suffered. (27:1067) He stated, "After the initial cut

she probably realized she was going to die." (27:1071) Even though Appellant claimed remorse, he admitted that he would have gone on with his life if he had never been caught, even after attending her vigil and seeing how distraught everyone was. (27:1065-66)

After the guilt phase, the jury unanimously found the defendant guilty of both premeditated murder and felony murder. The felony murder verdict was based on findings by the jury that the murder was committed during the commission of an attempted sexual battery and a burglary and/or attempted burglary. (12:2154-56)

Penalty Phase

On July 23, 2015, the trial reconvened for the jury penalty phase. (28:1247) Jacquelyn Blades, Futrell's daughter, testified regarding her mother's MS diagnosis, and Futrell being placed on social security disability on July 13, 1998, due to MS. (29:1275-76) Ms. Blades, Helen Futrell Stewart, Futrell's other daughter, and Debra Wright, Futrell's sister, all provided impact statements. (29:1277-94)

Appellant's trial counsel called as penalty-phase lay witnesses Appellant's father, Michael Deviney; Appellant's step-mother, Anne Deviney; and Debra Jackson, a jail minister. (29:1294-1360) As expert witnesses, Appellant's trial counsel

called Dr. Steven Bloomfield (29:1361-30:1463) and Dr. Steven Gold. (30:1464-1525) At the conclusion of the defense case, the State called Appellant's mother, Nancy Mullins, in rebuttal. (30:1537-44)

The jury was instructed on three aggravating factors: 1) the capital felony was committed while the defendant was engaged in the commission of a burglary or an attempt to commit a burglary, or an attempt to commit a sexual battery; 2) the capital felony was especially heinous, atrocious, or cruel; 3) the victim of the capital felony was particularly vulnerable due to advanced age or disability. (SR 1:8-9) The jury was instructed on four proposed mitigating circumstances: 1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; 2) 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; 3) the age of the defendant at the time of the crime; 4) the existence of any other factors in the defendant's character, background or life, or the circumstances of the offense that would mitigate against the imposition of the death penalty. (1:10) Following the penalty phase, the jury recommended death by a vote of eight to four. (SR 1:1)

Prior to the sentencing hearing, the State and defense counsel submitted sentencing memoranda that addressed the aggravating factors that were instructed to the jury. Defense counsel's sentencing memorandum addressed the PVV aggravating factor, stating, "[t]his circumstance, though established, should be given only little weight by this Court." Defense counsel did attack the weight to be given the PVV factor, arguing it should be given little weight because Appellant did not target Futrell due to her age or vulnerability, but never argued that the PVV factor was unproven or inapplicable. (SR 1:41) In addressing the HAC factor, trial counsel was similarly brief, stating, "[t]he Court should reject this aggravating circumstance in this case because no evidence was presented that supported the crime was conscienceless or pitiless." Trial counsel made no further arguments regarding the mindset or motivation of Appellant and what influence, if any, it should have on the HAC factor. (SR 1:40)

On October 14, 2015, the trial court sentenced Appellant to death. (SR 1:135-36) In its sentencing order, the trial court found three aggravating factors. The trial court found the capital felony was committed while Defendant was engaged in the commission of a burglary or sexual battery, or an attempt to commit a burglary or sexual battery, and gave this factor great

weight. As justification, the trial court found the following facts related to sexual battery or attempted sexual battery:

> Here, JSO officers found Ms. Futrell lying on her back on the living room floor. Her shirt was pulled up above her breasts and her bra was cut down the middle, exposing her right breast. MS. Futrell was not wearing pants and her underwear was cut at the crotch area and pulled up by her hips. She was nude from the waist down, and her legs appeared to be posed in a sexual manner, showing her genitalia. Dr. Giles testified he performed the procedures of a sexual battery kit on Ms. Futrell because '[i]n a case such as this, it's a possibility of sexual assault.' Dr. Giles then sent the specimens to FDLE for testing. The forensic technologist further testified there was no evidence of semen on Ms. Futrell's pants and bra. The forensic technologist further stated the vaginal swab, the oral swab, and the rectal swab of Ms. Futrell's sexual assault kit tested negative for semen. Dr. Giles stated he did not observe any injuries to Ms. Futrell's sexual organs nor any actual evidence of sexual assault; however, when asked whether this absence means there was no attempted sexual battery, he replied 'I see no evidence there was any attempted sexual activity but there could be.'
>
> At trial Mary Schuller, Ms. Futrell's neighbor, testified that a day or two after Ms. Futrell's murder and prior to the release of any information pertaining to the murder, Defendant told his mother and Ms. Schuller that Ms. Futrell had been violated. Defendant testified he cut Ms. Futrell's underwear using the same knife he killed her with immediately prior. However, there was no blood found on Ms. Futrell's underwear, which may indicate he either cut her underwear prior to killing her or he used a different tool to 'pose her.'

(SR 1:94-95)

The trial court also found the following facts relating to the commission of a burglary or an attempt to commit a burglary:

> About two weeks before Ms. Futrell's murder, Defendant went to her house and asked for twenty dollars. On the evening of August 5, 2008, Defendant admitted he went to Ms. Futrell's home armed with a knife. Defendant knew Ms. Futrell was home alone. While there were no signs of forced entry and the inside of the house appeared mostly tidy, the contents of Ms. Futrell's purse were poured out on the couch and her open wallet was found on an ironing board. There was no cash in Ms. Futrell's wallet. In the backyard, there were large pools of blood and a piece of a knife blade with blood on it. Dr. Giles testified Ms. Futrell had defensive wounds on her arms and wrists, indicating she engaged in a struggle.

(SR 1:95)

The trial court found that the capital felony was especially heinous, atrocious, or cruel, (HAC) and gave that factor great weight. As justification for the HAC finding, the trial court found a variety of supporting facts, including the following:

> Defendant murdered Ms. Futrell at her own home. Dr. Giles concluded the large cut across Ms. Futrell's neck was fatal. When slicing her neck, Defendant penetrated Ms. Futrell's right jugular vein, voice-box, larynx, and most of her esophagus. Dr. Giles testified Ms. Futrell was still breathing when the cut was inflicted and it took approximately 'seconds to minutes' for her to die. Dr. Giles opined Ms. Futrell bled to death and the injury to her breathing tube caused her to suffocate.
>
> Dr. Giles further testified Defendant inflicted other injuries to various parts of Ms. Futrell's body. Defendant inflicted two distinct sharp-force injuries and numerous superficial cuts to Ms. Futrell's chest. Defendant also inflicted sharp-force injuries to the inside of Ms. Futrell's left arm. She suffered various blunt force injuries to her left eye, nose, forehead,

mouth, shoulders, and arms. She also had bruises and abrasion marks on her back. Dr. Giles further explained Ms. Futrell appeared to have defensive wounds on her hands and wrists. According to Dr. Giles, it is likely many of these injuries occurred at or near the same time as the fatal neck injury. Based on the totality of Ms. Futrell's injuries, Dr. Giles concluded a struggle occurred.

...At trial, Defendant testified he eventually confessed to killing Ms. Futrell during his August 30, 2008 interview with police. At the interview, Defendant told police Ms. Futrell screamed for help as he killed her. However, during trial, Defendant testified Ms. Futrell did not put up a struggle and the only time Ms. Futrell touched him was when she grabbed his arm in an attempt to prevent him from leaving. Regardless, the evidence establishes that Defendant's attack on Ms. Futrell was merciless. Defendant admitted to slicing Ms. Futrell's throat and stabbing her three times in the chest. Defendant acknowledged Ms. Futrell suffered and knew she was going to die when he cut her throat. Defendant stated it took thirty to forty-five seconds for Ms. Futrell to die and she was aware she was dying the entire time.

Defendant's torturous attack on Ms. Futrell was shown not only by the numerous brutal knife wounds, but also by the force behind his attack. Defendant stabbed Ms. Futrell with such power that the knife blade broke. The defensive wounds to Ms. Futrell's hands and wrists indicate she fought for her life. However, her struggle to escape was to no avail. Instead, she fought in vain, acutely aware of her impending death, before she suffocated and drowned in her own blood. Defendant testified he has a vivid memory of how Ms. Futrell's face looked as he stabbed her and explained, 'It was a horrible crime...either way you look at it.'

