IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-476

EMILIA L. CARR

Appellant,

v.

STATE OF FLORIDA

Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

On April 9, 2009, Carr was indicted by the grand jury of Marion County, Florida, for the February 15, 2009 murder of Heather Strong. Following various pre-trial proceedings, Carr's trial began on November 29, 2010. The jury returned a verdict of guilty of kidnapping and murder in the first degree on December 7, 2010, and recommended that Carr be sentenced to death by a vote of seven to five on December 10, 2010. The trial court imposed that sentence on February 22, 2011. Notice of appeal was filed on February 23, 2011. Carr filed her *Initial Brief* on or about January 3, 2012.

STATEMENT OF THE FACTS

On February 15, 2009, Brenda Smith worked with Heather Strong at the Iron Skillet Restaurant in Reddick, Florida. (V33, R649, 651). Smith, the manager, said Strong was a reliable employee and always called when she could not come to work. (V33, R651).

Smith knew Strong's husband Joshua Fulgham was arrested in January 2009 because "he threatened to kill" Strong. (V33, R656-57). Smith told Strong that Fulgham was "really going to kill you" when he got out of jail.[1] (V33, R657).

[1] Fulgham's mother testified he was released from jail on February, 6, 2009. (V33, R749).

On February 15, at approximately 2:00 p.m., Smith was informed by the cashier that Strong had received two phone calls at the restaurant and the caller had said, "it was an emergency." (V33, R653). After Smith told Strong about the phone calls, Strong made a call to check on her children. Shortly thereafter, Strong was crying. Strong told Smith, "It was Josh ..." (V33, R653). Smith advised Strong not to tell Fulgham that she was leaving him and taking their children with her. (V33, R657-59). After Strong left at 3:00 p.m., Smith never saw or heard from her again. (V33, R653-54, 659).

Benjamin McCollum met Strong and Fulgham before they married. (V33, R660, 661). Strong and Fulgham had two children. (V33, R661). In June 2008, against Fulgham's wishes, Strong and her children moved in with McCollum. Strong became a "live-in nanny" for McCollum's two children. (V33, R662-63, 668). About three weeks later, Strong and McCollum began an intimate relationship. (V33, R663).

McCollum recalled several occasions when Fulgham threw "missiles"[2] at his house, cursed at him, and confronted McCollum with a firearm. (V33, R669). At one point, Fulgham had Strong arrested at McCollum's house. (V33, R670). Fulgham and his mother made harassing phone calls to McCollum. Fulgham also

[2] The missiles were non-explosive devices. (V33, R671-72).

threatened McCollum. (V33, R672). Fulgham tried to get Strong to leave McCollum by harassing both of them. (V33, R672). In December 2008, Strong and her children returned to Fulgham and they married. (V33, R663).

On February 15, 2009, McCollum brought his children to the Iron Skillet. McCollum did not know Strong was working there at that time.[3] (V33, R664). Strong gave McCollum a letter and told him she cared about him and wanted to come back to live with him. McCollum would not allow it. (V33, R671). That was the last time McCollum saw Strong. (V33, R664, 671).

McCollum knew Emilia Carr but never dated her. She lived a few miles from his home. (V33, R668).

James Acome had a relationship with Carr. Carr claimed Acome was the father of her son, C.B.[4] (V33, R674, 676). Acome was also friends with Strong and Fulgham. (V33, R674, 690). Acome, Carr, Strong and Fulgham socialized together. (V33, R677).

On January 26, 2009, Acome went to the Strong/Fulgham home to pick up Carr and bring her to her mother's house. Strong and Carr had been drinking. (V33, R678, 690). Carr asked Strong to

[3] Strong had worked on and off at the Iron Skillet several times. (V33, R649).

[4] Carr said Acome does not acknowledge her youngest son as his child. (V34, R818, 877).

write a letter on Fulgham's behalf. Acome said that after Strong refused, Carr pulled Strong's hair and held a knife to her throat. (V33, R677-78).[5] Carr dropped the knife after Acome grabbed her. The two women then apologized to each other. (V33, R680, 690). Acome said Strong and Carr remained friends. Carr also babysat Strong's children. (V33, R691).

On January 27, Acome and Strong moved into an apartment together. (V33, R680, 689; V39, R1753). On February 15, Strong used Acome's truck to go to work.[6] After she returned that day, Strong and Acome had a "discussion." Acome left the apartment at approximately 4:14 p.m. and did not return until approximately 8:30 p.m. (V33, R682-83). Acome noticed the lights were on and the door lock and padlock on the door were locked. Only he and Strong had a key to the padlock. (V33, R684). Acome's phone calls to Strong went unanswered. (V33, R684). Later that evening, Fulgham called Acome. (V33, R684; V39, R1753). As a result of that phone call, Acome picked up his friend Jason Lotshaw who then helped Acome pack his belongings at the

[5] There was no objection to this testimony. The State asked whether defense counsel wanted a *Williams* Rule instruction given. *Williams v. State*, 110 So. 2d 654 (Fla. 1959). The defense waived the instruction. (V33, R694-95).

[6] Fulgham was in jail at this time. (V33, R700). Strong's maroon Toyota disappeared after Fulgham was released from jail. (V33, R682).

apartment. Acome moved to his parents' house. He never saw Strong again. (V33, R684, 686, 691; V39, R1753).

Acome said he and Lotshaw went to Carr's house on the evening of February 15, 2009. (V39, R1754). Acome spoke to Carr for a few minutes and told her that Fulgham and Strong "were back together." (V39, R1754, 1755, 1757). Acome wanted to find Fulgham. (V39, R1756). Acome said he and Lotshaw had not been drinking prior to their arrival. (V39, R1756).

Acome recalled a conversation that occurred between Carr and Lotshaw where Carr offered Lotshaw $500.00 to find a new residence. Acome did not hear Strong's name mentioned. (V39, R1755, 1756). Carr talked to Acome and Lotshaw (together) in early January 2009, and asked them, "Would you guys like to make $500.00" to kill Heather Strong. (V39, R1759, 1793).

Jason Lotshaw was friends with Carr and Acome. (V33, R695). Lotshaw also knew Fulgham and Strong. (V33, R696, 699). Lotshaw and his girlfriend spent a lot of time with Acome and Strong at their apartment. (V33, R700).

Prior to Strong's murder, Lotshaw recalled he and Acome gave Carr a ride to the store.[7] (V33, R701-02). Lotshaw said Carr "offered me - - said she was fixing to get her income tax, and offered me money to help her lure Heather Strong, get her drunk,

[7] He could not recall the specific date when this occurred. (V33, R712, 715).

so that she could snap her neck." (V33, R702). Carr offered five hundred dollars.[8] (V33, R702). Lotshaw knew Carr "was serious." (V33, R703). Strong and Lotshaw's girlfriend were also in the car. (V33, R715, 716). Lotshaw could not recall if Strong and Carr had an argument that night. (V33, R716). Subsequent to the conversation with Carr, Lotshaw helped Acome move out of the apartment he shared with Strong. (V33, R704, 718).

Christy Stover worked with Heather Strong. She was also a friend of Carr's whom she met through her brother-in-law, James Acome. (V33, R722-23). Stover's younger brother was a friend of Fulgham's. (V33, R723). In January 2009, while Fulgham was in jail, Stover received daily phone calls from Carr. Carr was upset that Strong had Fulgham arrested. (V33, R725, 726). Carr was pregnant with Fulgham's baby at this time. Carr told Stover that she would pay somebody five hundred dollars to have Strong killed. Stover said Carr told her, "She would do it herself, but she wouldn't be able to move the body." (V33, R725, 726).[9] Stover thought Carr was just kidding. (V33, R728). After Fulgham was released from jail, Carr did not discuss this subject with Stover again. (V33, R727).

[8] In his deposition, Lotshaw said Carr offered seven hundred dollars. (V33, R702, 709, 712).

[9] These conversations took place every day for about two weeks. (V33, R726).

Misty Strong and Heather Strong were cousins. They grew up near each other in Mississippi and were like sisters. Fulgham lived nearby. (V33, R732-33). Strong was 15 years old when she met Fulgham and the two started dating. Their relationship was "rough, a lot of domestic violence." (V33, R734). Fulgham, Strong, and their oldest daughter, M.F., eventually moved to Florida. Strong was pregnant with their second child. (V33, R734, 735).

Misty said Strong contacted her frequently when Strong lived with McCollum. Fulgham was "just too controlling." (V33, R735, 736). In mid-February 2009, Misty could no longer get in touch with Strong. She contacted Strong's brother who had heard from Acome that Strong was missing. (V33, R736). After Misty contacted Brenda Smith (Heather Strong's boss), she called the Marion County Sheriff's Office. (V33, R737).

Judy Chandler is Fulgham's mother. (V33, R740). Chandler moved to Florida in March 2003. Strong, Fulgham, and their daughter joined her in July 2003. (V33, R741). Strong and Fulgham maintained a violent, on and off again relationship. (V33, R742, 743). Chandler was aware that Strong left Fulgham in 2008 and moved in with McCollum. (V33, R745). However, Strong returned to Fulgham in December 2008 and they married. (V33, R746).

Chandler met Carr during the time Fulgham and Carr were in a relationship. In December 2008, Carr left the home she was sharing with Fulgham. (V33, R747). In January 2009, while Fulgham was in jail, Chandler asked Carr to "stay away from Joshua" so that he and Strong could work things out. (V33, R748-49). In February 2009, upon his release, Fulgham initially stayed with Chandler but eventually moved into a trailer home with Carr. (V33, R750).

Chandler said she drafted a letter for Strong to sign which would give Fulgham custody of their two children. During the evening of February 15, 2009, she saw Fulgham and Strong leaving her home. (V33, R750-51). Fulgham returned later that night with the letter. However, the signature was not Heather Strong's. (V33, R752, 756).

Chandler said that sometime after February 17, Fulgham and Carr moved into a different trailer park. (V33, R754). Fulgham's two children joined them. (V33, R755).

Tammie Trapp worked in the guidance department at Reddick-Collier Elementary. (V33, R757-58, 759). On February 17, 2009, Fulgham and his mother Judy Chandler enrolled M.F. in the school, which was located near Chandler. (V33, R753-54, 759, 776). Fulgham signed the school's emergency medical form and listed himself, his mother, and his sister as emergency contacts who were allowed to pick up M.F. (V33, R748, 758, 762, 773-74).

Fulgham also presented the typed February 15 “letter” purportedly signed by Strong which gave him custody of the children. (V33, R763, 770-71, 778). Trapp said an emergency card dated February 11, 2009, from M.F. previous school, was signed by Heather Strong and only listed Jamie Acome as an emergency contact. (V33, R764, 768, 778). On February 24, 2009, an additional emergency medical form was submitted to Reddick-Collier Elementary, which added “Emilia Yera” as a contact person, as well as a new living address. (V33, R765). Trapp did not know Heather Strong but knew Emilia “Yera” Carr. (V33, R768, 776). One of Carr’s children had previously attended this same school. (V33, R776).

Deputy Beth Billings works for the Marion County Sheriff’s Office. (V33, R779). On February 24, 2009, Misty Strong called the office and reported Heather’s disappearance. (V33, R780). Misty told Billings that James Acome was Heather’s current boyfriend. Misty also told Billings about Fulgham’s January 6, 2009 aggravated assault claim by Heather Strong. (V33, R781). Billings first spoke with Acome at his mother’s home. She then spoke to Fulgham by phone on February 24. (V33, R782). She also interviewed a manager at Heather’s workplace. Subsequently, Billings classified Heather Strong as a “missing person” and issued a BOLO. (V33, R782-83). Billings spoke with several other people including Ben McCollum, Judy Chandler and Heather

Strong's mother, Carolyn Spence. No one knew Heather Strong's whereabouts. (V33, R783-84).

Detectives Donald Buie and Brian Spivey, Marion County Sheriff's Office, investigated the disappearance of Heather Strong. (V34, R801-02, 804; V36, R1153-54; V37, R1372). On March 18, 2009, Buie interviewed Strong's friends including James Acome, Cristy Stover, Jason Lotshaw, and Strong's daughter, M.F. (V34, R804-06). Buie and Spivey then spoke with Fulgham and Carr[10] at their homes. (V34, R806, 875; V36, R1154-55). Subsequent to these initial interviews, Buie and Spivey requested Fulgham and Carr voluntarily come to the Sheriff's office for additional interviews. (V34, R806-07; V36, R1154-55, 1156-57; V37, R1372, 1373).

Carr gave recorded videotaped interviews on March 18 and 19. (V34, R808-09, 827, 830, 846, State Exhs. 8, 9, 10, 11).

During her first interview,[11] Carr said she knew Fulgham for two years. (V34, R814). They dated for four months the prior year when he and Strong had "split up." (V34, R815). When Fulgham and Strong reunited in December 2008, Carr and Fulgham

[10] Carr and her children lived with her mother.

[11] Carla McCathran, media specialist with the Fifth Judicial Circuit State Attorney's Office edited CDs and DVDs that needed redacting as ordered by the Court. (V33, R785-86, 787). Carr's first interview took place at 8:05 p.m. on March 18. Carr was not placed in custody. (V34, R811). A redacted version was published for the jury. (V34, R809-10). The actual questions and answers lasted about 15 minutes. (V34, R825).