(SR 1:97-99)

The trial court found that the victim of the capital felony was particularly vulnerable due to advanced age or disability

(PVV), and gave this aggravating factor great weight. As justification for this aggravating factor, the trial court found the following facts:

> Ms. Futrell was sixty-five years old when she died. Defendant was approximately forty-five years her junior. During the penalty phase, the State introduced a letter from the Department of Social Security explaining Ms. Futrell was determined to be disabled with an onset date of July 13, 1998, based on a diagnosis of MS. Jacquelyn Blades, the victim's daughter, testified Ms. Futrell could no longer work and received Social Security Disability checks each month. She became weaker and weaker in the years before her death and could no longer do yard work. At trial, Mr. Perkins testified Ms. Futrell was unable to walk or care for their dog by herself. Mr. Perkins further stated Ms. Futrell would often lose her balance and did not have great coordination. Moses Oche, Ms. Futrell's neighbor, testified he noticed a decline in Ms. Futrell's physical abilities around the time of her murder. Mr. Oche stated he helped her bring her groceries inside that August, and it appeared she had wet her pants and was not as strong as she used to be.

(SR 1:99-100)

In addition to the aggravating factors, the trial court also found numerous mitigating circumstances, including Defendant's age at the time of the crime, which was given moderate weight, as well as twenty-four non-statutory mitigating circumstances.[1] (SR 1:100-34) The trial court rejected a number

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[1] Defendant suffers from exposure to abuse and emotional deprivation, given slight weight; it is possible Defendant suffered from PTSD at the time of the offense, given minimal weight; Defendant has a history of being prescribed psychotropic

of proposed mitigating circumstances, including that Defendant had limited cognitive ability (SR 1:113-14), and that Defendant showed remorse. (SR 1:133) In rejecting the proposed mitigating

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medications, given slight weight; before Defendant was thirteen years old, he was short-tempered, was a show-off, had difficulty sitting still and completing tasks that require concentration, given minimal weight; Defendant's younger brother stabbed him, given some weight; Defendant's parents were convicted of killing his older brother, given moderate weight; Defendant was bounced from one parent to the other, creating a very unstable upbringing, given slight weight; Defendant was physically abused by his father, given little weight; Defendant was sexually abused by his mother, given minimal weight; Defendant was sexually abused by his mother's drug dealer, "Uncle Mike," given minimal weight; Defendant's mother merely tolerated him and made him feel neglected, given slight weight; when Defendant's mother and father separated, Defendant's father moved his new girlfriend into the house with her children while his mother still lived there, given minimal weight; Defendant's parents engaged in a nasty divorce, fighting over child custody and child support, given slight weight; Defendant's mother was much more supportive to his half siblings, never beat them or cursed at them, didn't supervise him or his brother, given slight weight; Defendant's mother and father have both been arrested for domestic battery, acts often committed in front of Defendant, given slight weight; Defendant watched his father abuse women, given slight weight; as a child, Defendant was prescribed medication for behavior and learning disabilities and his parents refused to administer them, given slight weight; Defendant was hit in the head by his brother with a baseball bat as a child, given minimal weight; Defendant's mother smoked tobacco while pregnant with him, given minimal weight; Defendant has people who love him and would maintain a relationship with him if his life was spared, given slight weight; Defendant is a Christian, given minimal weight; Defendant maintained gainful employment, given slight weight; Defendant enjoyed various enriching activities, given minimal weight; in elementary and high school, Defendant had repeated trouble with school authorities, given minimal weight. (SR 1:112-134)

circumstance of limited cognitive ability, the trial court found substantial evidence supporting Appellant's cognitive abilities:

> Mr. Deviney stated Defendant was able to graduate from high school with his special diploma 'because he could function and hold down a job.' It is also clear from his testimony at trial, Defendant can understand questions and generate comprehensive answers. Moreover, the facts of the crime give weight to Defendant's aptitude at the time of the offense. Defendant's actions were thought out and planned. Defendant was able to go to Ms. Futrell's home and convince her to let him inside. He was then able to brutally murder her, leave her residence, and dispose of the murder weapon without being seen. Further, once he returned home, Defendant was shrewd enough to dispose of his clothing and play cards with his mother as if nothing had happened. He then lied to police about committing the murder.

(SR 1:114)

In rejecting remorse as a mitigating factor, the trial court found the evidence presented at trial to be inconsistent with Appellant's self-serving statements of remorse. In support of this finding, the trial court noted:

> [H]e admitted he initially lied to police and concealed his involvement during Ms. Futrell's vigil. Defendant also admitted to disposing of evidence after the murder. Defendant stated he did not think he would get caught for this crime and would have gone on with his life if he was never caught. He testified he wanted to get away with the murder, and he was upset detectives obtained DNA evidence implicating him. Moreover, Defendant still maintains he did not intend to murder Ms. Futrell and contends he accidentally slit her throat.

(SR 1:133)

After weighing the aggravating factors and mitigating circumstances, the trial court concluded, "the aggravating circumstances heavily outweigh the mitigating circumstances." (SR 1:135) The trial court sentenced Appellant to death on October 14, 2015. (SR 1:136)

SUMMARY OF THE ARGUMENT

Appellant is not entitled to relief under Hurst v. Florida, 136 S. Ct. 616 (2016). The jury unanimously found a sentencing aggravator during the guilt phase of Appellant's trial, satisfying the requirements of Ring v. Arizona, 536 U.S. 584 (2002), and Hurst. Any potential Sixth Amendment error would clearly be harmless beyond any doubt on the facts of this case. Appellant is not entitled to be resentenced to a life sentence under section 775.082(2), Florida Statutes, because this statute only applies where the death penalty itself is held to be unconstitutional, and Hurst struck down Florida's process for imposing capital sentences, not capital sentencing itself.

There was sufficient evidence for the trial court to deny Appellant's motion for judgment of acquittal on attempted sexual battery as the underlying felony for felony murder. The jury verdict of guilt is supported by competent, substantial evidence. Futrell was found nude from the waist down, with cut-off undergarments and her legs spread. Appellant's self-serving explanation of an intent to mislead law enforcement does not preclude the conviction, as his failure to candidly admit to many acts, established by Futrell's numerous injuries, destroys the credibility of his testimony.

There was sufficient evidence for the trial court to find the especially heinous, atrocious, or cruel (HAC) aggravating factor. Futrell was conscious long enough to suffer, and her defensive wounds and Appellant's testimony indicate that she was aware of what was occurring to her. Competent, substantial evidence supports the trial court's finding.

There was sufficient evidence for the trial court to find the particularly-vulnerable-victim (PVV) aggravating factor. The evidence establishes that Futrell was sixty-five years old and disabled from multiple sclerosis (MS), which impaired her coordination and strength. Competent, substantial evidence supports the trial court's finding.

The trial court properly rejected various non-statutory mitigating circumstances. The evidence at trial did not compel the finding of remorse or limited cognitive ability, and the court did not abuse its discretion in rejecting them.

Appellant's capital sentence is proportionate. Upon review of capital cases with aggravating factors and mitigating circumstances similar to the present case, it is clear that the present case is among those most aggravated and least mitigated, and the capital sentence should not be disturbed.

ARGUMENT

ISSUE I: APPELLANT IS NOT ENTITLED TO RELIEF UNDER HURST V. FLORIDA

A. Appellant's Capital Sentence Was Not Imposed in Violation of Hurst v. Florida.

Appellant asserts that his capital sentence was imposed in violation of his Sixth Amendment right to a jury trial, as interpreted by the United States Supreme Court (Supreme Court) in Hurst v. Florida,136 S. Ct. 616 (2016). Appellant's sentence was imposed in July, 2015, prior to the January, 2016, release of the Hurst opinion, and prior to the March, 2016 effective date of Chapter 2016-13, Laws of Florida. Appellant's penalty phase was necessarily conducted in accordance with the capital sentencing scheme in place at the time. Appellant argues that simply because Appellant was sentenced under the former capital sentencing scheme, his sentence violates the Sixth Amendment, and the violation cannot be harmless. Appellant's argument fails to recognize that the procedural flaws recognized in Hurst did not exist in his case, and thus, no Hurst violation exists.

Appellant's argument fails primarily because the jury unanimously found a sentencing aggravator during the guilt phase, to which the trial court later gave great weight in deciding Appellant's sentence. Hurst found fault with Florida's sentencing system because it only required the jury to make a

general sentence recommendation, rather than specific factual findings, and required the judge alone to make the critical findings necessary to impose a capital sentence. Hurst, 136 S. Ct. at 622.

In Hurst, the Supreme Court extended the holding in Ring v. Arizona 536 U.S. 584 (2002), to Florida's capital sentencing scheme, requiring the jury to find the facts necessary to impose a capital sentence. Hurst, 136 S. Ct. at 620. Ring required the jury to find at least one aggravating factor in order for the capital sentence to comply with the Sixth Amendment. Ring, 536 U.S. at 597, 609. As Hurst is an extension of Ring, a jury finding of one aggravating factor is sufficient to satisfy Hurst as well.

This Court has previously dismissed Ring claims in cases where an aggravating factor had been previously found by a jury. In Ault v. State, 53, So. 3d 175, 206 (Fla. 2010), Ault challenged Florida's death penalty scheme for failing to require a unanimous jury finding of at least one aggravating circumstance. Id. at 205. This Court rejected Ault's claim because several of Ault's aggravating circumstances were established by prior and contemporaneous convictions. Id. at 206. At Ault's murder trial, he was convicted by a unanimous jury of two counts of first-degree murder, two counts of

kidnapping, two counts of sexual battery on a person less than twelve years of age, and two counts of aggravated child abuse. Id. at 183. This Court held that because several of Ault's aggravating circumstances were established by prior and contemporaneous convictions, the requirements of Ring were satisfied. Id. at 206.

This Court has reiterated this rule in numerous cases. In Salazar v. State, 991 So. 2d 364, 378 (Fla. 2008), this Court held that Ring was satisfied because the trial court applied the prior violent felony conviction aggravator based on Salazar's conviction for a contemporaneous attempted murder. Also, because the jury at Salazar's murder trial found him guilty of burglary and attempted murder, the jury found the facts supporting the trial court's application of the "during the course of a felony" aggravator. Id.

Jones v. State, 845 So. 2d 55 (Fla. 2003), and Davis v. State, 2 So.3d 952 (Fla. 2008), progress similarly. In Jones, 845 So.2d at 74, this Court rejected a Ring claim where two of the aggravating circumstances were that Jones had been convicted of a prior violent felony and that the murder was committed while Jones was committing a robbery and burglary. The prior violent felony aggravator was supported by a prior conviction, and the other aggravator was charged in the indictment and found

unanimously by the jury at the end of the guilt phase. In Davis, 2 So.3d at 966, this Court rejected a Ring claim where the "prior violent felony" aggravator was based on contemporaneous convictions for murder, and the "murder in the course of a felony" aggravator was based on a felony murder conviction.

In the present case, the jury unanimously convicted Appellant of the first degree murder of Futrell, and further found that Appellant committed the murder during the course of a burglary and/or an attempted burglary and during the course of an attempted sexual battery, (R. 12:2154-56). These facts formed the basis of the aggravating factor that "[t]he capital felony was committed while Defendant was engaged in the commission of a burglary or sexual battery, or an attempt to commit any burglary or sexual battery," to which the trial court later gave great weight in deciding Appellant's sentence. (SR 1:93-96) In the sentencing order, the trial court based the sentence, in part, on the same aggravating factor found by the jury, finding "[t]he capital felony was committed while Defendant was engaged in the commission of a burglary or sexual battery, or an attempt to commit any burglary or sexual battery. §921.141(5)(d), Fla. Stat. (2008)." (SR 1:93) One of the aggravators in this case was found unanimously by the jury during the guilt phase, much like

the facts in Ault and Salazar. As this Court has held repeatedly, such findings satisfy Ring, and by extension, Hurst.

After Hurst, the Supreme Court denied certiorari in three direct appeal decisions where the capital sentences were supported by prior felony convictions, leaving intact this Court's denial of any Sixth Amendment error. Fletcher v. State, 168 So. 3d 186 (Fla. 2015), Delmer Smith v. State, 170 So. 3d 745 (Fla. 2015), and Hobart v. State, 175 So. 3d 191 (Fla. 2015), involved capital sentences that were supported by prior felony convictions. In Fletcher, the defendant waived his right to a jury trial and entered a plea to multiple counts of burglary and was sentenced to ten years' imprisonment. Fletcher, 168 So. 3d at 193 (see footnote 1). While serving his sentence, the defendant escaped imprisonment and committed murder. Id. at 200-201. At sentencing, the trial judge imposed a capital sentence, giving great weight to the aggravating factor that the murder was committed by a person previously convicted of a felony and under a sentence of imprisonment. Id. at 201. The Supreme Court denied certiorari on January 25, 2016, after the Hurst opinion was released. See Fletcher v. Florida, 136 S. Ct. 980 (2016).

Delmer Smith v. State, 170 So. 3d at 745, and Hobart v. State, 175 So. 3d at 191, progressed in a similar fashion to

Fletcher; both defendants had convictions for prior or contemporaneous violent felonies that supported aggravating factors found in those cases. Hobart was convicted of two contemporaneous murders, one of which the trial court used to support the aggravating factor that he committed another felony involving the use or threat of violence to another person. Hobart, 175 So. 3d at 198, 203-04. The trial court's finding was upheld by this Court. Id. at 203-04. Smith had a prior state robbery conviction and a prior federal bank robbery conviction at the time of the murder, which the trial court used to support the aggravating factor that he had prior violent felony convictions. Delmer Smith, 170 So. 3d 754, 765. The trial court's finding was upheld by this Court. Id. at 764. The Supreme Court subsequently denied certiorari in both cases. See Hobart v. Florida, 136 S. Ct. 1454 (2016); Smith v. Florida, 136 S. Ct. 980 (2016). Quite simply, Appellant's sentence does not violate Hurst because the necessary facts to support the capital sentence were found by a unanimous jury.

While Appellee firmly contends that no Hurst error exists in this case, should this Court disagree, any such error would be harmless. Violations of the Sixth Amendment right to a jury trial are subject to harmless error. Washington v. Recuenco, 548 U.S. 212, 222 (2006). The appropriate harmlessness standard is

whether it is clear beyond a reasonable doubt that a rational jury would have made the findings in question. Galindez v. State, 955 So. 2d 517, 522-523 (Fla. 2007). It is readily apparent from the record that any error is harmless because the jury in this case did, in fact, find one of the capital sentence aggravators to exist beyond a reasonable doubt during the guilt phase. (R. 12:2154-56) Additionally, the evidence in this case overwhelmingly supports the other aggravating circumstances found in this case. If presented the opportunity to make specific factual findings regarding all of the aggravating factors in this case, any reasonable jury would have found those factors to exist, rendering any error harmless.

B. Commuting Appellant's Capital Sentence to a Sentence of Life in Prison Is an Improper Remedy for a Harmful Hurst Defect.

Appellant's reliance on Section 775.082(2), Florida Statutes, to require imposition of a life sentence is misplaced because Hurst struck down Florida's process for imposing capital sentences, not capital sentencing itself. In Hurst, the Supreme Court recognized that under section 775.082(1), Florida Statutes, a defendant could only be eligible for a capital sentence upon "findings *by the court* that such person shall be punished by death." Hurst, 136 S. Ct. 616, 622 (2016) (quoting § 775.082(1)(2010)). The Supreme Court's holding hinged on the

fact that Florida's capital sentencing procedure did not require the jury to make the "critical findings" required to impose a capital sentence, but rather, solely the trial court must find the facts to impose a capital sentence. Id. The statute Appellant relies on, section 775.082(2), Florida Statutes, provides that a life sentence must be imposed "[i]n the event the death penalty in a capital felony is held to be unconstitutional..." § 775.082(2)(2008).

Appellant's argument fails because Hurst did not hold that capital sentencing itself was unconstitutional; it only invalidated Florida's procedures for implementing capital sentencing, finding that they could result in a Sixth Amendment violation if the judge makes factual findings that are not supported by a jury verdict. Hurst, at 624. Therefore, section 775.082(2), Florida Statutes, does not apply by its own terms.

Although Appellant suggests that this Court used similar language to require the commutation of all death sentences to life following Furman v. Georgia, 408 U.S. 238 (1972), in Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), Appellant is misreading and oversimplifying the Donaldson decision. Donaldson is not a case of statutory construction, but one of jurisdiction. Based on our state constitution in 1972, which vested jurisdiction of capital cases in circuit courts rather

than the criminal courts of record, Donaldson held that circuit courts no longer maintained jurisdiction over capital cases since there was no longer a valid capital sentencing statute to apply; no "capital" cases existed, since the definition of capital referred to those cases where capital punishment was an optional penalty. Donaldson observes the new statute (§775.082(2)) was conditioned on the invalidation of the death penalty, but clarifies, "[t]his provision is not before us for review and we touch on it only because of its materiality in considering the entire matter." Donaldson, 265 So. 2d at 505.