“parted ways.” However, Carr was already pregnant with Fulgham’s baby and was currently eight months pregnant. (V34, R814, 815).

Carr said that in January 2009, Strong claimed Fulgham “had pulled a gun on her.” Although he denied the claim, Fulgham served jail time for the gun charge. (V34, R815, 876). The gun had belonged to Carr’s father but was now in police custody. (V34, R815). After Fulgham’s release, Carr and Fulgham tried to work things out and “possibly try a relationship again.” However, the relationship was “rocky.”(V34, R816). Carr and Strong did not have a friendly relationship because of Carr’s on and off relationship with Fulgham for two years, “So we pretty much maintained our distance.” Carr said she and Strong never fought about anything. (V34, R816).

Carr claimed that the last time she saw Strong alive was on January 10, 2009, a few days after Fulgham’s gun charge incarceration. (V34, R817, 819, 877). Carr babysat Strong’s two children at Strong’s trailer while Strong worked. (V34, R817, 819). When Strong returned, Carr and Strong argued about Carr’s and Fulgham’s relationship. Carr did not “put her hands on” Strong because Strong “would have had me in jail.” (V34, R821). Carr denied grabbing Strong’s hair. “When we got into it, I chose to leave.” (V34, R821, 823). She asked Acome to bring her home. (V34, R821). Carr denied having a problem with Strong. (V34, R822). However, Carr admitted she told Cristy Stover, “I

was mad and I told her that I was pissed off about the whole situation." (V34, R824).[12]

Carr's second interview began at 9:54 p.m. (V34, R826, 827, 884-85). Carr admitted she grabbed Strong two or three nights after Fulgham went to jail. But, "I made sure not to have no contact with her after that." (V34, R828). Carr insisted she maintained her distance from Strong. (V34, R829). At the end of this interview, Carr was brought home. (V34, R829, 885).

Buie interviewed Fulgham after his second interview with Carr had concluded. (V34, R830). At midnight, Buie went to Carr's house and brought her to the sheriff's office for another interview. (V34, R829, 886).

Carr's third interview began at 12:39 a.m. on March 19.[13] (V34, R830, 845, 886). Carr was read her *Miranda*[14] rights and she signed the waiver of rights form. (V34, R832, 834-35, 836-37, 887).

Buie played an audio recording for Carr containing an interview between himself and Fulgham. (V34, R837-39, 888). As

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[12] Buie informed Carr that Fulgham was in an interview room next to hers. (V34, R824).

[13] Although this interview concluded at 3:49 a.m., Carr was actually questioned for a total of fifteen minutes. (V34, R830, 889). She was not placed in custody for any of the three interviews. (V34, R831).

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

the recording played, Buie told Carr, “Josh got you driving the bus.” Fulgham said on the recording, “I don’t know if she did it. I don’t know if she’s dead.” (V34, R838). Buie told Carr, “Your boyfriend has thrown you under the bus. He admitted to lying. He’s admitted, okay, that he is involved in this and knows about it.” (V34, R842). Carr claimed she was at home on February 15, the day Strong disappeared. (V34, R839, 841, 844). She admitted to talking with Fulgham several times via phone. (V34, R858).

Buie again interviewed Fulgham. (V34, R846). Subsequently, detectives went to Carr’s home with Fulgham while Carr stayed at the sheriff’s office. (V34, R847, 848, 869; V37, R1386-87).[15] At this time, Fulgham was in custody and under arrest for fraud and using Strong’s credit cards. (V34, R869-70). Fulgham showed police where Strong’s body was located.[16] (V34, R870). Buie said Fulgham claimed, “Emilia had told him where the body was.” (V34, R893).

Carr’s fourth interview with Buie began at 5:31 a.m. on March 19. (V34, R847-48, 891). Carr was informed she was being detained. (V34, R849). Carr admitted that Fulgham had come

[15] Carr was free to leave the Sheriff’s office during this time. (V34, R849). However, Detective Spivey spoke to Carr during this time period. The conversation was not recorded. (V34, R850, 890-91).

[16] Police received permission from Carr’s mother to enter the property. (V34, R870).

knocking on her bedroom window in the early morning hours of Monday, February 16, and told Carr that he loved her. Carr thought this was “weird” behavior. (V34, R851-52). Carr admitted that their relationship was tense “this last week-and-a-half” and told Fulgham that she was going to return to permanently live with her mother. Carr claimed Fulgham then told her, “I wouldn’t do that ... ” (V34, R852). Carr told Buie that Fulgham admitted he killed Strong, “I don’t know if he said he strangled her or he choked her or whatever, but he said he did that.” (V34, R852, 854). Carr claimed Fulgham told her that he had put Strong’s body in a storage trailer on her mother’s property. (V34, R853).

Carr did not tell Buie that Fulgham admitted killing Strong because “I didn’t put two and two - - I thought he was full of crap. And then when you said something about my mom’s trailer is when it clicked in my head.” (V34, R854). Fulgham had told Carr, “She’s closer than you think.” (V34, R855). Carr assumed Fulgham threw Strong’s body in Orange Lake because Fulgham told her, “gators ... digest bones there.” (V34, R855). Carr said, “I’m hoping and praying to God that she’s not in my mama’s back yard because that’s sick.” (V34, R855).

Carr said Fulgham had borrowed her father’s gun in early January “to clean it as a surprise for my mom.” (V34, R856). Fulgham asked her if she had shells for it. Carr said, “Had he

had shells, I have no doubt he would have killed her then." (V34, R856). Carr said every time Fulgham assaulted Strong, "he has choked her." (V34, R856).

Carr admitted that Fulgham called her many times on February 15. (V34, R858). At approximately 8:30 p.m., Fulgham called her and said, "that he had the kids; that 'she' had left and he had the kids." (V34, R858). Carr claimed Acome called her and arrived at her home at 11:00 p.m., "drunk," claiming "he was going to get them back." (V34, R858-59; V37, R1310). Carr did not have any further contact with Acome. (V37, R1310).

Carr claimed that no one could hear what is going on in her backyard. (V34, R859). There were numerous occasions when Carr and Fulgham went to her mother's home to pick up some of her things. Fulgham "would be out there in the backyard 10 or 15 minutes. Doing what, I don't know, because I would be out front ... " (V34, R860).

Carr said "things started getting bad between me and him (Fulgham) in the last week-and-a-half." (V34, R863). Carr said, "if I tried to leave him, take this baby from him, he would do to me what he did to her." (V34, R863; V36, R1260). Carr claimed she asked Fulgham, "What are you talking about? I thought she was in Mississippi." Fulgham said, "She's closer than you think." Fulgham repeatedly made "little comments." (V34, R863).

At the conclusion of the fourth interview,[17] Carr reiterated that she had not seen Strong since January 2009. (V34, R867, 868). Carr insisted she was home on February 15 and did not have access to a vehicle. (V34, R868-69).

On March 19, 2009, Buie obtained a search warrant for Carr's property. Strong's body was found buried in the yard. (V34, R871, 872).

On the afternoon of March 19, Detective Michael Mongeluzzo, Captain Tommy Bibb and Detective Brian Spivey[18] interviewed Carr after Mongeluzzo read her *Miranda* rights. (V36, R1136, 1137, 1138, 1139, 1142). The videotaped interview was published for the jury. (V36, R1141, 1158, 1162-1270, State Exh. 13).

Mongeluzzo informed Carr that Fulgham showed police where Strong's body was located, and as a result, Strong's body had been recovered. (V36, R1164, 1165). Mongeluzzo told Carr, "everything is pointing to Emilia." (V36, R1145-46, 1147, 1164). Bibb told Carr, "Don't dig a hole and protect somebody." (V36, R1167). Carr said she "wanted immunity" and would testify against Fulgham. (V36, R1148, 1151). Mongeluzzo "couldn't give her immunity or promise her anything." (V36, R1149). Mongeluzzo

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[17] Carr was interviewed for a total of 87 minutes during the period of March 18-19, 2009. (V37, R1448).

[18] Spivey did not interview Carr until Mongeluzzo's interview had concluded. (V36, R1153, 1158).

said, “the body was found on your property, okay, where you were living. We have Heather. Okay. And obviously she’s deceased. But Josh was going back with her, the father of your baby.” (V36, R1165).

Mongeluzzo knew Fulgham had a violent history with Strong. (V36, R1166). Carr said, “I can hand you Josh on a silver platter.” (V36, R1171). Carr further stated, “I didn’t kill her, but I can tell you details and I can tell you things - - about everything.” (V36, R1174). Carr said Fulgham was throwing her under the bus “for something he did.” (V36, R1176).

Carr said that Fulgham stayed with her from February 13-15, 2009. He left on the 15th at 2:00 p.m. to go to his mother’s house “because M.F. wanted to talk to him.” (V36, R1183, 1195). Carr spoke with Fulgham’s sister, Michelle Gustafson, who told Carr that Fulgham had arrived at their mother’s house around 2:00 p.m. but he left and did not return until 10:00 p.m. (V36, R1184, 1195). Carr said Fulgham called her throughout the day until about 9:00 p.m. (V36, R1195, 1196).[19] Carr said Fulgham told her that he took Strong to work and he “had the kids and Heather left.” (V36, R1196). The morning of February 16, at about 5:00 a.m., Fulgham knocked on Carr’s window, told her he loved her, and said he was on his way to work. (V46, R1184,

[19] Carr claimed she was home with friends on February 15 until late in the evening. (V36, R1250; V37, R1391; V38, R1646).

1219, 1252, 1254, 1265). Carr said Fulgham was “wired.” (V36, R1219; V37, R1304). Fulgham told Carr not to go back to the trailer until he came back after work. Carr said, “I went back there anyhow. I had to know.” (V36, R1263). Carr said, “I was pretty sure I was going to find Heather.” (V36, R1265).

At noontime, Carr said she went to the trailer because they “store stuff there” including diapers and her children’s clothing. (V36, R1184, 1197, 1198, 1252). The trailer also contained “all kinds” of suitcases. (V36, R1191). Carr said, “I come across Heather ... duct taped to the little blue chair.”(V36, R1184, 1186, 1189, 1198, 1249, 1251).[20] There was a ripped, taped, black garbage bag covering Strong’s head. (V36, R1188-89, 1198). Strong was slumped in a chair with her head back and leaning to her right. (V36, R1225-26, 1266-67). Carr said, “I freak out. I check for a pulse. I’m looking to see if she’s breathing. And I walked out.” (V36, R1185, 1189, 1214). Strong’s body “was cold.” (V36, R1186). Fulgham called Carr at 2:00 p.m. She told him to come to her mother’s house. (V36, R1198). When Fulgham arrived, Carr asked him, “What the hell did you do?” (V36, R1185, 1198, 1259, 1267). Fulgham told Carr that he took Strong there, “And I guess he told her that he knew where I had money stashed to get her to go back there.” (V36,

[20] Carr told police several times that she observed blood on Strong’s forehead. (V36, R1217, 1224-25).

R1185, 1200, 1236, 1263). Fulgham told Carr he had hit Strong on the head because Strong tried to fight him off of her. (V36, R1187, 1200). When Strong tried to leave, she broke a window. (V36, R1185, 1200, 1264). Carr said Fulgham told her that he warned Strong to be quiet or "he was going to kill her." (V36, R1201). Carr said Fulgham told her, "he put a bag over her head and he suffocated her." (V36, R1185, 1201, 1264). Fulgham told Carr he left Strong's body there because he did not know "how to dispose of her." (V36, R1185). Carr told Fulgham to get Strong's body off her mother's property. (V36, R1185). She said, "I didn't think he would bury her on my mother's property." (V36, R1188). Fulgham warned Carr, "If you tell anyone I'll make sure you go down with me and you'll be right next to her. Right next to her." (V36, R1188, 1192, 1232, 1260).

Carr claimed she told Fulgham, "I want nothing to do with it ... I said, if you don't do something, I'm going to call the cops. And what he did after that I don't know." (V36, R1186). After Carr told Fulgham to get rid of Strong's body, Carr said Fulgham asked her mother for a shovel because "he hit a dog." (V36, R1186, 1188, 1199, 1202, 1268). Fulgham told Carr he had murdered Strong because he was not "going ... to go through what she'd been doing with taking the kids ... and threatening him with his kids anymore." (V36, R1187, 1199, 1259). Carr said her

mother told her that Fulgham borrowed the shovel for about 45 minutes. (V36, R1209).

Carr claimed she only touched Strong's neck and arm to check for a pulse. "I was scared to touch anything." (V36, R1189, 1191). She did not touch the black bag or the duct tape. (V36, R1192, 1223). However, the black garbage bag could have come from the trailer/storage shed. "There's all kinds of stuff back there." (V36, R1192). Additionally, there was a lot of loose wood, tires, pipes and fence wire in the yard. (V36, R1221). Carr did not know if there was any duct tape in the trailer, but "it's where we throw everything." (V36, R1222).