The focus and primary impact of the Donaldson decision was on those cases which were pending for prosecution at the time Furman was released. Donaldson does not purport to resolve issues with regard to pipeline cases pending before the Court on direct appeal, or to cases that were already final at the time Furman was decided. This Court's determination to remand all pending death penalty cases for imposition of life sentences in light of Furman is discussed in Anderson v. State, 267 So. 2d 8 (Fla. 1972), a case which explains that, following Furman, the Attorney General filed a motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences that were imposed were illegal sentences. There is no

legal reasoning or analysis to explain why commutation of forty sentences was required, but it is interesting to observe that this was before the time that either this Court or the United States Supreme Court had determined the current rules for retroactivity, as Teague v. Lane, 489 U.S. 288 (1989), and Witt v. State, 387 So. 2d 922 (1980), were both decided later.

By equating Hurst with Furman, Appellant reads Hurst far too broadly. Section 775.082(2), Florida Statues, exists to provide a remedy where the death penalty itself is found unconstitutional, and therefore is an inappropriate remedy here.

C. If Resentencing is Granted, Appellant Should Be Resentenced Under Chapter 2016-13, Laws of Florida.

Appellant argues that the wording of Chapter 2016-13 indicates a lack of intent to apply the law to any capital offenses that occurred prior to the law's effective date. Appellant further argues that regardless of the wording of Chapter 2016-13, Article X, section 9, of the Florida Constitution, also known as the "Savings Clause," prohibits retroactive application of the new law. These arguments fail upon a review of the application of the Savings Clause and the legislative intent behind the creation of Chapter 2016-13.

Article X, section 9, of the Florida Constitution requires that "[r]epeal or amendment of a criminal statute shall not

affect prosecution or punishment for any crime previously committed." The purpose of the Savings Clause is to ensure that the statute in effect at the time of the crime will govern the sentence the offender receives for that crime. Castle v. State, 330 So. 2d 10, 11 (Fla. 1976). However, procedural or remedial changes to statute are distinct from the substantive changes contemplated by the Savings Clause, and may be applied to a crime that occurred prior to its enactment. Glover v. State, 474 So. 2d 886, 891-92 (Fla. 1st DCA 1985); State v. Pizarro, 383 So. 2d 762, 763 (Fla. 4th DCA 1980). Moreover, where the statute in effect at the time of the crime is found to be unconstitutional, the Savings Clause is inapplicable because its purpose cannot be carried out in a manner that is constitutional. Horsley v. State, 160 So. 3d 393, 406(Fla. 2015).

In Horsley, this Court faced a question much like the one here, in dealing with a juvenile offender whose life sentence was invalidated by the United States Supreme Court ruling in Miller v. Alabama, 132 S. Ct. 2455 (2012). Horsley, 160 So. 3d at 394-95. The Florida Legislature responded to the ruling in Miller by passing Chapter 2014-220, Laws of Florida, which cured the constitutional defect identified by the Miller ruling. The new law did not contain any language addressing retroactive or

prospective application, and it contained an effective date of July 1, 2014. Horsley, 160 So. 3d at 394, (citing Ch. 14-220, Laws of Fla.). This Court concluded that Chapter 2014-220 was the appropriate remedy for resentencing all juvenile offenders whose sentences contained Miller defects, in part because the new law was enacted as a direct response to Miller and was tailored specifically to cure the constitutional defect at issue, making the Legislature's intent very clear. Id. at 406.

Appellant's argument fails because this Court has already decided that when the Legislature passes a law to cure a constitutional error, that law may be used to cure the same error in previously sentenced cases. Much like Chapter 2014-220 at issue in Horsley, the Legislature passed Chapter 2016-13 in direct response to the Hurst ruling, and the appropriate remedy is to use Chapter 2016-13 to cure harmful Hurst sentencing errors. Additionally, because the Savings Clause only prohibits the retroactive application of substantive changes to the law, it does not prohibit retroactive application of the procedural changes required by Hurst. Thus, Chapter 2016-13, Laws of Florida, is the appropriate remedy and should be applied in this case if this Court determines that resentencing is required for any reason.

D. Chapter 2016-13, Laws of Florida, is constitutional.

Appellant argues that resentencing under Chapter 2016-13, Laws of Florida, would violate his Sixth Amendment constitutional right to jury trial and the Eighth Amendment constitutional prohibition against cruel and unusual punishment because it does not require a unanimous finding by a jury to impose a capital sentence. Newly-amended subsection 921.141(2)(a) provides that "the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6)." Subsection 921.141(2)(b) further provides that the "jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be unanimous." Paragraph (2)(b)2. also provides that if the jury unanimously finds at least one aggravating factor, it "shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death." Because the trial court cannot rely on any aggravating factor that was not unanimously found by a jury, the Sixth Amendment and Eighth Amendment violations Appellant alleges cannot exist under Chapter 2016-13, Laws of Florida. Additionally, the recommendation shall be based on a weighing of whether sufficient aggravating factors exist,

and whether aggravating factors outweigh the mitigating circumstances found to exist. This sentencing procedure is precisely what Hurst requires.

ISSUE II: THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON ATTEMPTED SEXUAL BATTERY AS THE UNDERLYING FELONY FOR FELONY MURDER.

Appellant argues that the evidence is consistent with simply posing Futrell's body to throw off suspicion, and as such, the motion for judgment of acquittal on attempted sexual battery should have been granted. In reviewing the denial of a motion for judgment of acquittal, this Court applies a de novo standard of review and does not reverse a conviction where it is supported by competent, substantial evidence. Delmer Smith v. State, 170 So. 3d 745, 755 (Fla. 2015); Jackson v. State, 25 So. 3d 518, 531 (Fla. 2009). A trial court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993). In moving for judgment of acquittal, a defendant admits the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the

proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). While this Court recognizes that circumstantial evidence may be deemed insufficient where it is not inconsistent with a reasonable theory of defense, this Court has also recognized the issue of whether such inconsistency exists is for the jury to decide. Spencer v. State, 645 So. 2d 377, 380-81 (Fla. 1994).

In order to establish an attempt to commit a crime the State must prove: (1) a specific intent to commit a particular crime, and (2) an overt act toward its commission. Williams v. State, 967 So. 2d 735, 755 (Fla. 2007). The state presented competent, substantial evidence that Appellant committed an attempted sexual battery on Futrell. See Dailey v. State, 594 So. 2d 254, 258 (Fla. 1991) (competent, substantial evidence existed to support aggravating factor that the murder occurred during a sexual battery or attempted sexual battery where the victim's body was found totally nude in the Intercoastal Waterway, her underwear was found on shore near areas of fresh blood, and her jeans had been removed and thrown away); Geldreich v. State, 763 So.2d 1114, 118-19 (Fla. 4th DCA 1999)(defendant committed an overt act towards the commission of

sexual battery by forcibly carrying the victim to a parking lot, throwing her down, straddling her, and beginning to take her blouse off; he thus committed attempted sexual battery); L.J. v. State, 421 So. 2d 198 (Fla. 3rd DCA 1982) (unsnapping of victim's pants without her consent sufficiently alleged separate overt act done toward commission of sexual battery); State v. Ortiz, 766 So. 2d 1137 (Fla. 3rd DCA 2000)(State's evidence was sufficient to establish prima facie case of attempted sexual battery, despite absence of physical or medical evidence such as semen or DNA; victim was found beaten and virtually nude in isolated wooded area of a park with her shirt pulled up around her head and her shorts down around her ankles).

Appellant argues that the evidence clearly shows that Futrell was killed outside, was dragged inside with all her clothing undisturbed, and then her clothing was removed after she had died and was "posed" to look like she was sexually assaulted. (IB 49-50) However, the record establishes that this is not the case. In this case, Futrell was found dead and lying on her back in her living room with her shirt pulled up over her torso, her underwear sliced at the crotch and pulled up over her hips, revealing her nude from the waist down. Her legs were also sprawled in a sexual manner. (25:624) Dr. Giles, the medical examiner, testified that Futrell's shirt and bra had also been

cut. (26:878) He testified that he did a sexual assault kit on Futrell because "[i]n a case such as this, it's a possibility of sexual assault." (26:880) Additionally, Appellant's neighbor, Mary Schuller, overheard him say he heard Futrell had been "violated." (25:753-54) This fact is particularly significant because Sergeant Craig Waldrup, the lead detective involved in the murder investigation, testified that prior to Appellant's arrest, no information was released to the public about specific details of the murder, the crime scene, or the condition of Futrell's body when discovered by police. (25:785)

The manner in which Futrell was left naked from the waist down is sufficient to establish a prima facie case of attempted sexual battery, notwithstanding the lack of semen or trauma to Futrell's genital area. The condition of Futrell's body parallels the evidence in Ortiz, 776 So. 2d at 1142-43, which was found to be sufficient to establish prima facie evidence of attempted sexual battery. Moreover, the sole act of unsnapping a victim's pants without her consent was sufficient to establish a prima facie case in L.J. v. State, 421 So. 2d at 198-99, and far more than that was done to Futrell. Competent, substantial evidence supports the trial court's denial of the motion for judgment of acquittal, thus, this claim is without merit.

While Appellee firmly contends that the trial court's denial of Appellant's motion for judgment of acquittal is without error, should this Court disagree, any such error would be harmless beyond a reasonable doubt. Felony murder was equally applicable to Appellant based on robbery and/or attempted robbery and attempted sexual battery as the underlying offenses. Competent, substantial evidence was presented to support the jury's unanimous verdict of guilt for burglary and/or attempted burglary as an underlying felony for felony murder. (12:2154-56) Even if this Court finds error with the trial court's denial of the judgment of acquittal on attempted sexual battery, there is no reasonable possibility that Appellant's conviction or sentence would have differed if the trial court had granted the motion for judgment of acquittal on attempted sexual battery. Thus, any error in denying the motion for judgement of acquittal on attempted sexual battery is harmless beyond a reasonable doubt, and Appellant's conviction and sentence should be left undisturbed.

ISSUE III: THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO FIND THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL (HAC) AGGRAVATING FACTOR.

Appellant incorrectly contends that the trial court's sentencing order erred in finding the especially heinous, atrocious, or cruel (HAC) aggravating factor due to the brevity of the attack and Appellant's lack of intent to cause suffering. The evidence in the present case plainly undermines Appellant's assertion that Futrell's death was swift and she did not know "what was coming or was aware of what was occurring for more than a few seconds." (IB 55) During the time that Futrell was alive, she experienced brutal violence at the hands of Appellant, and she struggled to survive against the attack, even in her weakened state. Appellant testified at trial that after he slashed Futrell across the throat, he then proceeded to stab her repeatedly with such force that the knife blade broke. (27:1007-08).

Futrell was covered in defensive wounds, with blunt-force and sharp-force injuries over several areas of her body. (26:854) Her injuries included abrasions around her mouth, forehead, contusions near her hairline, (26:859) superficial sharp-force injuries of varying depths (26:862), sharp-force injuries to the inside of her left arm (26:867), contusions and other injuries on the hands (26:870-71), among others. Blood was

also found on the bottom of Futrell's feet, indicating that she was upright during the attack long enough to stand in a pool of her own blood. (25:683, 684) Dr. Giles, the medical examiner, testified, "In my opinion there was definitely a struggle involved in this death." (26:868) In addition to the wounds on Futrell's body, there were multiple areas in the backyard where Futrell's blood was found, including in a puddle in the middle of the yard (25:629-30), smeared on a lawn chair, transferred onto multiple areas around the Koi pond, (25:631-32), and near the screened porch. (25:663) This evidence indicates that the struggle likely spilled into various areas of the yard.

The trial court properly found that the HAC finding was supported by testimony of Appellant, the physical injuries sustained by Futrell during the struggle, and the numerous surfaces upon which her blood was found. These facts demonstrate that Futrell suffered a brutal attack and she was aware of her impending death as Appellant repeatedly stabbed her. Appellant's argument necessarily fails because it is based on an inaccurate interpretation of the facts.

In reviewing the trial court's finding of an aggravating factor, this Court must determine if the trial court applied the correct rule of law to each aggravating factor, and if so,

whether competent, substantial evidence exists to support the finding. Boyd v. State, 910 So. 2d 167, 191 (Fla. 2005).

Section 921.141(5)(h), Florida Statutes, provides that if the capital felony is "especially heinous, atrocious, or cruel," those circumstances constitute an aggravating factor. Contrary to Appellant's argument, HAC actually does not focus on the motivation or mindset of the defendant, but rather on the "means and manner in which death is inflicted and the immediate circumstances surrounding the death." Tai A. Pham v. State, 70 So. 3d 485, 497 (Fla. 2011). The HAC aggravating factor has been consistently upheld where the victim was repeatedly stabbed. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998); Finney v. State, 660 So. 2d 674 (Fla. 1995).

Contrary to Appellant's assertion, the length of time it takes the victim to die is not dispositive of HAC. Evidence that may support an HAC finding include the advanced age of the victim, that the victim was attacked in his or her own home, the victim was forced to view the killer and knew who he was, and the victim had always shown the killer kindness and generosity. Barnhill v. State, 834 So. 2d 836, 850 (Fla. 2002). In fact, this Court has upheld the HAC finding where the victim was only conscious briefly during the attack. Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997).

Barnhill directly undermines Appellant's argument that the swiftness of Futrell's death is dispositive to the trial court's HAC finding. In that case, the victim was an eighty-four-year-old man who met the defendant when he was hired to mow the victim's lawn. Barnhill, 834 So. 2d at 840. Sometime later, the defendant hid in the victim's house, attacking and strangled him. Id. at 840-41. The defendant admitted the victim resisted and tried to yell for help, and the medical examiner testified that the victim became unconscious within one to two minutes. Id. at 850. This Court upheld the trial court's HAC finding based on the following facts: the victim was elderly; the defendant stalked the victim in his home, struck him in the head and strangled him; the defendant forced the victim to view the defendant and the victim knew who he was; the victim had a history of always showing the defendant generosity and kindness; the defendant made multiple attempts to strangle the victim before succeeding; and the defendant stated that the victim initially struggled and tried to call for help. Id.

Notably, this Court found the Barnhill facts sufficient to support an HAC finding even though the victim lost consciousness very quickly: "the medical examiner testified that the victim lost consciousness within one to two minutes after being manually strangled." Id. This Court found that "[b]ecause

strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC." Id.

The Rolling case further demonstrates that an HAC finding can be supported by the evidence even when the victim is conscious for only a matter of seconds. 695 So. 2d at 296-97. In Rolling, the defendant broke into the victim's home, duct taped her mouth, and stabbed her multiple times in a "blitz" attack while she slept. Id. at 281 and 296. During the attack, she sustained several defensive wounds and died within thirty to sixty seconds. Id. at 296. The defendant argued that the HAC finding was improper because there was no evidence presented to establish that the victim's suffering was "prolonged," or that she anticipated her impending death. Id. This Court rejected that argument and upheld the trial court's HAC finding because the victim "did not die instantaneously," and sustained multiple defensive wounds while attempting to fight off the attack with duct tape over her mouth. Id.

Appellant puts misplaced emphasis on George Brown v. State, 644 So. 2d 52 (Fla. 1994), to support the argument that the victim's death came too swiftly to support the HAC finding. While this Court did find the evidence in George Brown to be insufficient to support an HAC finding, Appellant misses the

point of that holding. The medical examiner in George Brown testified that the victim's body was discovered at an advanced stage of decomposition and "all that could be determined was that the victim had been stabbed three times and none of the wounds would have been immediately fatal." Id. at 54. The sparse evidence at trial was insufficient to support an HAC finding because that testimony was the only evidence presented regarding the manner and circumstances of the victim's death. Id. No evidence could be presented regarding how long the attack lasted or whether the victim was conscious during the attack. Id. The holding in George Brown hinged on the lack of evidence available, rather than the length of time it took the victim to die. Id.

In the present case, the trial court properly found that the HAC finding was supported by the evidence beyond a reasonable doubt. (SR 1:99) As justification for the HAC finding, the trial court found a variety of supporting facts, including the following:

> Defendant murdered Ms. Futrell at her own home. Dr. Giles concluded the large cut across Ms. Futrell's neck was fatal…Ms. Futrell was still breathing when the cut was inflicted and it took approximately 'seconds to minutes' for her to die. Dr. Giles opined Ms. Futrell bled to death and the injury to her breathing tube caused her to suffocate…

> Defendant inflicted two distinct sharp-force injuries and numerous superficial cuts to Ms. Futrell's chest. Defendant also inflicted sharp-force injuries to the inside of Ms. Futrell's left arm. She suffered various blunt force injuries to her left eye, nose, forehead, mouth, shoulders, and arms. She also had bruises and abrasion marks on her back. Dr. Giles further explained Ms. Futrell appeared to have defensive wounds on her hands and wrists...Dr. Giles concluded a struggle occurred...
>
> At trial, Defendant testified he eventually confessed to killing Ms. Futrell during his August 30, 2008 interview with police. At the interview, Defendant told police Ms. Futrell screamed for help as he killed her...Defendant admitted to slicing Ms. Futrell's throat and stabbing her three times in the chest. Defendant acknowledged Ms. Futrell suffered and knew she was going to die when he cut her throat. Defendant stated it took thirty to forty-five seconds for Ms. Futrell to die and was aware she was dying the entire time.
>
> (SR 1:97-98)

Appellant incorrectly argues that the HAC finding is improper because the victim did not suffer "prolonged or extreme physical or mental torture." (IB 54) Much like the victim in Barnhill, Futrell's personal history of knowing the Appellant since his childhood, being kind and generous to him by feeding him when he would come visit and looking after him (24:577), only to be later attacked in her own home by Appellant (27:1007), increased the mental anguish that Futrell suffered during the attack. Appellant himself admitted during trial that Futrell knew who he was when he attacked her, and that being killed by him after she had cared for him over the years was a

horrible way for her to die. (27:1055) These facts mirror the facts that were found in Barnhill, and demonstrate the brutality and emotional toll of being attacked in her own home by someone she cared for.