Carr clarified that the last time she saw Strong "alive" was when she babysat the children the prior month. (V36, R1193, 1228). She argued with Strong about their relationships with Fulgham. Strong pushed Carr, so she pulled Strong's hair. Carr then asked Acome to drive her and their child home. (V36, R1194).

Carr "had no reason to want that girl dead." (V36, R1204). Carr said Fulgham told her that Strong "signed a note saying that if she left whenever she came back to Florida she could see the kids. So that's why originally I assumed she left that night." (V36, R1211). Carr did not know how Fulgham got Strong's body out of the trailer and buried in the yard. (V36, R1216).

Carr never went to the burial site/grave “because I didn’t even know it was there.” (V36, R1230, 1244).

In the weeks following Strong’s murder, Carr said Fulgham avoided any conversation having to do with it. Fulgham asked Carr to move in with him but, “We’ve tried living together. It’s too much.” (V36, R1210). When Carr’s mother wanted to sell her home, Fulgham “talked my mom out of selling the house.” He offered to clean the yard and “burn up all the branches.” (V36, R1215, 1216).

Carr said Fulgham took Strong’s purse because he had Strong’s food stamp card and their children’s birth certificates, “everything that Heather wouldn't even come off of. She would not leave all their information.” (V36, R1212, 1229).

Carr claimed she initially asked Fulgham about Strong’s “disappearance” and told him that Strong’s children needed their mother. Fulgham told Carr, “Momma (Judy Chandler) has a general area where she’s gone.” (V36, R1232, 1237). Carr said Fulgham would only confide in his mother. (V36, R1221, 1237).

Spivey continued the interview with Carr. (V36, R1247, 1386). Carr insisted she was not in the trailer when Strong was murdered. (V36, R1247-48, 1251, 1256, 1262). Spivey and Buie went back and forth between the two rooms to compare what Carr and Fulgham said. (V37, R1379, 1383-84). Carr admitted Lotshaw

and Acome had nothing to do with Strong's murder. (V36, R1268, 1269, 1270; V38, R1632).

Spivey went to Carr's home after the interview concluded. (V37, R1287, 1397). He and Carr conducted a videotaped walk-through of the trailer.[21] (V37, R1287, 1399). Shelby Roberts, crime scene technician, videotaped Spivey and Carr during the walk-through. (V35, R1072-73).

Carr explained that it was odd that she saw glass outside the trailer before she entered it on March 16. (V37, R1291-92). Carr said that, as she walked through the trailer, "I saw her in the chair. And she was taped to it. I didn't know what to think or what to do. And then I just went up to her. And I was checking for a pulse." (V37, R1293, 1299). There was duct tape on Strong's neck, wrists, and ankles. (V37, R1294). Carr did not recall seeing tape over Strong's eyes or mouth. Strong was not wearing any shoes. (V37, R1300). After checking for a pulse, Carr "just kind of looked at her." She left and went back inside her mobile home. (V37, R1294).

Carr told Spivey that there could be many rolls of duct tape in the trailer. "Everywhere you can find rolls ... behind things ... " (V37, R1295). Carr explained that Fulgham told her the following: he had lured Strong to the trailer with a promise

[21] The videotape was published for the jury. (V37, R1291-1360, State Exh. 54).

of stashed money. Fulgham sat Strong down, they argued, then fought, and Fulgham hit Strong in the forehead. (V37, R1296-97, 1300). Strong made a run for it and broke the window. Fulgham dragged Strong back to the chair, tied her up, put a bag over her head and suffocated her. (V37, R1298). “And when she stopped he opened up the bag to see whether or not she was still alive.” (V37, R1299).

Carr said the trailer contained “stuff thrown everywhere” including suitcases. (V37, R1301). The trailer might contain a box of black garbage bags but, “If not, there’s some in the house.” (V37, R1301). Carr recalled that the trailer “stunk.” She attributed the smell to Strong’s deceased body. (V37, R1303).

After finding Strong’s body on Monday, February 16, Carr returned to the storage trailer on Wednesday. Strong’s body was gone. (V37, R1302). Carr did not see any evidence of beer cans or alcoholic beverages in the trailer. (V37, R1305).

Carr knew Fulgham had possession of his children’s personal identification (birth certificates and social security cards) subsequent to Strong’s murder. (V37, R1307). Fulgham also had Strong’s food stamp card. Strong kept all these items in her purse. (V37, R1307-08).

Carr claimed Fulgham told his daughter that Strong “left, and he hasn’t heard from her.” No one asked Carr if she knew where Strong was. (V37, R1309).

Spivey said Carr called him several times at work on March 20 to check on the status of the case. (V37, R1312, 1404). Spivey said Carr admitted that Fulgham had called her the night of February 15 when he was on his way to her house with Strong. (V367, R1313). Spivey said Carr told him, “She knew what was about to happen ... but didn’t think he would go through with it.” (V37, R1314).

Spivey said Carr called him a second time because “she was worried about what was going to happen concerning herself.” She thought “she had said too much” and would not talk to police further unless she had immunity. (V37, R1314-15). Spivey told Carr “immunity was something that I couldn’t give.” (V37, R1315). Spivey agreed with Carr to speak in “hypothetical terms.” (V37, R1316).

When Carr called Spivey again later that day, he recorded the conversation. (V37, R1317, 1318, State Exh. 14). Carr was unaware the call was being recorded. (V37, R1335, 1417). Spivey again told Carr he could not offer her immunity. (V37, R1320, 1405). Carr said she could “put a nail in the coffin as long as I don’t go to jail and prison.” Further, Carr informed Spivey that her children had been taken away from her. (V37, R1321,

1405). Carr only wanted to talk to Spivey "off the record." (V37, R1323, 1407). Carr admitted her fingerprints would be found "on stuff," but she "didn't kill the girl." (V37, R1324, 1411).[22] Spivey reminded Carr that Strong's body was found in her yard. (V37, R1326). However, Carr said her mother saw Fulgham at 5:00 a.m. on February 16 when he came to the front door after knocking on her window. (V37, R1326).

Spivey told Carr they were talking "off the record." (V37, R1329). Carr said, "Hypothetically maybe I know a little bit more about what happened while he was back there ... I'm not going to say anything else without immunity ... " (V37, R1329). Carr said she could "seal this case." (V37, R1330). Carr said there was no plan ahead of time to kill Strong. "People talk crap when they're pissed off." (V37, R1332, 1333, 1334, 1415). Carr claimed Fulgham killed Strong in "a - - hypothetically kind of last minute panic ... once it started it was too late." (V37, R1336, 1418). Carr said she did not kill Strong, "I don't have it in me." (V37, R1337, 1418). Carr insisted she did not drive Strong to her home, did not hold her against her will, did not tape Strong to a chair, and did not injure her in any way. (V37, R1338, 1339, 1345). However, "hypothetically, she "could be" an eyewitness as to what happened to Strong. (V37, R1345).

[22] Detective Buie entered the room at this point. (V37, R1325, 1360).

Carr told Spivey there was no way to retrieve any other tape that was used on Strong besides what police already had recovered. (V37, R1343, 1349). Carr claimed she told Fulgham "to get rid of the body ... I didn't know he put her in my backyard." (V37, R1345, 1412). Carr admitted to Spivey the storage trailer contained suitcases and blankets. (V37, R1348, 1423).

Buie testified that Michele Gustafson (Fulgham's sister) contacted him on March 24. (V37, R1449; V38, R1623). Buie and Spivey arranged a meeting with Gustafson in order to have Gustafson record a conversation between her and Carr. (V37, R1449-50; V38, R1620). Recording and transmittal equipment was installed in Gustafson's car. (V37, R1364-65, 1451). Buie and Spivey followed Gustafson and Carr to a park and recorded their conversation. (V37, R1366, 1452, State Exh. 15). The conversation was published for the jury. (V38, R1460-1526).

During the conversation, Carr told Gustafson, "I know for a fact what happened and who did what." (V38, R1466). Gustafson asked Carr for her "side of it" and "what happened that night?"(V38, R1467, 1469). Gustafson told Carr, "I already heard it from Josh" before he was taken into custody because "it's killing him." (V38, R16, R1467, 1468). Carr told Gustafson, "He didn't lie, Michele" and what happened was "pretty much what he told you." (V38, R1469). Carr said Strong was going to leave

Fulgham again and take the children with her. (V38, R1469-70). Strong "did sign that letter"[23] but "not by choice." (38, R1470). Carr said she was not physically capable of killing Strong. "And they knew Heather wouldn't come within five feet of me." (V38, R1470, 1484). Carr said, " ... the people they want is not me and Josh." (V38, R1468, 1632). Further, police should want "the people who have already signed affidavits saying that for the right price they'd have killed her."[24] (V38, R1470). Gustafson told Carr again, "You need to tell me what happened that night and then we can work on a story ... "(V38, R1471, 1628).

Carr initially told Gustafson that she did not know how Fulgham "talked (Strong) into coming over." But, Fulgham later told Carr he got Strong to go to Carr's trailer because he claimed "he knew where some money was stashed in our trailer" and no one was home. (V38, R1473, 1516). After Fulgham got Strong to the trailer, Carr "was supposed to come over there ... he had planned it out." (V38, R1473). When Carr joined Fulgham and Strong in the trailer, Fulgham was questioning Strong about her intentions to leave him. (V38, R1474, 1516). Carr told Gustafson, "Every time he heard something he didn't want to hear

[23] State Exh. 4. (V33, R751-53, 761-63).

[24] Carr suggested that Jamie Acome and Jason Lotshaw were responsible for Strong's murder. (V38, R1470, 1476, 1505, 1632).

he hit her. He hit her upside the head and broke a flashlight."[25] When Strong tried to run, she broke out a window and knocked Carr down.[26] (V38, R1474-75, 1587). Fulgham "dragged her back" and taped Strong to a chair "so she couldn't run." (V38, R1475). Carr said Fulgham told Strong, "You've cost me a lot of money. You've cost me my kids. You've cost me just about everything I've ever had and I'm tired of it, Heather." Fulgham hit Strong "a couple of times" and said, "She wasn't going to cost him his kids anymore." (V38, R1475). Carr told Gustafson, "**We** put the bag over her head. And **we** tried to snap her neck; that didn't work." (V38, R1475). Carr tried to break Strong's neck because "it would be quick and painless." (V38, R1476). Carr did not think they left any marks on Strong's head or neck. (V38, R1518).

Carr told Gustafson that Fulgham should "keep his mouth shut" because then "it would look like **we** got set up." (V38, R1476, 1477, 1479). Carr said Fulgham was getting himself "in a deeper and deeper hole" because he was listening "to everything they tell him. They don't think he had anything to do with this, but right now he keeps giving them more and more." (v38, R1476-77)." Carr said, "Josh has to point the finger at Jamie for a

[25] Carr said a candle was lit after Fulgham broke the flashlight on Strong's head. (V38, R1584).

[26] Strong urinated on herself when she made her attempt to escape. (V38, R1574).

motive." (V38, R1477). Carr insisted, "Josh has to say ... he left (Strong) at Sparr[27] that night ... he knew his DNA was going to be on her body, that they had sex before he left Sparr. He's got to stick to that." (V38, R1477, 1480). Carr said her DNA would not be found on Strong but, "That shed is full of our DNA, our fingerprints, and everything else ... because it was used for storage. Even our fingerprints on the duct tape." (V38, R1480, 1487). Carr told Gustafson that she and Fulgham "joked about" killing Strong but "we were not really serious." (V38, R1478. 1479).

Carr told Gustafson, "It looks like **we** got set up because they can't place Josh at my mom's house that night. They can place Jamie and Jason (Lotshaw) but they cannot place Josh at my Mom's house." (V38, R1480, 1487). Carr said, "No matter what I try to say to cover for him he's digging himself in a hole he can't get out of." (V38, R1482). Carr said, "I'm trying to get him out of this, but he can't throw me under the bus, either." (V38, R1484). Carr wanted to get a message to Fulgham so he would "keep his mouth shut." (V38, R1490).

Carr said Fulgham only planned on leaving Strong's body in Carr's yard "for a little while and then he was going to move her." However, "I can't believe he led them back there ...

[27] Sparr, Florida, is where Strong lived with James Acome for a short time. (V33, R680).

without a body they can't do nothing." (V38, R1488). Carr said Strong did not go peacefully, "she fought." (V38, R1491, 1631).

Carr helped duct tape Strong to the chair. (V38, R1491). Fulgham was "really, really mad. His eyes were glazed over." (V38, R1502). Fulgham told Carr to wrap a blanket around Strong's head "because he couldn't look at her." (V38, R1504).

Carr asked Gustafson to tell Fulgham "If you talk to him please tell him just to keep his mouth shut and to keep his head up because everything is going to be okay." (V38, R1504-05). Carr said only she, Fulgham, and Gustafson knew "the truth." (V38, R1508).

Subsequent to this conversation, Carr was taken into custody. (V37, R1367, 1452, 1454; V38, R1527). During her transport to the sheriff's department, Spivey recorded the conversation. (V39, R1672, 1677-97, State Exh. 65). Spivey did not threaten or coerce Carr in any way. (V39, R1704). They discussed Carr's children and Carr mentioned the possibility of immunity for herself. (V39, R1706).

Buie and Spivey interviewed Carr again. The interview was published for the jury and is summarized below. (V37, R1368, 1454; V38, R1528-29, 1533-34, State Exh. 16).

Carr said that she found Strong in the back trailer on the morning of February 16. Strong was already taped to the chair with a black garbage bag over her head and tape around her neck.

(V38, R1537, 1539). She returned to her home and waited for Fulgham to arrive. (V38, R1540). Carr reiterated that Fulgham told her that he brought Strong there on the pretext of giving her some stashed money. And, "things just got out of hand." (V38, R1541). Carr said she stayed in her house and did not know Fulgham and Strong were in her backyard trailer. Carr said Fulgham fought with Strong, taped her to a chair, and taped a bag over her head. (V38, R1542). Carr insisted she did not kill Strong she was not in the trailer when Strong was killed. (V38, R1549, 1554, 1555). Carr said, "I did what I was told." (V38, R1557). She then admitted she was in the back trailer with Fulgham when Strong died. (V38, R1558).

Carr said Fulgham put a bag over Strong's head and held his hand over Strong's nose and mouth. Fulgham "tried" to tape the bag around Strong's neck. (V38, R1559). Carr said Fulgham "cleaned everything up" including the black garbage bag that covered Strong's head. Carr hid Strong's shoes. (V38, R1561). Carr said, "This was not planned" and "I honestly didn't think he was serious."[28] (V38, R1562, 1564). Carr tried to break Strong's neck "because he told me to." (V38, R1565). Carr was there when Strong took her last breath. (V38, R1566).

[28] Before Fulgham brought Strong to Carr's home, he asked Carr if she still wanted to kill Strong. Carr told him, "Yeah, sure whatever." (V38, R1575).

Nonetheless, Carr insisted she did not kill Strong. (V38, R1565).

Carr told Buie and Spivey that she taped Strong's hands to the arms of the chair and taped her feet together while Fulgham held Strong down. (V38, R1570-71). Strong asked Fulgham, "Josh, why ..." (V38, R1573, 1588). Strong asked Carr, "help me." (V38, R1573). Fulgham put tape over Strong's mouth. Strong was crying. (V38, R1572). Duct tape was wrapped around Strong's chest. (V38, R1572, 1594, 1596). Carr put a garbage bag over Strong's head. (V38, R1607). Carr stretched out a piece of tape so Fulgham could wrap it around the bag over Strong's head and neck. (V38, R1572, 1594, 1596, 1607). Fulgham told Carr "to snap her neck." Carr twice attempted to snap Strong's neck. Carr was "shaking so bad" and could not do it. (V38, R1573, 1594, 1596, 1597). Fulgham held his hand over Strong's nose and mouth. (V38, R1597). Carr did not know how long Strong "squirmed." (V38, R1573).

Fulgham hid Strong's body underneath a table in the trailer. (V38, R1579). Fulgham returned the next day with a shovel and bleach. (V38, R1609). Fulgham dug a hole in Carr's yard. Fulgham asked Carr if the hole "was deep enough" before he put Strong's body in the hole. (V38, R1580-81, 1582, 1609-10). Carr insisted she did not assist in putting Strong's body in the suitcase or help drag Strong to the hole in the ground. (V38,

R1610-11, 1615-16). Carr "didn't want to touch her." (V38, R1616). As a result of this last interview, Spivey and crime scene technicians Beverly Rodia-Turner and Lisa Berg returned to Carr's home and found the broken flashlight in the storage trailer and Strong's shoes hidden in a charcoal grill in a shed. (V35, R978, 980, 982-83; V38, R1368-69).

Buie testified that the flashlight and Strong's shoes collected at the crime scene did not contain Carr's DNA. (V39, R1663). Buie was not aware of any injuries to Strong's face. (V38, R1631). However, Strong's body was significantly decomposed due to being in the ground for thirty days. (V39, R1668). Strong's fingerprints were provided to the medical examiner. (1662, 1667).

Susan Livoti, crime scene technician, assisted in collecting evidence at Carr's mother's house and videotaped the crime scene.[29] (V35, R925-26, State Exh.17). Livoti and her team sifted through a large pile of debris located on back side of the property. (V35, R927, 931-32). Strong's body was found inside a large luggage-type soft container, underneath the debris. (V35, R928). In addition, a purse was collected from inside the storage trailer. (V36, R939-40).

[29] The videotape was published for the jury. (V35, R927).

Beverly Rodia-Turner, Forensic Evidence Technician, assisted in searching the crime scene and photographed the area. (V35, R940, 942). Turner photographed a hole in the ground[30] which was covered by debris, plywood[31] and a mattress spring. (V35, R948-954). After the debris and plywood were removed, Turner noticed a strong smell of decomposition. (V35, R956). Subsequently, the medical examiner was called in to continue excavating the site. (V35, R956).

Turner said that after personnel removed the plywood and debris, a suitcase containing the body of Strong was discovered. (V35, R957-58). Strong's body, while still partially zipped in the suitcase, was removed from the burial site, placed in a body bag, and taken to the medical examiner's office. (V35, R960, 962, 1004). Turner collected evidence from the medical examiner which included Strong's clothing, a necklace, fingerprints, duct tape,[32] and a sexual assault kit. (V35, R963, 964, 966, 968, 972-73, 974).

[30] The hole was located 342.7 feet from the road. (V35, R986, 991-92).

[31] The hole was 27 inches deep from the plywood. (V35, R992).

[32] The duct tape had been removed from the buttocks area of Strong's jeans. (V35, R1013, 1034).

Dr. Barbara Wolf,[33] medical examiner, performed the autopsy on Heather Strong on March 20, 2009. (995, 1001, 1023). Strong's body[34] was moderately decomposed and bloated. (V35, R1007, 1008). X-rays did not show any projectiles in Strong's body or fractures of any sort. (V35, R1007, 1027). Wolf noted that Strong was not wearing any shoes. (V35, R1008). Wolf performed a sexual assault kit. (V35, R1008, 1017, 1026-27). Strong's internal organs showed no evidence of injury or any pre-existing natural disease process, only decomposition. (V35, R1018). There was a two-inch injury to Strong's mid-forehead region that was only visible under the skin. (V35, R1018). In Wolf's opinion, this non life-threatening injury was caused by blunt force trauma. (V35, R1019, 1033). There was no bleeding in the brain or fractures to Strong's skull. (V35, R1019). There were no toxic gases found in Strong's body; however, there was a .099 level of alcohol in the decomposition fluids. (V35, R1035; 1038). The internal exam did not indicate a specific cause of death. (V35, R1019).

[33] The court overruled the defense's objection to any testimony from Dr. Wolf that related to cause and manner of death. (V35, R994-95).

[34] Strong was five foot eight inches and weighed 108 pounds. Wolf explained that a body loses weight as it decomposes. (V35, R1007, 1008).

Wolf explained that there is no marker in a deceased body that shows a lack of oxygen if a person is suffocated and, either did not fight back or was in some way incapacitated. (V35, R1020). In Wolf's opinion, the cause of death[35] for Heather Strong was suffocation which occurred between February 15 and March 19, 2009. (V35, R1021, 1022). The manner of death was homicide. (V35, R1022). There was no indication of manual strangulation. (V35, R1031-32).

Shelby Roberts, crime scene technician, collected evidence from the storage trailer located at the crime scene. (V35, R1041-42, 1043). She videotaped and photographed the inside and outside. (V35, R1043, 1044). Roberts collected various pieces of duct tape[36] and a black chair found inside the trailer. (V35, R1052-53, 1055, 1056, 1073-74, 1076, 1077, 1079-80, 1081, 1084). The duct tape pieces were processed for latent fingerprints and an "unknown stain" was on one of the pieces. The swab was taken from the stain on the largest piece of duct tape and indicated the presence of blood. (V35, R1058, 1064, 1068, 1088, 1101). The black chair was examined and processed which indicated the presence of hairs. (V35, R1070).

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[35] Dr. Wolf did not determine the cause of death until she received additional information. (V35, R1023, 1036).

[36] The pieces of duct tape were located in a "Promise box," a "Makita box," and underneath a bag of dog food. (V35, R1084).

Shannon Woodard, former forensic DNA technician, examined the swab taken from the stain on the large piece of duct tape and found it tested positive for blood. (V36, R1099, 1100-01). Woodard retrieved hairs that were on the duct tape found in the Promise box and in the Makita box. (V36, R1102). In addition, she collected the oral swabs obtained from the sexual assault kit and sent them to the Florida Department of Law Enforcement (FDLE).(V36, R1104-05, 1107).

Larry Denton,[37] Crime Lab Analyst, FDLE, tested two swabs from the blood samples retrieved from the strips of duct tape from the boxes and the hairs retrieved from the black chair. (V36, R1110, 1114, 1116, 1117, 1127, 1129). Two blood swabs obtained from the duct tape matched Strong's DNA.[38] (V36, R1130-31, 1132, State Exh. 41, State Exh. 43). The hairs collected from the black chair matched Strong's DNA. (V36, R1132, 1133, State Exh. 46). Additionally, hairs collected from the duct tape also matched Strong's DNA. (V36, R1133, State Exh. 47).

Rena Greenway, latent fingerprint examiner with the Marion County Sheriff's Office, examined one of the pieces of duct tape collected from the kitchen area in Carr's trailer and determined

[37] The court qualified Denton as an expert in DNA testing. (V36, R1129).

[38] The swabs were compared to the known DNA sample (State. Exh. 48) collected from Strong's sexual assault kit. (V36, R1132).

it contained Fulgham's prints. (V37, R1429, 1434, 1435-36, State Exh. 42). The other pieces of duct tape collected did not contain any latent prints of value to use for comparison purposes. (V37, R1442-44). However, Greenway said someone else could have touched the duct without leaving a latent print of value. (V37, R1445).

At the conclusion of the State's case, the court denied Carr's motion for judgment of acquittal. (V39, R1713).

Milagro Yera, Carr's sister, said she, her mother, Carr and her children lived together in February 2009. (V39, R1722, 1723, 1724). Yera slept in the same room with Carr and the children. (V39, R1725). Yera could not hear anyone in the backyard area where the storage trailer was located because it was too far from the house. (V39, R1726).

Yera said Penny and Nathaniel Salvail[39] visited the Carr/Yera home on February 15, 2009, between 9:00 and 10:00 p.m. (V39, R1727-28). After the Salvails left, Acome and Lotshaw showed up. Carr spoke to the two men outside the house. (V39, R1729). Yera did not recall Carr receiving any phone calls that night. (V39, R1731). The two men left about 15 minutes after the Salvails. Yera said they all then "went to sleep." (V39, R1730).

Maria Zayas, Carr's mother, testified that she lived with Carr, her children, and Milagro Yera in February 2009. (V39,

[39] Penny and Nathaniel are mother and son. (V44, R39, 45).

R1732-33, 1734). Zayas recalled the Salvails visited on February 15 to celebrate Penny's birthday. The Salvails left between 9:00 and 10:00 p.m. (V39, R1734-35). However, Jamie Acome and Jason Lotshaw arrived before the Salvails left. (V39, R1736). Carr spoke to the two men outside the house. (V39, R1737). Zayas did not recall Carr receiving any phone calls that evening. (V39, R1737). In addition, Zayas did not see Fulgham at her house that night. (V39, R1738).

In March 2009, detectives asked Zayas' permission to search her property. They did not question Zayas about any visitors she had at her home on the night of February 15, 2009. (V39, R1738).

Emilia Yera Carr[40] testified on her own behalf. (V39, R1760). In February and March 2009, Carr and her three children lived with her mother. Occasionally she shared a home with Fulgham during those months. (V39, R1761). Carr said detectives Spivey and Buie came to her home on March 18, 2009. They asked her to come to the sheriff's office and answer questions about Strong's disappearance. (V39, R1762).

Carr lied "repeatedly" while she was being interviewed during March 18-19 "because they kept threatening I wouldn't see my kids." (V39, R1763-64, 1771, 1772). Carr told Spivey she would be a witness in Fulgham's case and asked Mongeluzzo and

[40] Carr married Jamie Carr on March 8, 2008. They divorced in October 2008. (V39, R1761; V42, R2086).

Bibb for immunity. (v39, R1764). Carr talked to Gustafson because "the detectives kept telling me I had to know what I was talking about. I needed more details, more details." (V39, R1764, 1769). Carr told Gustafson that she "wanted to kill the bitch." (V39, R1773). Carr claimed the information she provided to police "came from detectives and Michele." The shoes collected at her home were not Strong's.[41] The flashlight "was just a flashlight that was back there." (V39, R1765). Carr said, "I made stuff up." (V39, R1770).

Carr said she was with the Salvails on the evening of February 15, 2009. (V39, R1765). She did not see Fulgham that night, only Acome and Lotshaw, "between 10:30 and 11:00 p.m." (V39, R1766). Carr argued with Fulgham several times via phone on February 15 because Fulgham wanted Carr "to put my baby up for adoption." (V39, R1770).