During trial Appellant testified, "After the initial cut she probably realized she was going to die." (27:1071) He also testified that she was alive and looking at him when he attacked her, and she knew she was dying for the thirty to forty-five seconds it took for her to die. (27:1055-56) This testimony is crucially important to this issue because it clearly establishes that Futrell experienced the pain and extreme fear of knowing she was dying and that Appellant was the one killing her. In both Barnhill and Rolling, this Court placed decisive emphasis on evidence that showed that the victims were aware of what was happening to them. Barnhill, 834 So. 2d at 850; Rolling, 695 So. 2d at 296. In this case, this Court does not have to rely on physical or circumstantial evidence alone to extrapolate whether the victim was awake or experiencing fear; Appellant's own trial testimony could not have made it clearer that Futrell died in a brutal way while awake and fully aware of her impending death.

Appellant further contends that his state of mind at the time of the murder undermines the trial court's HAC finding. Firstly, this point was not preserved in the trial court for

appeal. In order to preserve a particular issue for appellate review, a party must have made the same argument to the trial court that it raises on appeal. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (stating that the issue "must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved"); Woods v. State, 733 So. 2d 980, 984-85 (Fla. 1999) (holding that a boilerplate motion for judgment of acquittal was not sufficient to preserve the issue on appeal because it did not set forth the specific grounds that formed the basis of the issue on appeal); Morrison v. State, 818 So. 2d 432, 455-56 (Fla. 2002)(holding that objections to statutory aggravator jury instructions must be specifically objected to at trial in order to be preserved for appeal).

In the sentencing order, trial counsel simply stated, "The Court should reject this aggravating circumstance in this case because no evidence was presented that supported the crime was conscienceless or pitiless." (SR 1:40) Trial counsel made no other comments regarding conscience, intent, or the mindset of Appellant as it concerns the application of the HAC aggravator. A vague reference to "conscience" is insufficient to establish the specific grounds underlying Appellant's objection to the HAC

finding, and therefore is insufficient to preserve this issue for appellate review.

Secondly, even if this Court reaches the merits of Appellant's state-of-mind claim, Appellant's assertion is counter to this Court's own holdings. The defendant in Barnhill raised a similar claim, arguing that the HAC finding should not apply because he made an attempt to kill the victim as quickly as possible. In that case, this Court dismissed the defendant's misplaced focus on his own state of mind because the HAC factor focuses on the victim's perception, not the attacker's intent. 834 So. 2d at 850. While the HAC factor often applies in murders that are marked by the desire to inflict a high degree of suffering or utter indifference to such suffering, this Court clarified that HAC focuses on the victim's experience and perception, rather than the intent or motive of the defendant. Id. at 849-50. This Court has reiterated this rule repeatedly. See Paul Brown v. State, 721 So. 2d 274 (Fla. 1998) ("the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death"); Orme v. State, 677 So. 2d 258, 263 (Fla. 1996). Because Appellant's argument is based on a premise that is clearly counter to the requirements to uphold an HAC finding, this claim is without merit.

ISSUE IV: THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO FIND THE PARTICULARLY-VULNERABLE-VICTIM (PVV) AGGRAVATING FACTOR.

Appellant incorrectly contends that the trial court's sentencing order erred in finding the particularly-vulnerable-victim (PVV) aggravator because any infirmity that Futrell had was unrelated to her death. Trial counsel failed to preserve this issue, rendering it unavailable for review here. However, should this Court reach the merits, Appellant's argument that there must be a causal connection between Futrell's infirmity and her manner of death is clearly unsupported by this Court's own precedent.

Appellant's objection to the PVV aggravator at trial was far different from the attack Appellant is making here, and therefore was insufficient to preserve this issue for this Court's review. The requirements for preserving a particular issue for appellate review are discussed at length supra, Issue III. Appellant's trial counsel did argue against the weight of the PVV aggravator. (SR 1:41) However, trial counsel's argument only requested that the aggravator be given little weight because Appellant was not motivated to kill Futrell based on her age or disability, and because she was able to care for herself without assistance. (SR 1:41) Moreover, trial counsel unequivocally agreed to include this aggravating factor in the

jury instructions, which waived any potential attack on the penalty phase jury instruction regarding the PVV aggravating factor. See Morrison, 818 So. 2d at 455-56. Trial counsel even conceded that this aggravating factor was established, and instead argued that the trial court should give it little weight for various reasons. (SR 1:41)(stating, "[t]his circumstance, though established, should be given only little weight by this Court.") Trial counsel never argued that the state failed to prove this aggravating factor or that a nexus requirement had to be satisfied.

Throughout the trial and penalty proceedings, trial counsel never argued that the aggravator was inapplicable or unproven, or that a nexus requirement was unsatisfied. The questions of nexus, applicability, and even sufficiency of the evidence to support this aggravator were raised by Appellant for the first time on direct appeal (IB 56-59), and therefore have not been properly preserved. See Woods, 733 So. 2d 984-85.

Should this Court reach the merits on this issue, Appellant's argument is meritless because a nexus is not required to connect the victim's age or disability with the manner in which the victim died. The standard of review for evaluating a trial court's application of an aggravating factor is discussed supra, Issue III. Section 921.141(5)(m), Florida

Statutes, provides a capital sentencing aggravating factor for cases in which the victim "was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." The plain words of the statute do not include a requirement that the vulnerability contributed to the victim's death. "Legislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning." Fla. Dep't of Children & Family Servs. v. P.E., 14 So. 3d 228, 234 (Fla. 2009) (citing Knowles v. Beverly Enterprises-Florida, Inc., 898 So.2d 1, 5 (Fla. 2004)). Where the statute's language is clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent. See Polite v. State, 973 So. 2d 1107, 1111 (Fla. 2007).

The plain language of the statute here is unambiguous and does not contain any wording such as "facilitated by" or "caused by" that would indicate a nexus requirement. Therefore, Appellant's argument that a nexus is required between the victim's infirmity and the manner of death must fail upon a plain reading of the statute.

Opinions issued by this Court addressing the application of the PVV aggravating factor likewise do not support Appellant's

contention that Futrell's physical condition was not severe enough for her to be a particularly vulnerable victim under the statute. Appellant discusses two of this Court's cases: Francis v. State, 808 So. 2d 110 (Fla. 2001), and Woodel v. State, 804 So. 2d 316 (Fla. 2001). A close read of these cases reveals that the facts and holdings undermine Appellant's position more than they help it.

In Woodel, this Court rejected Woodel's argument that the PVV aggravator was inapplicable since he did not target the victims due to their age or vulnerability. 804 So. 2d at 324-25. Woodel's argument was strikingly similar to Appellant's argument here that there must be a nexus between Futrell's vulnerability and her manner of death; both arguments assert that there must be some kind of causal connection between the age or vulnerability and the victim's death. In Woodel, this Court rejected Woodel's argument, holding "[c]ontrary to Woodel's assertion, the finding of this aggravator is not dependent on the defendant targeting his or her victim on account of the victim's age or disability." Id. at 325. The victims' infirmities, which were related to their advanced age, were sufficient to support the PVV aggravator. Id. Both victims suffered from physical infirmities much like the ones that affected Futrell. Id. at 325-26. They were in their seventies,

one victim led a sedentary lifestyle due to a triple bypass and walked with a limp due to two knee replacements, and the other victim was recovering from a severe arm injury, with a loss of mobility, strength, and use of that arm. Id. This Court held that the victims' physical states, along with their attacker's comparative youthfulness, were sufficient to support the PVV finding. Id.

In the present case, Futrell had significantly diminished strength and mobility. Much like the victims in Woodel, she was in a weakened state due to health-related infirmities. Additionally, the age difference between her and Appellant was forty-seven years, similar to age gap between the victims and the defendant in Woodel. Futrell's vulnerability was clearly sufficient for her to be a particularly vulnerable victim under the statute.