Carr recalled that her mother told her that she gave police a shovel. (V39, R1767). Carr knew police wanted her to cooperate. The information she provided to police came from "Detective Buie." (V39, R1767). Carr said Fulgham did not tell her that he was bringing Strong to her home on February 15. Carr did not go out to the storage trailer that night. (V39, R1771,

[41] Although Acome testified he did not recognize the shoes as Strong's, he could not recall if this pair belonged to her or not. (V39, R1788-89, 1790).

1776, 1778-79). Carr found out Strong was buried on her property "when Detective Buie told me." (V39, R1771).

Carr did not offer Acome and Lotshaw money to help murder Strong. (V39, R1773, 1774). She did not talk to Cristy Stover about killing Strong. (V39, R1774). Carr lied to detectives about being in the storage trailer with Fulgham and Strong. (V39, R1774, 1776). Carr lied about trying to break Strong's neck, lied about taping Strong to a chair, and lied about putting a bag over Strong's head. (V39, R1774-75). Carr thought she would get immunity if she admitted to participating in Strong's murder. (V39, R1775). Carr and Fulgham did not discuss murdering Strong. (V39, R1775, 1780). Carr said she did not know who killed Strong. (v39, R1776). Carr claimed detectives told her that Fulgham had killed Strong. (V39, R1781).

On December 7, 2010, the jury returned its verdict finding Carr guilty of First Degree Murder and Kidnapping as charged in the indictment. (V40, R1956).

The penalty phase began on December 8, 2010. (V41, R1967).

Carla McCathran, media specialist with the State Attorney's office, created DVDs containing portions of the redacted statements (State Exhs. 8, 9) made by Carr. (V41, R1992, 1993,

1994). The exhibits (State Exhs. 67, 68) were published to the jury. (V41, R1996-2006).[42]

Carolyn Spence, Strong's mother, said Strong met Fulgham when she was 16 years old. (V41, R2007, 2010). Strong dropped out of school at 17 and moved in with Fulgham and his mother. (V41, R2010, 2011). When Strong and Fulgham fought, Strong would stay with Spence for a few months. However, Fulgham "would call her back and she would end up going back." (V41, R2013). Strong, Fulgham and their daughter McKinzie eventually moved from Mississippi to Florida. (V41, R2012). Spence said Strong's family is devastated due to Strong's murder. (V41, R2014-15).

Sue Zayas, Carr's aunt, is very close with Carr. (V42, R2034, 2039). Carr was "silly ... fun ... always family oriented ... always there." (V42, R2041). Carr's life revolved around her children. "Her life was her children." (V42, R2042, 2045). Zayas said Carr is very close with her sister, Miracle (Milagro). (V42, R2043). Zayas never saw Carr angry. (V42, R2044). Carr was bright and planned for her future. (V42, R2044).

Maria Zayas, Carr's mother, grew up in a migrant family that picked fruit and moved all over. (V42, R2046, 2049). Zayas did not have any complications while pregnant with Carr. (V42, R2057). Carr and her siblings are close. (V39, R2058, 2061). She

[42] These statements were played during the guilt phase and are detailed on pages 11-17, above.

and her disabled sister Milagro[43] "were like twins, shadow to shadow." (V42, R2061). Zayas did not think Carr would ever harm Milagro. (V42, R2069).

After Zayas' husband[44] was accused of molesting one of Zayas' four children, Carr and her siblings were placed in foster care. Eventually Carr, her brother, and Milagro returned to live with Zayas while her older sister lived with their maternal grandmother. (V42, R2063, 2064, 2066).

Carr was a good student, talented, and participated in school activities. (V42, R2068, 2092). She had many friends and was popular. (V42, R2070). Carr only got into trouble at school "once in a blue moon." (V42, R2071). She joined the ROTC program in high school, graduated from high school and modeling school, and earned a massage therapy license. (V42, R2071, 2092). Zayas said, "She had everything. Everything." (V42, R2071-72).

Zayas said Carr was very close to her father while growing up. (V42, R2081). However, when Carr was about 14 years old, Zayas said Carr was molested by her father. Carr and her siblings were again placed in foster care. (V42, R2080, 2090). Prior to going to court on the molestation charge, Carr's father was charged with solicitation of murder. Zayas said, "He wanted

[43] Milagro was born with spina bifida. (V42, R2039).

[44] Pelayo "David" Vinales was Zayas' second husband and Carr's biological father. (V42, R2055).

to get rid of us because we were going to go and testify." (V42, R2080, 2091). When Carr's father went to prison, Zayas said Carr felt that she "destroyed the family." (V42, R2081). Carr became very protective of Milagro. (V42, R2082). Carr was never violent with Zayas. (V42, R2081).

Zayas said Carr met Eric Reppy when she was 16 years old. During their marriage, they had a son, J.R, and a daughter, D.R.. (V42, R2082, 2085). Reppy and Carr lived with Zayas off and on. (v42, R2083). They occasionally argued. (V42, R2083). Carr was very good with her children, "her kids came first." (v42, R2084). After Carr and Reppy divorced, Carr had a relationship with Jamie Acome. Carr also had a third child, C. A. (V42, R2085). Carr then married Eric Bracewell. After they divorced, she married Jamie Carr. They divorced in October 2008 (V42, R2085, 2086). Zayas did not talk to Carr about the men in her life. (V42, R2089).

Zayas said Carr does not have any mental illness or suffer from any physical problems. (V42, R2091-92). Zayas supported her children and took care of them the best she could. (V42, R2093).

Eric Reppy married Carr when she was 16 years old and pregnant with their first child. (V42, R2096, 2098). Reppy said Carr "couldn't stand" her father. (V42, R2100). Reppy taught Carr how to feed their prematurely-born son. (V42, R2101).

Eventually Reppy and Carr had a daughter, Destiny. (V42, R2102). Carr was an “excellent” mother. (V42, R2104).

Christina Zayas, Carr’s older sister, was molested by Carr’s father and her maternal grandfather. (V42, R2106, 2108, 2109). Carr told Christina that their grandfather also fondled her and her own father raped her. (V42, R2109, 2110). Christina was aware that Carr’s father had hired someone to kill Christina’s mother, Carr and their maternal grandmother. Carr told Christina, “He was just doing it because of what she had said.” (V42, R2112). However, Carr loved and hated her father, “for what he had done to her.” (V42, R2113).

Christina attended Carr’s graduations and school plays. Christina said, “We had a good time.” (V42, R2111).

Lydia Zayas, Carr’s grandmother, took care of Carr’s older sister Christina after she was sexually abused by Carr’s father. However, Carr still lived with her own mother and father. (V42, R2115, 2118-19, 2120). Lydia said Carr took very good care of her disabled sister, Miracle. (V42, R2121).

Lydia attended Carr’s plays and graduations. (V42, R2121). Carr did not often show Lydia if she was upset about something. (V42, R2121). Lydia never observed Carr angry with her husband, Eric Reppy, her children, or her family. The children were clean and well-fed. (V42, R2122-23, 2125). Lydia did not know Carr’s other boyfriends. (V42, R2124).

Milagro Yera, Carr's sister, identified family photographs. (V42, R2131-33).

Dr. Ava Land, forensic psychologist, evaluated Carr and administered tests. (V42, R2135, 2137). The tests included an IQ test, and the Millon Clinical Multiaxial Inventory "MCMI", which contains true/false questions. (V42, R2137). The results of the MCMI indicated Carr answered question truthfully. There was no indication of mental illness. (V42, R2138). Additionally, the results indicated symptoms of post-traumatic stress disorder and anxiety. (V42, R2138-39).

Land said Carr is fairly bright. Her IQ score was 125, "in the superior range of intelligence." An "average range" would produce a score of 90-109. (V42, R2139).

Land said Carr claimed she had been sexually abused by her grandfather since 4 years of age and abused by her father since 5 years of age. Carr said the abuse continued until age 15, and then she reported it to her school. (V42, R2139, 2140). At some point, Carr recanted the allegations, "so nothing came of that." (V42, R2141). Media attention caused Carr to feel ashamed. She was teased at school so she dropped out. Carr was told, "You've destroyed the family. You did a bad thing." (V42, 2142, 2143). However, she earned a GED and obtained some technical training. (V42, R2142).

Carr started having a sexual relationship with Eric Reppy when she was 16 and he was “an adult.” Carr’s mother was aware of it but did nothing about it. (V42, R2141). Carr had several relationships with men, was married twice, and has four children. Her relationships with men “are very superficial, no emotional attachment.” (V42, R2141).

Carr, the caretaker of her maternal family, is “very proud” and does not ask for help easily. (V42, R2142). She loves her children but does not typically show a lot of emotion. (V42, R2143). Carr “looks calm on the surface, but ... there is good deal of anxiety and stress beneath the surface.” (V42, R2144).

Carr believes her mother failed to protect her by choosing men over Carr. Zayas was aware of the sexual abuse suffered by Carr and her sister but said “the man was more important.” (V42, R2145). Carr spoke very highly of her father. He taught her many things and pushed her to receive an education. But, Carr “hates what he did.” (V42, R2145). Carr was under tremendous pressure when she testified against her father and therefore she recanted. (V42, R2146).

In Land’s opinion, there is no evidence Carr suffers from any psychosis, antisocial personality disorder, delusions, or schizophrenia. (V42, R2146). Carr knows right from wrong, good from bad, and does not disassociate from reality. Carr is intelligent, independent, and manipulates males in her

relationships. (V42, R2147, 2148). In Land's opinion, Carr could be manipulated "but she's quite on guard about that." (V42, R2148). Land considers Carr "a leader" and not "submissive." (V42, R2148). Carr does not have any co-dependency issues. (V42, R2149). Land "cannot account for" Carr's sexual abuse as a child relating to Strong's murder. (V42, R2147). In addition, Carr denied participating in Strong's murder. (V42, R2147, 2149-50).

On December 10, 2010, by a vote of seven to five, the jury returned its advisory verdict recommending that Carr be sentenced to death for the murder of Heather Strong. (V43, R2262).

A *Spencer*[45] Hearing was conducted on February 17, 2011. (V44, R1-152).

On February 22, 2011, the court followed the jury's advisory sentence and imposed a sentence of death on Emilia Carr for the murder of Heather Strong. (V45, R28). The court found the following aggravating circumstances: 1) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit the crime of kidnapping - great weight; 2) The capital felony was heinous, atrocious, or cruel (HAC) - great weight; 3) The capital felony was a homicide and was committed in a cold, calculated, and

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

premeditated manner without any pretense or moral or legal justification (CCP)- great weight.(V10, R1929-36).

The court found the following statutory mitigating circumstance: The defendant has no significant history of prior criminal activity - significant weight. (V10, R1937). The court found the following non-statutory mitigating circumstances:

1) Poor upbringing - little weight; 2) Un-protecting mother - little weight; 3) The defendant was raised in a dysfunctional family - little weight; 4) The defendant was a good sister to all of her siblings - little weight; 5) The defendant suffered no mental illness or cognitive brain dysfunctions - little weight; 6) The defendant was bright, a good student and graduated from high school - little weight; 7) The defendant was a good mother - little weight; 8) The defendant was a good daughter - little weight; 9) The defendant performed community service and charitable or humanitarian deeds - little weight; 10) The defendant regularly attended church and bible study as a child while growing up - little weight; 11) The defendant completed modeling school - little weight; 12) The defendant completed message therapy school - little weight; 13) The defendant was a participant in the "Young Marines" or R.O.T.C. - little weight; 14) The defendant was not a violent person - little weight; 15) The defendant was a "child" mother - little weight; 16) The defendant was a single parent - little

weight; 17) The defendant is bilingual - little weight; 18) This incident was an isolated incident - some weight; 19) Defense expert's testimony supports a life sentence - little weight; 20) The pre-sentence investigation report recommends consecutive life sentences - some weight; 21) Life in prison, without the possibility of parole, meets the needs of society in this case - some weight; 22) The jury recommendation for the death penalty was only by a margin of seven to five - little weight; 23) There was no evidence the defendant intended the kidnaping (sic) or the murder to occur - little weight; 24) The defendant has the support of friends and family - little weight; 25) The defendant was sexually abused as a child by her grandfather and her father, and she was removed from the home when she reported the abuse – little weight; 26) There are only the words of the defendant to rely upon for proof of her participation in the crime - little weight; 27) The defendant was experiencing a high risk pregnancy at the time of the offense - little weight; 28) The defendant voluntarily gave statements to law enforcement and was generally cooperative - little weight; 29) The defendant did not flee from law enforcement - little weight. (V10, R1940-52).

This appeal follows.[46]

[46] Carr does not directly challenge the sufficiency of the evidence supporting her conviction. The State submits that the foregoing statement of the facts contains more than enough evidence to support Carr's conviction of first degree murder.

SUMAMRY OF THE ARGUMENT

The issue concerning the admission of specified school records is meritless, in addition to not having been preserved for review, anyway. The "excluded hearsay" claim has no legal basis because the exclusion of that evidence was proper under settled hearsay law.

The "denial of a motion to continue" claim is meritless insofar as the only time Carr asked for a continuance is concerned. In that instance, the expert whose claimed "unpreparedness" was the basis for a continuance said that she would in fact be prepared for trial so long as a written report was not required. As to the other instances mentioned in Carr's brief, at no point did Carr ask for a continuance -- there is nothing before this Court.

The closing argument claim does not identify any statement by the prosecution that was improper, much less one that would have necessitated a mistrial. There was no improper argument.

The sentencing order complies with Florida law in all respects. The "mitigation" that was given little weight by the sentencing court was given the weight it was due, and, when all is said and done, Carr's argument is no more than a claim that the mitigation should have been given more weight than it was.

The sentencing court properly found that the murder of Heather Strong was cold, calculated and premeditated as that aggravator is interpreted. There is no basis for relief.

Likewise, the sentencing court properly found the heinous, atrocious or cruel aggravating circumstance, given that the victim died by suffocation. Carr was present when the victim was killed, and was an active participant in the murder. Her claim that there can be no "vicarious" application of the aggravators is meritless.

The claim that a majority vote of the penalty phase jury is insufficient to "constitutionally" recommend a death sentence has no legal basis.

Carr's claim that her death sentence is "disproportionate" is not supported by the facts. The evidence was that Carr was not manipulated or dominated by anyone, and was an active participant in (if not the moving force behind) Heather Strong's murder. Carr tried to kill Heather herself and, only when she proved to have insufficient strength to do so did she then assist her co-defendant in carrying out the killing through another method. There is no basis for relief.

The *Ring v. Arizona* claim is foreclosed by binding precedent.

ARGUMENT

I. THE "ADMISSION OF EVIDENCE" CLAIMS

On pages 29-39 of her brief, Carr sets out what she calls a "complex evidentiary" issue. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion."). The issue is not complex at all, and there is no error for the reasons set out below.

THE SCHOOL RECORDS

Carr's first claim is that it was error to admit a business record of the Marion County school system which listed the defendant as an "emergency contact" for co-defendant Fulgham's school-age children. This is relevant circumstantial evidence because the children's mother was the murder victim, and the contact information change was made some two days after she was killed. There is no dispute about the circumstances through which Carr was listed as an emergency contact, nor is there any suggestion at all that she was present when her name was added

to the contact information. (Vol. 33, R757-78).[47] The jury was well-aware of how Carr came to be added as an "emergency contact," and was well able to assess the weight to be given the evidence.

Carr does not claim that the records at issue do not satisfy the §90.803(6) business record exception to the hearsay rule. Instead, she says that she is "prejudiced" because an "official business record" connected her to her co-defendant. Adverse evidence is, by definition, prejudicial -- otherwise there would be no reason to offer it. However, that does not somehow become an issue of constitutional dimension. In this case the "adverse evidence" was the business record, and Carr was well able to challenge it on cross-examination. The business record evidence has no confrontation clause component to it.[48]

In any event, Carr waived any objection to this evidence, which was the subject of a pre-trial ruling that it was admissible. (Vol. 20, R560-71). However, when the evidence was offered at trial, Carr's counsel affirmatively said "no objection." (Vol. 33, R765-66). Notwithstanding §90.104, a rule of law that the opponent of certain evidence can object pre-trial, affirmatively state "no objection" at trial, and have a

[47] The records custodian knew Carr because her children had attended the same school. (Vol.33, R776).

[48] Alternatively and secondarily, any error was harmless beyond a reasonable doubt. *DiGuilio v. State,* 491 So. 2d 1129 (Fla. 1986).

preserved evidentiary issue for appeal makes no sense at all. If defense counsel had said nothing, had said "as previously argued" (for example), or addressed the issue at a bench conference, the situation would be different. And, as noted in note 10, *supra*, Carr renewed objections to other pre-trial rulings.

The scenario that Carr has generated is similar to a defendant who objected initially objected to the jury and then accepted it immediately before the panel was sworn. No one would seriously argue that the act of accepting the jury did not waive the prior objection, and this circumstance is no different. Any other result encourages gamesmanship and supplies an automatic escape hatch if a changed strategy fails. The Evidence Code was not intended to allow continual position-switching, and this Court should not add such a provision into it. Carr affirmatively waived her prior objections.

THE EXCLUDED HEARSAY

On pages 32-38 of her brief, Carr says that certain hearsay statements about the relationship between the victim and co-defendant Fulgham that she wanted to introduce were wrongly excluded because the "opportunity to rebut" component of § 921.141(1) of the *Florida Statutes* does not apply to the State, but rather only applies to the defendant. Carr implies that *Hicthcock v. State*, 578 So. 2d 685 (Fla. 1990) is no longer good

law after *Crawford v. Washington,* 541 U.S. 36 (2004), (*see* footnote 7 at page 35-36), but neglects to cite the following, post-*Crawford*, decision:

> Our review of the record in this case shows that the trial court did not abuse its discretion in excluding the evidence in question. In several instances the evidence was actually presented through the testimony or videotaped depositions of the individuals who had first-hand knowledge of the information, rather than through the testimony of the mitigation specialist who was asked to relate her conversations with these individuals. In several other instances, the defense attempted to introduce hearsay statements made by the Frances brothers, neither of whom testified at trial and thus were not subject to the State's cross-examination. Section 921.141(1), *Florida Statutes* (2006), provides in pertinent part: "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." While the statute "relaxes the evidentiary rules during the penalty phase of a capital trial, the statute clearly states that the defendant must have an opportunity to fairly rebut the hearsay evidence in order for it to be admissible. This rule applies to the State as well." *Blackwood v. State*, 777 So. 2d 399, 411-12 (Fla. 2000) (citation omitted); *see also Hitchcock v. State*, 578 So. 2d 685, 690 (Fla. 1990) (finding no merit to claim that state's ability to introduce hearsay in a penalty proceeding is limited while a defendant's ability to introduce hearsay is unlimited). Additionally, the defense was able to elicit some of the information through opinion testimony of the mental health expert. Thus, the trial court did not abuse its discretion when it excluded these hearsay statements by the brothers.

Frances v. State, 970 So. 2d 806, 813-814 (Fla. 2007). In any event, as was the case in *Frances*, evidence about the relationship between the victim and Fulgham was before the jury,

as was evidence of the relationship between Carr and Fulgham. The hearsay evidence was properly excluded, and there is no error.[49]

II. THE DENIAL OF A CONTINUANCE CLAIM

On pages 39-46 of her brief, Carr says that the trial court abused its discretion when it denied her motion to continue the penalty phase of her capital trial. Motions for continuance are reviewed under the abuse of discretion standard. In *Kearse v. State*, 770 So. 2d 1119 (Fla. 2000), the Florida Supreme Court held that the granting of a continuance is within the trial court's discretion, and the trial court's ruling will only be reversed when an abuse of discretion is shown. An abuse of discretion is generally not found unless the trial court's ruling on the continuance results in undue prejudice to the defendant, and it is an appellate court's obligation to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance. Carr cannot show an abuse of discretion because she cannot identify a motion to continue that preserved anything for review.

Throughout her brief, Carr identifies only **one** instance where she requested a continuance. (V30, R395). That motion was

[49] Carr's only argument is that the hearsay rule should not apply to her. There is no argument that the evidence at issue is not hearsay, nor is there any exception to the hearsay rule identified in Carr's brief.

predicated on counsel's claimed difficulties in communication with the penalty phase mental state expert. Through the efforts of the State (which they volunteered to do), a subpoena was served on the expert, and she appeared in court. Following discussion, that expert represented that she could be ready for any penalty phase **so long as she did not have to write a report.**[50] (Vol. 32, R.567-68). Counsel never said anything else about a continuance, and there is nothing preserved for further review. *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982).

Even if the motion to continue somehow survived the statements of the mental state expert that she could be ready so long as no report was required, and also survived trial counsel's failure to renew the motion, there can be no abuse of discretion. In the face of the expert's testimony that she could be ready to testify at the penalty phase, the trial court was clearly justified in denying the motion to continue. There is no basis for relief.

Throughout this issue, Carr discusses various other "issues," the majority of which are inaccurately described,

[50] Of course, not writing a report worked no prejudice at all to the defense. As with the other instances of "unpreparedness" mentioned in Carr's brief, the only prejudice was to the State because it was forced to prepare on short notice with less than full information. *See,* V16, R28 (". . . not fair to keep doing this" to the State.) The defense was not prejudiced at all.

taken out of context, or meaningless. By not addressing each "issue" individually, the State should not be understood to have conceded anything. For example, it is true that defense counsel's daughter was hospitalized due to an accident, but counsel never asked for a delay based on that event, and later turned it to her advantage in closing argument. (V43, R2237-38). Likewise, the fact that the trial court made specific findings that trial counsel had not been ineffective (in a *Nelson* context) is not improper.[51] (V16, R34-35). Finally, there has been no showing that the testimony of the mental state expert would have somehow changed (or "improved") if the penalty phase had been postponed. There is no error and no basis for relief.

III. THE CLOSING ARGUMENT CLAIM

On pages 47-52 of her brief, Carr says that two specific arguments made during the State's penalty phase closing were "erroneous." Florida law is settled that

> [w]ide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). It is within the judge's discretion to control the comments made to a jury, and we will not interfere unless an abuse of discretion is shown. *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990); *Breedlove*, 413 So. 2d at 8.

[51] There was never a need for a true *Nelson/Faretta* inquiry. The trial court's findings were made in an abundance of caution -- they do not supply a basis for criticism of that court, much less a basis for relief.

Moore v. State, 701 So. 2d 545, 551 (Fla. 1997). The arguments about which Carr complains were not improper at all -- they were factual arguments based squarely in the evidence. The trial court did not abuse its discretion in any way, and there is no basis for relief. There certainly was no basis for a mistrial, which is the relief that the defendant sought, and which is also reviewed under the abuse of discretion standard. *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999).

Carr's first argument is that it was error for the State to argue that the fact that she was sexually abused was not factually connected to the murder of Heather Strong, and that, while it should be considered as a mitigating circumstance, it was not entitled to significant weight **under the facts of this case.** That is an accurate statement of the law, and is exactly what the sentencing court is required to do: determine if the facts argued as mitigation are mitigating in nature under the facts of the case. *Ford v. State*, 802 So. 2d 1121, 1134-1135 (Fla. 2001). *See also*, *Ellerbee v. State*, 2012 WL 652793, 12 (Fla. Mar. 1, 2012); *Tanzi v. State*, 964 So. 2d 106, 119-120 (Fla. 2007); *Schoenwetter v. State*, 931 So. 2d 857, 875 (Fla. 2006); *Lugo v. State*, 845 So. 2d 74, 116 (Fla. 2003); *Crook v. State*, 813 So. 2d 68, 74 (Fla. 2002); *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000). There is no error at all, let alone a basis for granting a mistrial.

The second argument about which Carr complains is that her "mothering" was improperly compared to "Heather's caring for her own children who were now placed in an adoptive home." *Initial Brief*, at 48. The State's argument was no more than a statement of the obvious. If Carr chose to argue that the fact that she was a "good mother" was mitigation, it was reasonable, and entirely proper, for the State to point out the obvious effect of her crime in reference to the significance of that fact as mitigation. The State is entitled to argue against the significance of proffered mitigation, and there was no error here. *McGirth v. State*, 48 So. 3d 777, 789-790 (Fla. 2010); *Doorbal v. State*, 837 So. 2d 940, 958-959 (Fla. 2003);[52] *Gonzalez v. State*, 786 So. 2d 559, 568-569 (Fla. 2001). There was no abuse of discretion, nor was there a basis for declaring a mistrial. There is no basis for relief.

In any event, the jury was properly instructed that the arguments of counsel are not evidence, (V42, R2178), and that sympathy should not play a role in the deliberations. (V42, R2247). There was no abuse of discretion, and there is no basis for reversal.

[52] The comments in this case are not even the "unfortunate" comments at issue in *Doorbal*. The comments in Carr's case are not improper at all.

Finally, Carr's argument that the "cumulative effect" of the two identified arguments is a basis for relief fails. There is no error to "cumulate" in the first place.

IV. THE SENTENCING ORDER CLAIM[53]

On pages 53-64 of her brief, Carr says that the sentencing court erred in its weighing of the various mitigation evidence. The weight to be given to a particular mitigator is within the trial court's discretion. *Blanco v. State*, 706 So. 2d 7, 10 (Fla. 1997). *See also, Bevel v. State*, 983 So. 2d 505, 521-522 (Fla. 2008); *Rodgers v. State*, 948 So. 2d 655, 668-669 (Fla. 2006); Stewart v. State, 872 So. 2d 226, 228 (Fla. 2003); Cave v. State, 727 So. 2d 227, 230 (Fla. 1998). However, if a mitigator is found to merely exist, **but not be mitigating based on the facts**, the sentencing court does not have to give it any weight. *Ford v. State*, 802 So. 2d 1121 (Fla. 2001); *Trease v. State*, 768 So. 2d 1050 (Fla. 2000). And:

> This Court has adopted the definition of a mitigating circumstance from the United States Supreme Court, as "any aspect of a defendant's character or record and any of the circumstances of the offense" **that reasonably may serve as a basis for imposing a sentence less than death**. *Campbell v. State*, 571 So. 2d 415, 419 n. 4 (Fla. 1990) (*quoting Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978))*, receded from in part by Trease v. State*, 768 So. 2d 1050 (Fla. 2000).