The distinctions between Francis and the facts of the present case also support the PVV finding here. In Francis, the only facts supporting the PVV finding was the victims' age of 66 years old, but the victims were described as active and in good health. 804 So. 2d at 139. Appellant argues that this Court's denial of PVV was due to a lack of causal connection between the victims' vulnerabilities and their deaths, but this is inaccurate. This Court's holding was based on a lack of basic

evidence to support the PVV finding. Id. This Court held that because the state did not present any evidence of vulnerability other than the fact that the victims were 66 years old, the PVV finding was unsupported. Id.

In contrast to the victims in Francis, who were healthy and active, here Futrell was 65 years old, stood at five feet, five inches tall, and had been on disability due to MS since 1998. (29:1275) Her neighbor, Moses Oche, described her as "frail," and had noticed a decline in her strength and physical ability in the months preceding her death. (25:608) Her health had even deteriorated to the point that she had difficulty walking. (25:772) These, and the other facts detailed in the trial court's order and documented supra, clearly support this aggravator with competent and substantial evidence. Here, the evidence shows the age and disability of a small woman living at home alone who clearly merits coverage of the statute.

ISSUE V: THE TRIAL COURT PROPERLY REJECTED VARIOUS NON-STATUTORY MITIGATING FACTORS.

Appellant challenges the trial court's findings rejecting several proposed non-statutory mental mitigators on the grounds that Appellant "could understand right from wrong and had sufficient cognitive ability to commit the murder." (IB 62) Specifically, Appellant challenges the trial court's rejection of his speech and language problems as a child, his functional IQ of 74 as a child, his current IQ in the low average range, his placement in special education in elementary school due to learning problems, his special education placement in high school, and his graduation from high school with a special diploma. A review of the evidence and the sentencing order establishes that while Appellant disagrees with the factual conclusions reached by the trial court, no abuse of discretion occurred below.

Whether the evidence presented at trial has established a mitigating circumstance is a question of fact and subject to the competent substantial evidence standard of review. The weight the trial court assigns to a mitigating circumstance is within the trial court's discretion and is subject to the abuse of discretion standard. Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997). Trial courts are required to consider all

mitigating evidence presented by the defendant and supported by the record, Griffin v. State, 820 So. 2d 906, 913 (Fla. 2002), to the extent that it is "believable and uncontroverted." Muhammad v. State, 782 So. 2d 343, 363 (Fla. 2001). Whether the evidence supports the proposed mitigation is a question for the trial court, and the trial court must dispense with this task by expressly and thoroughly evaluating the aggravating and mitigating facts and circumstances Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990). The trial court may reject a mitigating circumstance as unproven when the record contains competent, substantial evidence to support that rejection. Taylor v. State, 855 So. 2d 1, 29 (Fla. 2003).

Furthermore, this Court has repeatedly upheld trial court rulings rejecting or giving little weight to mitigation when other evidence, such as the defendant's actions, counteracts it. Douglas v. State, 878 So.2d 1246, 1257 (Fla. 2004)(upholding a trial court's rejection of a mitigating factor that defendant loved his children, was a good father, and supported them; while several witnesses testified that defendant was a good father and supported his children, witnesses did not know how many children defendant had, or whether defendant paid child support on a regular basis, and none of the four mothers of defendant's children corroborated this testimony); Philmore v. State, 820

So. 2d 919, 935-37 (Fla. 2002)(upholding trial court's rejection of extreme mental or emotional disturbance mitigator where antisocial personality disorder diagnosis was supported by unrefuted expert testimony, but the facts and circumstances of the homicide indicated a coherent, deliberate, well thought out plan which spanned over the course of two days).

Appellant claims that the trial court rejected the proposed mitigation in question because it was "not mitigating and entitled to no weight." (IB 60) In fact, the trial court found that "Defendant has not established this mitigating circumstance and gives it no weight in determining Defendant's sentence." (SR 1:114) The trial court clearly rejected the proposed mitigators because the evidence was insufficient to establish them. This distinction is important because Campbell makes it clear that determining the sufficiency of the evidence to prove a mitigating circumstance is well within the province of the trial court. Campbell, 571 So. 2d at 420. The question here, then, is whether the trial court's findings were an abuse of discretion. Taylor, 855 So. 2d at 30.

Appellant takes issue with the trial court's rejection of the proposed mitigation, arguing that the trial court "erred in rejecting this evidence on the grounds that Deviney could understand right from wrong and had sufficient cognitive ability

to commit a murder." (IB 62) However, the trial court's basis for rejecting this mitigation is not as simplistic as Appellant has stated. The trial court in fact rejected this mitigation because Appellant displayed substantial cognitive abilities that extended far beyond simply distinguishing right from wrong or committing murder. (SR 1:114) In its sentencing order, the trial court evaluated the specific proposed mitigators at issue here under the general issue of whether "Defendant has limited cognitive ability." (SR 1:113) The trial court noted that some of the evidence demonstrated that Appellant had speech and language issues as a child, was diagnosed with learning disabilities, failed a grade, tested at an IQ of 74 as a child, and currently has a low average IQ with some learning disability. (SR 1:113-14) However, the trial court noted that substantial evidence also existed to support Defendant's intellectual capabilities.

> Mr. Deviney stated Defendant was able to graduate from high school with his special diploma 'because he could function and hold down a job.' It is also clear from his testimony at trial, Defendant can understand questions and generate comprehensive answers. Moreover, the facts of the crime give weight to Defendant's aptitude at the time of the offense. Defendant's actions were thought out and planned. Defendant was able to go to Ms. Futrell's home and convince her to let him inside. He was then able to brutally murder her, leave her residence, and dispose of the murder weapon without being seen. Further, once he returned home, Defendant was shrewd enough to

> dispose of his clothing and play cards with his mother as if nothing had happened. He then lied to police about committing the murder.

(SR 1:114)

The trial court here reviewed all the relevant evidence thoroughly, as required by Campbell, and based the rejection of the proposed mitigation on competent, substantial evidence of Appellant's cognitive abilities. Much like the evidence in Philmore, the evidence presented here shows that Appellant was able to think clearly and plan a murder. Rather than showing that Appellant had limited cognitive ability, the evidence demonstrated that he was able to plan the murder and destroy the evidence so effectively, that Futrell's murder investigation likely would have reached a dead end if his DNA had not been found under Futrell's fingernails.

Finally, even if this Court reaches a different conclusion with regard to the trial court's findings regarding mitigation, remand is not necessary because any error regarding mitigation is harmless. It is clear that any further consideration would not result in a life sentence because the capital sentence is supported by three strong aggravating factors that outweigh any possible mitigation in this case. See Thomas v. State, 693 So. 2d 951 (Fla. 1997)(holding that trial court's failure to address mitigating evidence of defendant's good character was harmless

error in light of massive evidence in aggravation, including defendant's murder of his own mother to keep her from talking to police about victim's death); Singleton v. State, 783 So. 2d 970 (Fla. 2001)(holding court's failure to specifically address claims of mitigation, including defendant's courtroom behavior, his behavior on parole, and his alleged remorse and cooperation with police, was harmless, where those claims did not outweigh the two weighty aggravators found to exist by trial judge).

Although the trial court rejected the proposed mitigation regarding Appellant's limited cognitive ability, it found over twenty other mitigating circumstances and weighed them accordingly. (SR 1:100-34) The trial court concluded, "the aggravating circumstances heavily outweigh the mitigating circumstances." (SR 1:135) Failing to find the mitigating circumstances at issue here cannot offset the three strong aggravators found, thus rendering any error harmless.

ISSUE VI: THE TRIAL COURT'S REJECTION OF REMORSE AS A MITIGATING FACTOR WAS PROPER.

Appellant challenges the trial court's findings rejecting remorse as a mitigating circumstance on the grounds that "remorse is inconsistent with not wanting to get caught." (IB 64) The heart of Appellant's argument takes issue with the trial court's factual findings and thus, this Court must review the record for an abuse of discretion. See Blanco, 706 So. 2d at 10. A trial court may reject remorse when it is not established by the greater weight of the evidence. See Weaver v. State, 894 So. 2d 178, 197-98 (Fla. 2004)(upholding the trial court's finding rejecting remorse where the defendant's apology was for the victim's family having to endure a trial and the loss of their son; that he never admitted shooting the victim; the defendant's sorrow was over his own predicament; and he never expressed remorse during the guilt or penalty phases). This Court has repeatedly upheld trial court findings regarding aggravators and mitigators where the trial court rejected remorse as unproven. See Armstrong v. State, 73 So. 3d 155, 165-66, 175 (Fla. 2011); Nelson v. State, 850 So. 2d 514, 520, 532 (Fla. 2003); Evans v. State, 838 So. 2d 1090, 1097-98 (Fla. 2002). A review of the evidence and the sentencing order establishes that the trial

court based its finding on competent, substantial evidence, and no abuse of discretion occurred below.