[53] The State does not concede that there is any error within the sentencing order. However, even if there were, the proper remedy would be a remand for the entry of a corrected order, not relief from the death sentence.

Crook v. State, 813 So. 2d 68, 74 (Fla. 2002) (emphasis added); *Tanzi v. State*, 964 So. 2d 106, 118 (Fla. 2007). In this case, none of the "mitigators" at issue were given "no weight" by the sentencing court. Carr's individual complaints are addressed in the order in which they appear in her brief.

Carr's claim that it was error for the sentencing court to state that there was no "nexus" between the mitigation and the murder is not a basis for relief. It is true that the trial court pointed out that there is no "nexus" between the murder and Carr's "poor upbringing," her "lack of a protecting mother," her dysfunctional family, and the sexual abuse to which she was subjected. However, it is also true that each of those factors was given some weight as mitigation -- when the sentencing order is fairly read, the term "nexus" was used to refer to the fact that the "mitigation" existed (and was found), but was entitled to little weight. Carr's claim is really that the trial court did not give **enough** weight to this "mitigation" -- that is a matter that is within the trial court's discretion, and the trial court should not be criticized for explaining **why** it gave no more weight to the matters at issue. This claim is not a basis for any relief.

The claim that the trial court made "improper use of defense counsel's opening statement" by quoting part of that

argument in the sentencing order makes no sense. The reference at V10, R1938-9 and R1946-7 of the Sentencing Order is no more or less than a reference to what defense counsel said in argument which was consistent with the expert testimony. The reference to the statement at the *Spencer* hearing that Carr "was the promise of her family" is, again, a reference to a statement by counsel that was consistent with the evidence. How either of these statements can be criticized in unclear.

The reference at V10, R1946-7 makes reference to defense counsel's opening statement being contradictory to the "mitigation" that Carr is "immature and wanted a relationship." All of the evidence (including Carr's own testimony) was consistent with this "mitigation" not existing, as the sentencing court found. There is simply no error in the sentencing order.

The remainder of Carr's brief complains that the trial court did not give enough weight to various facts that were offered as non-statutory mitigation.[54] No abuse of discretion has been argued or shown.

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[54] Carr argued the jury's advisory recommendation as "mitigation." Even though the law does not recognize it, the Court gave her the benefit of it and considered the jury's vote as mitigation to be weighed. (V10, R1948). *Whitfield v. State*, 706 So. 2d 1, 6 (Fla. 1997); *Craig v. State*, 510 So. 2d 857, 867 (Fla. 1987). *See also*, *Bevel v. State*, 983 So. 2d 505, 521-522 (Fla. 2008); *Rodgers v. State*, 948 So. 2d 655, 668-669 (Fla.

Alternatively, any "error" in the sentencing order would properly be remedied not by reversal of the sentence, but by remand for the entry of a corrected order. There is no basis for relief.

V. THE COLDNESS AGGRAVATOR

On pages 65-75 of her brief, Carr says that the sentencing court was wrong to find that the murder of Heather Strong was cold, calculated and premeditated as that aggravating circumstance is defined under Florida law. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence standard. When reviewing aggravating factors on appeal, this Court in *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, saying that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance, and, if so, whether competent substantial evidence supports its finding." *Quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla.), *cert.*

2006); *Stewart v. State*, 872 So. 2d 226, 228 (Fla. 2003); *Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998).

denied, 522 U.S. 970 (1997). *Franklin v. State*, 965 So. 2d 79, 98 (Fla. 2007).

In its sentencing order, the trial court addressed the coldness aggravator at length:

> In order to establish this aggravating circumstance the State must show that (1) the killing was the product of cool and calm reflection, and not an act prompted by emotional frenzy, panic or a fit of rage; (2) that the defendant had a careful plan or prearranged design to commit murder before the killing; (3) that the defendant exhibited heightened premeditation; and (4) that the defendant had no pretense of moral or legal justification. *See Zommer v. State*, 31 So. 3d 733 (Fla. 2010); *Anderson v. State*, 863 So. 2d 169 (Fla. 2003); *Richardson v. State*, 604 So. 2d 1107 (Fla. 1992); *Jackson v. State*, 648 So.2d 85 (Fla. 1994); *Banda v. State*, 536 So. 2d 221 (Fla. 1988); and *Rogers v. State*, 511 So. 2d 526 (Fla. 1987). The Florida Supreme Court has found the CCP aggravating circumstance to be present in cases where men have executed a plan to kill their spouse. *See Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998); *Harris v. State*, 843 So. 2d 856 (Fla. 2003).
>
> In *Zakrzewski* the court found the CCP aggravating circumstance when the defendant killed his wife after learning that she wanted a divorce. After hearing this news the defendant procured a weapon and then returned to work. After work he waited for his wife to get home and killed her shortly after she arrived. *Zakrzewski*, at 493. The court found the CCP aggravating circumstance to be present under these circumstances. The court added that it has never approved of a "domestic dispute" exception to imposition of the death penalty. *Zakrzewski* at 493, Although domestic violence murders are often the result of failed relationships, only in "heated murders of passion, in which the loss of emotional control is evident from the facts" would the "cold" element be lacking. *Harris*, at 867.
>
> This court has considered the four distinct elements to reach its conclusion about this

aggravating circumstance. First, the killing was "cold." Heather Strong's death was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage. Emilia Carr's actions were not only calm and careful, but they exhibited a degree of deliberate ruthlessness, as shown by her attempt to break Heather Strong's neck as Strong asked Emilia Carr to help her. Second, the killing was "calculated." Emilia Carr participated in a careful plan and prearranged design to commit this murder before the fatal incident. At trial there was testimony that the defendant offered money for help "snapping the victim's neck," and offered money to have the victim killed. Jason Lotshaw testified that the defendant offered him money to kill the victim, and Christie Stover testified that the defendant was trying to find someone to help her kill the victim, and she was willing to pay. Third, Emilia Carr exhibited "heightened premeditation." The evidence in this case was that Emilia Carr is a deliberate and calculated person. This is evident from the testimony of the State's witnesses, but is emphasized by the statements of the defendant herself in her recorded conversations with the codefendant and his sister. The evidence in this case was more than that necessary to prove the premeditation prong of first-degree murder, Fourth, Emilia Carr acted with no pretense of moral or legal justification.

When analyzed collectively the evidence in this case establishes beyond any reasonable doubt that this crime was committed in a cold, calculated and premeditated manner, and without any pretense of moral or legal justification. Emilia Carr had harbored anger against Strong since December of 2008 when Strong reconciled with Fulgham, which caused Fulgham to throw Emilia Carr out of the house. This anger intensified when Strong then had Fulgham arrested and held in jail for threatening her with a shotgun. In attempting to get Fulgham released from jail, Carr threatened Strong with a knife. After Fulgham's release, and on the day of Strong's disappearance and murder, Emilia Carr and Fulgham discussed still being "down" or willing to participate in what they had already talked about, Carr waited until Fulgham had gotten Heather Strong into the dark, isolated storage trailer to go out and assist Fulgham in binding her and then suffocating

> her. There were numerous opportunities for Emilia Carr to renounce her planned activity, but she chose instead to participate in the murder.
>
> Like heinous, atrocious or cruel, the aggravating circumstance cold, calculated and premeditated has been deemed by the Florida Supreme Court to be one of the most serious aggravating circumstances set out in Florida's death penalty sentencing scheme. *Zommer v. State*, 31 So. 3d 733 (Fla. 2010); *Everett v, State*, 893 So. 2d 1278 (Fla. 2004); *Larkin v. State*, 739 So. 2d 90 (Fla. 1999).
>
> There is proof beyond a reasonable doubt as to all four of the factors that comprise the aggravating factor of cold, calculated and premeditated, and this court gives it great weight.
>
> (V10, R1934-36).

Those findings are supported by competent substantial evidence, as discussed in the order itself. This aggravator was properly found.

In upholding the coldness aggravator, this Court has said:

> that to support the CCP aggravator, a jury must find that (1) the killing was the result of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident; (3) the defendant exhibited heightened premeditation; and (4) the defendant had no pretense of moral or legal justification. *See Buzia v. State,* 926 So. 2d 1203, 1214 (Fla. 2006) (*quoting Jackson v. State,* 648 So. 2d 85, 89 (Fla. 1994)). To establish CCP, the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began. *See Thompson v. State*, 565 So. 2d 1311, 1318 (Fla. 1990). The heightened premeditation required to satisfy this aggravator has been found where a defendant had the opportunity to leave the scene with the victim alive, but chose instead to commit the

murder. *See Alston v. State*, 723 So. 2d 148, 162 (Fla. 1998).

Zommer v. State, 31 So. 3d 733, 745 (Fla. 2010). The fact that Heather's murder may not have been carried out precisely according to "plan" makes no difference:

> Kopsho's argument that the trial court improperly found CCP because the murder did not go according to plan is without merit. In *Sweet v. State*, 624 So. 2d 1138 (Fla. 1993), we upheld a finding of CCP where the victim was not the subject of the defendant's plan. Sweet forced his way into an apartment intending to kill the occupant. To his surprise, the target's neighbors were also present. Sweet killed one of the neighbors rather than his intended victim. We explained:
>
> > [T]he key to this factor is the level of preparation, not the success or failure of the plan, and we therefore reject Sweet's argument that because there were survivors of the shooting this aggravator is not applicable. Sweet was probably surprised by the presence of Cofer's neighbors, and planning is not the equivalent of shooting skill.
>
> *Id.* at 1142. Moreover, we have explained that heightened premeditation exists "where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder." *Owen v. State*, 862 So. 2d 687, 701 (Fla. 2003). In the instant case, Kopsho had ample opportunity to choose whether to complete the intended murder after his original plan was interrupted. He got out of the truck, loaded the gun, and ran Lynne down rather than allowing her to escape. The fact that Lynne's escape from the truck forced Kopsho to modify his otherwise carefully prearranged plan does not negate the premeditated and calculated elements of CCP.

Kopsho v. State, 2012 WL 652790, 7-8 (Fla. Mar. 1, 2012). Like Kopsho, Carr had more than enough chances to choose not to

kill Heather. The coldness aggravator was properly found. *Ellerbee v. State,* 2012 WL 652793, 7 (Fla. Mar.1, 2012) ("*See Russ v. State*, 73 So. 3d 178, 193 (Fla. 2011) (*citing Walls v. State*, 641 So. 2d 381 (Fla. 1994)) (explaining that confession is direct evidence and circumstantial evidence test is not applicable to finding of CCP where evidence of guilt is direct)."); *Russ v. State*, 73 So. 3d 178, 192 (Fla. 2011).

Carr's claim (*Initial* Brief, at 69) that the State is "stuck with" her confession is incorrect, as this Court said in *Ellerbee:*

> Ellerbee argues that had the jury or the trial court viewed the facts differently —- mainly, had they believed the exculpatory aspects of Ellerbee's statement made to law enforcement -- a different result might have been reached on the issue of CCP. This argument is, in effect, an improper attempt to have this Court reweigh the evidence and make factual determinations on the credibility and reliability of the evidence. Such argument invades the province of the fact-finder and disregards the proper standard of review. *See generally Barnhill v. State*, 834 So. 2d 836, 850 (Fla. 2002) ("**A trial judge is not prevented from relying on specific statements made by the defendant if they have indicia of reliability, even if the defendant has given several conflicting statements**." (*citing Hildwin v. State*, 531 So. 2d 124, 128 n. 2 (Fla. 1988))); *see also Fla. Std. Jury Instr*. 7.11 (Penalty Proceedings—Capital Cases) (explaining that it is up to jury to determine what evidence is reliable and jury may believe or disbelieve all or any part of the testimony of any witness); *see also Bradley v. State,* 787 So. 2d 732, 738 (Fla. 2001) (explaining that in determining sufficiency of evidence question is whether, after viewing evidence in light most favorable to the State, a rational trier of fact could have found that fact in question was

established beyond a reasonable doubt) (*citing Banks v. State*, 732 So. 2d 1065, 1067 n. 5 (Fla. 1999)).

Ellerbee v. State, 2012 WL 652793, 7 (Fla. Mar. 1, 2012). (emphasis added); *Cole v. State*, 36 So. 3d 597 (Fla. 2010); *Victorino v. State*, 23 So. 3d 87, 106 (Fla. 2009); *Hunter v. State*, 8 So. 3d 1052, 1074 (Fla. 2008); *Rodgers v. State*, 3 So. 3d 1127, 1133-1135 (Fla. 2009); *Lawrence v. State*, 846 So. 2d 440, 450 (Fla. 2003); *Lugo v. State,* 845 So. 2d 74, 113-114 (Fla. 2003); *Doorbal v. State*, 837 So. 2d 940, 960-961 (Fla. 2003); *Looney v. State*, 803 So. 2d 656, 678-680 (Fla. 2001); *Hertz v. State*, 803 So. 2d 629, 649-651 (Fla. 2001).