The relevant authority guiding this Court's review of the trial court's rejection of a mitigating circumstance is discussed thoroughly, supra, Issue V. In rejecting remorse as a mitigating circumstance, the trial court acknowledged that Appellant admitted to murdering Futrell and is aware of the grief he caused. During trial, he stated that he was extremely sorry. However, other facts indicated that he wanted to get away with the murder and likely never would have confessed if police had not found his DNA to implicate him. Specifically, the trial court found,

> [H]e admitted he initially lied to police and concealed his involvement during Ms. Futrell's vigil. Defendant also admitted to disposing of evidence after the murder. Defendant stated he did not think he would get caught for this crime and would have gone on with his life if he was never caught. He testified he wanted to get away with the murder, and he was upset detectives obtained DNA evidence implicating him. Moreover, Defendant still maintains he did not intend to murder Ms. Futrell and contends he accidentally slit her throat.

(SR 1:133)

Appellant's own testimony revealed that he lied to police repeatedly, even after confessing to Futrell's murder. (27:1012, 1064) He stood at a vigil with Futrell's grieving family and friends, yet was not moved to confess or make any effort to

provide them with closure. (27:1065) Appellant even admitted during his cross-examination that he would have gone on with his life like nothing happened if the police had not found his DNA. (27:1065) Defendant made no effort to accept responsibility or apologize for his wrongdoing until after he was caught, and made it clear in his testimony that he would have continued to do so if he had been able. The trial court is not obligated to accept Appellant's self-serving statement of his alleged remorse as a matter of law. The trial court properly assessed the authenticity of Appellant's claim of remorse and concluded that this mitigating circumstance had not been proven. The evidence presented at trial provides competent, substantial support to the trial court's finding rejecting this proposed mitigating circumstance, and it should not be disturbed.

Finally, even if this Court reaches a different conclusion with regard to the trial court's findings regarding mitigation, remand is not necessary. Even when remorse is established, it is typically given little weight. See Stephen Smith v. State, 998 So. 2d 516, 522, 527(Fla. 2008) (upholding trial court's findings where defendant's remorse was given little weight); Everett v. State, 893 So. 2d 1278, 1288 (Fla. 2004) (upholding trial court's findings where defendant's remorse was given very little weight for a murder); Philmore v. State, 820 So. 2d 919,

926, 940 (Fla. 2002) (upholding trial court's findings where defendant's remorse was given little weight for a murder). Any error regarding mitigation is harmless for the same reasons discussed at length, supra, Issue V.

ISSUE VII: THE CAPITAL SENTENCE WAS PROPORTIONATE.

Appellant argues that his capital sentence is disproportionate because the murder was committed by him while emotionally disturbed and suffering from PTSD. (IB 65) The State disagrees. Without provocation, Appellant callously slashed the neck of a frail sixty-five-year-old woman who was suffering from MS and then proceeded to crush her neck and stab her repeatedly with such force that the knife broke.

The proportionality review of a capital sentence is not a simple comparison between the number of the aggravating and mitigating circumstances, but instead focuses on the totality of the circumstances in the case and compares it to other capital cases. Muehlman v. State, 3 So. 3d 1149, 1165 (Fla. 2009). In reviewing proportionality, this Court accepts the jury's recommendation and the weight assigned by the trial judge to the aggravating and mitigating factors. Id.

When reviewing the aggravators and mitigators in this case in comparison to similar capital cases, it is clear that the capital sentence in this case is proportionate. See Sparre v. State, 164 So. 3d 1183 (Fla. 2015) (sentence proportionate where victim was stabbed in her own home with such force that the knife blade broke; victim knew the defendant prior to the murder; victim's purse appeared to be rummaged through; both

aggravators, HAC and murder committed during a burglary, were given great weight; the only statutory mitigator was age and it was given moderate weight; and several non-statutory mitigators were given some, little, or slight weight); Singleton v. State, 783 So. 2d 970, 972-73 (Fla. 2001)(sentence proportionate where victim was stabbed seven times; the defendant claimed the stabbing occurred during an altercation; the victim knew the defendant prior to the murder; both aggravators, prior violent felony and HAC were given great weight; three statutory mitigators and nine nonstatutory mitigators were found); Hernandez v. State, 4 So. 3d 642 (Fla. 2009)(sentence proportionate where defendant killed the victim in her own home by snapping her neck and stabbing her in the neck with a knife; defendant stole the victim's purse after killing her; four aggravators were found and given great weight, one statutory mitigator was found, and twenty-three nonstatutory mitigators were found, ranging from slight to substantial weight); Abdool v. State, 53 So. 3d 208 (Fla. 2010)(sentence proportionate for nineteen year old defendant where only Cold, Calculated, and Premeditated and HAC aggravators were found, and four statutory mitigators were found, two of which were given moderate weight); Bates v. State, 750 So.2d 6 (Fla. 1999) (sentence proportionate where victim was stabbed; three aggravators were

established, including murder committed during kidnapping and sexual battery, pecuniary gain, and HAC; two statutory mitigators and numerous non-statutory mitigators established; testimony indicated some neurological impairment); Dusty Spencer v. State, 691 So.2d 1062 (Fla. 1996) (death penalty proportionate where victim beaten and stabbed; two aggravators of prior violent felony and HAC versus two statutory mental mitigators plus drug and alcohol abuse and paranoid personality); Gamble v. State, 659 So. 2d 242 (Fla. 1995) (capital sentence proportionate where two aggravators of cold, calculated, and premeditated and pecuniary gain were found versus one statutory mitigator and several non-statutory mitigators were found and the codefendant was sentenced to life).

There are three strong aggravators in this case, including HAC; murder committed during the course of a burglary, sexual battery, or attempted burglary or sexual battery; and PVV. (SR 1:92-100) The trial court assigned great weight to all three. (SR 1:93-100) Much like Sparre, Appellant's age at the time of the crime was the sole statutory mitigator found, and the trial court gave it moderate weight. (SR 1:104-05) The trial court found that some non-statutory mitigation was established, and assigned most of the mitigation minimal or slight weight. Only

the fact that Appellant's parents were convicted of killing his older brother was given moderate weight. (SR 1:112-134) While Appellant's mitigation demonstrates that he has suffered sexual and other types of abuse and was treated for learning and behavior disabilities as a child, these mitigators were found primarily to carry minimal or slight weight. In circumstances with similar mitigation, this Court has upheld sentences where fewer aggravators were found than exist in this case. See Sparre, and Gamble, discussed supra. The totality of Appellant's mitigation pales in comparison to the significance of the three aggravating factors in this case, all of which carry great weight.

Additionally, Appellant's reliance on Bell v. State, 841 So. 2d 329 (Fla. 2002), Sager v. State, 699 So. 2d 602 (Fla. 1997), Hawk v. State, 718 So. 2d 159 (Fla. 1998), Robertson v. State, 699 So. 2d 1343 (Fla. 1997), Fead v. State, 512 So.2d 176 (Fla. 1987), Wilson v. State, 493 So. 2d 1019 (Fla. 1986), and Voorhees v. State, 699 So. 2d 602 (Fla. 1997), is misplaced. Appellant relies on these cases to argue that this Court has found capital sentences disproportionate in cases that were equally or more aggravated, and were similarly or less mitigated. However, the cases above are easily distinguishable from the present case. For instance, Sager and Voorhees were

codefendant cases arising out of the same circumstances. In these cases, only two aggravators were found and the defendants acted impulsively while highly intoxicated. Voorhees, 699 So. 2d at 605, 614-15; Sager, 699 so. 2d at 621, 623. Hawk and Robertson both involved defendants with severe mental illness, Robertson had borderline functional intelligence, Hawk suffered from brain damage, and in both cases, only two aggravators were found. Hawk, 718 So. 2d 160, 163; Robertson, 699 SO. 2d at 1345, 1347. Furthermore, Roper v. Simmons, 543 U.S. 551 (2005) makes Bell v. State inapplicable and completely unpersuasive to Appellant's proportionality analysis because the defendant's age in Bell makes him legally ineligible for the death penalty. Appellant's capital sentence is proportionate and should not be disturbed.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm the conviction and sentence of death imposed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2016, I electronically filed the foregoing with the Clerk of the Court by using the e-portal system which will send a notice of electronic filing to the following: Nada M. Carey, Esquire, Nada.Carey@flpd2.com, 301 South Monroe Street Tallahassee, FL 32301.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted and certified,

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