Finally, the "vicarious application" claim has no factual support. Carr was a full participant in the planning and execution of Heather's murder. Her participation satisfied the coldness aggravator under controlling law. There is no error.

Alternatively and secondarily, death is still proper even without the coldness aggravating circumstance. The sentencing court also found, as aggravation, that the murder was committed during a kidnapping, and that the murder was heinous, atrocious or cruel. (V10, R1929-34). Both factors were given great weight in sentencing and are sufficient, together or separately, to support a sentence of death. Death is the proper sentence.

VI. THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR

On pages 76-81 of her brief, Carr challenges the sentencing court's finding of the heinousness aggravating circumstance. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence standard. When reviewing aggravating factors on appeal, this Court in *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, saying that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance, and, if so, whether competent substantial evidence supports its finding." *Quoting Willacy v. State*, 696 So. 2d 693, 695 (Fla.), *cert. denied*, 522 U.S. 970 (1997). *Franklin v. State*, 965 So. 2d 79, 98 (Fla. 2007).

In the sentencing order, the trial court made the following findings with respect to this aggravating circumstance:

> "The heinous, atrocious, or cruel aggravating circumstance is intended to include those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." *Dixon v. State*, 283 So. 2d 1, 9 (Fla. 1973).
>
> It is the Florida Supreme Court's interpretation that "heinous means extremely wicked or shockingly

evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." *Id*.

The Florida Supreme Court has stated that fear of impending death is an important factor in determining whether a death was heinous, atrocious or cruel. *See Blackwood v. State*, 777 So. 2d 399, 409 (Fla. 2000), holding that HAC applies where the victim was conscious long enough to be aware of what was happening to her and to fear her impending death as she was smothered to death; *Capehart v. State*, 583 So. 2d 1009 (Fla. 1991), holding that HAC applies where victim's death was painful, and where the smothering was not instantaneous because the victim remained conscious for two minutes. *See also, Dame v. State*, 677 So. 2d 258 (Fla. 1996), holding that strangulations are nearly always per se heinous, atrocious or cruel.

The heinous, atrocious or cruel aggravating circumstance focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. *Farina v. State*, 801 So. 2d 44 (Fla. 2001). The Florida Supreme Court has held that

> "HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. Thus, if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference."

Barnhill v. State, 834 So 2d 836, 849-850 (Fla. 2002).

The medical examiner in this case, Dr. Barbara Wolf, testified that Heather Strong died as a result of suffocation, and that suffocation is a form of asphyxiation. Strangulation or asphyxiation of a

conscious victim has been held to be heinous, atrocious, or cruel. *Zommer v. State*, 31 So. 3d 733 (Fla. 2010); *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Mansfield v. State*, 758 So. 2d 636 (Fla. 2000); *Hildwin v. State*, 727 So. 2d 193 (F1a. 1998).

This aggravating circumstance is concerned primarily with the victim's perception of the circumstances. In *Hildwin, supra*, the court reaffirmed its earlier holdings in *Tompkins v. State*, 502 So. 2d 415 (Fla. 1986), that it is proper to infer from the strangulation death of a conscious victim that there was foreknowledge of death and extreme anxiety and fear, which supports a finding of heinous, atrocious or cruel. The court in. Hildwin upheld the PAC aggravating circumstance based on the fact that a wide band ligature was used, and the medical examiner's testimony that it would take several minutes to lose consciousness and die from that type of strangulation.

In evaluating the victim's perception and mental state, the court should apply common sense inferences from the victim's circumstances. *Pooler v. State*, 704 So. 2d 1375 (Fla. 1997). In *Pooler*, the Supreme Court held that threats made days prior to the actual killing could be used by the court to make common sense inferences about the fear, mental strain, and terror of the victim in the time leading up to the victim's death. Pooler threatened to kill his victim two days before the actual event of her murder, thus according to the court "giving her ample time to ponder her fate." *Pooler* at 1378. The rule of evaluating the victim's emotional state based on prior threats was followed in *Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008), where the Supreme Court said,

> "With respect to HAC, the circuit court correctly found that a threat on the victim's life contributes to the victim's apprehension prior to death and is thus relevant to the HAG aggravating factor. A threat need not be made contemporaneously with the murder in order to be relevant to the HAC aggravator if it causes the victim to experience fear, emotional strain, and terror in the moments leading up to her murder. *See Pooler v. State*, 704 So. 2d

> 1375, 1378 (Fla. 1997) finding evidence that the victim was threatened by the defendant two days before she was killed to be relevant to HAC aggravating factor even though the threat was not delivered on the day of the murder. *Hitchcock* at 355.

The evidence at trial established that approximately a month before the actual murder of Heather Strong, Emilia Carr held a knife to Heather Strong's throat in an attempt to get Strong to sign a document that would be used to get charges against Joshua Fulgham dropped. Fulgham was in jail for allegedly threatening Heather Strong with a shotgun, for which she had him arrested. Notwithstanding the fact that this threat occurred a month prior to the murder, it is a factor that may, and should be considered based upon the circumstances in this case.

The facts of this case portray a terrifying scene on the night of the murder where Heather Strong is so scared that she urinates in her pants as she tries to flee the mobile home. Her escape fails when she runs into the defendant. Heather Strong is hit in the head with a flashlight and restrained on a chair. In the dark of the night, the mobile home being illuminated by candlelight, Heather Strong can hear duct tape being ripped from the roll and feel it being used to bind her to the chair, While crying she asks why they are doing this and asks for help, but instead of helping her, the defendant tries to break her neck. A plastic bag is placed over her head and duct taped in place by taping around her neck. For approximately five minutes she is conscious, aware of her surroundings, aware that she will not get away, and aware that she is going to die. Suffocation eventually causes her to become unconscious and then die.

This aggravating circumstance has been deemed by the Florida Supreme Court to be one of the most serious aggravating circumstances set out in Florida's death penalty sentencing scheme. *Zommer v. State*, 31 So. 3d 733 (Fla. 2010); *Everett v. State*, 893 So. 2d 1278 (Fla. 2004); *Larkin v. State*, 739 So. 2d 90 (Fla. 1999). This court finds this aggravating circumstance has been proven beyond a reasonable doubt and gives it great weight.

(V10, R1930-34).

The only argument that Carr advances to challenge the applicability of the heinousness aggravator is her claim that finding that aggravator as to her is a "vicarious" finding which applies the aggravator to her based on her co-defendant's actions. Carr relies on *Omelus v. State*, 584 So. 2d 563, 566 (Fla. 1991), to support her position, but that case does not help. In applying *Omelus* in *Cole*, this Court held the heinousness aggravator inapplicable, saying:

> The only evidence indicating the manner of death contemplated by Cole and her codefendants was Nixon's testimony that Jackson stated that Jackson would kill the victims at the grave site by lethal injection. **The evidence shows that Cole was never near the victims during the crimes and that she was not at the grave site when her codefendants buried the victims alive.** We conclude that the trial court erred in instructing the jury on and in finding HAC because there is no competent, substantial evidence to support a finding that Cole either directed her codefendants to bury the victims alive or knew that her codefendants would kill the victims by burying them alive.

Cole v. State, 36 So. 3d 597, 609 (Fla. 2010). (emphasis added). The highlighted portion of that decision illustrates the difference between that case and this one, and is why, under the facts of this case, the heinousness aggravator was properly found. Unlike the "vicarious liability" cases, Carr was an active participant in Heather's murder, not a passive observer

or an absent co-defendant. (V10, R1933). The heinousness aggravator was properly found, and should not be disturbed.

Finally, the trial court properly considered the prior threats by the defendant against the victim. Those facts may, and should be, considered in connection with the heinousness aggravator. *See, Hitchcock v. State,* 991 So. 2d 337 (Fla. 2008). There is no error.

Alternatively and secondarily, here, as in *Cole, supra*, any error associated with finding this aggravator is harmless beyond a reasonable doubt.

VII. THE SENTENCING JURY'S VOTE CLAIM

On pages 82-84 of her brief, Carr argues that it is "unconstitutional" to allow a jury to recommend a death sentence by a vote of 7-5. This claim is foreclosed by long-settled precedent:

> the United States Supreme Court has never held that jury unanimity is a requisite of due process, [FN6] and in *Alvord v. State*, 322 So. 2d 533 (Fla. 1975), *cert. denied,* 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), this Court held that the jury in a capital case could recommend an advisory sentence by a simple majority vote. We do not find that unanimity is necessary when the jury considers this issue.
>
> [FN6] *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972).

James v. State, 453 So. 2d 786, 792 (Fla. 1984). *Accord, Butler v. State*, 842 So. 2d 817, 834 (Fla. 2003) (Wells, J., concurring); *Whitfield v. State*, 706 So. 2d 1 (Fla. 1997), *cert.*

denied, 525 U.S. 840, 119 S.Ct. 103, 142 L.Ed.2d 82 (1998); *Thompson v. State*, 648 So. 2d 692 (Fla. 1994), *cert. denied*, 515 U.S. 1125, 115 S.Ct. 2283, 132 L.Ed.2d 286 (1995); *Brown v. State,* 565 So. 2d 304 (Fla. 1990), *cert. denied*, 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990). This claim is foreclosed by precedent, and is not a basis for relief.

VIII. THE PROPORTIONALITY CLAIM

On pages 85-89 of her brief, Carr says that her death sentence is "not proportionally warranted" when compared to other cases in which a death sentence has been imposed. The foundation of this claim is the assertion that the co-defendant, Fulgham, was the "main actor" in Heather Strong's murder, and that Carr was influenced to commit an "uncharacteristic act" because of her "emotional involvement and parental connection" with Fulgham.[55] The problem is that there is a lack of evidence to support those claims.

In the sentencing order, the trial court said the following about the asserted "domination" by Fulgham in the context of the statutory mitigator:

> e. The defendant acted under extreme duress or under the substantial domination of another person.

[55] The aggravators weighed in sentencing were properly found, and, of course, the weight given the aggravation and mitigation is a matter for the sentencing court. Carr's contrary arguments in her proportionality claim have no legal basis.

There was no evidence presented to establish this mitigating circumstance. In fact, the evidence from the expert witness for the defense, Dr. Ava Land, was that Emilia Can was "a leader, not a follower." Moreover, Dr. Land stated Emilia Carr was of "superior intelligence" with an IQ of 125; that she does not get emotionally attached to men; that she is on guard against manipulation; and that she has no co-dependancy issues. Dr. Land opined that Emilia Can is "in control and manipulating in male relationships." Moreover, counsel for the defendant acknowledged in her opening statement at trial that Emilia Can was "her own person." Counsel stated:

> "Now Josh's relationship with Emilia is different. Josh and Emilia are kind of more like friends with benefits kind of relationship. They're not - - the State would have you to believe that Emilia is emotionally tied to Josh, Emilia is Emilia. She's her own person."

(Trial Transcript of Opening Statements, page 27), This mitigating circumstance does not apply.

(V10, R1938-9). Carr cannot resurrect that mitigator now.

Moreover, in discussing the non-statutory mitigation that Carr uses to support the proportionality argument, the sentencing court said:

> 20. Dr. Ava Land's testimony supports a life sentence. Dr. Land testified that the defendant grew up in a deficient home as it relates to parenting, that she suffers from anxiety, and that the defendant suffered sexual abuse as a child. Dr. Land also testified that Emilia Can- suffered no serious mental illness or schizoid personality; the defendant could be manipulated, but. she was "on guard about it;" that the defendant was "a leader, not a follower;" that Emilia Carr was of "superior intelligence" with an IQ of 125; that she does not get emotionally attached to men; that she has no co-dependancy issues; and that the defendant knows what is going on and does not disassociate herself from events, Dr. Land opined that Emilia Carr is "in control and

manipulating in male relationships." Moreover, counsel for the defendant acknowledged in her opening statement at trial that Emilia Can was her own person." Counsel stated:

> "Now Josh's relationship with Emilia is different. Josh and Emilia are kind of more like friends with benefits kind of relationship. They're not - - the State would have you to believe that Emilia is emotionally tied to Josh. Emilia is Emilia. She's her own person"

(Trial Transcript of Opening Statements, page 27). The court gives this mitigating circumstance little weight.

21. The co-defendant, Joshua Fulgham, manipulated and controlled the defendant. There is no evidence that the defendant was manipulated by Joshua Fulgham. In addition to the opinions of Dr. Land recited above, the defendant's conversations with Joshua Fulgham, the co-defendant, prior to the murder, and her conversation with Michelle Gustafson, who is Joshua Fulgham's sister, clearly demonstrate the defendant is in control of her own faculties, and is in fact quite concerned that Joshua Fulgham can not keep his mouth shut about the incident when talking to law enforcement officers, Based upon the evidence at trial, and for the reasons articulated here in this paragraph and in paragraph 20 immediately above, the court finds this mitigating circumstance does not apply.

23. The defendant was immature and wanted a relationship. There was no evidence presented to support this mitigating circumstance. All of the evidence presented at every phase of this case suggests that this is just not true. Defense counsel's opening statement (cited herein above) contradicts this claim, indeed, an additional witness called by the defense at *the Spencer* hearing, Nathaniel Salvail, testified specifically that the defendant was not immature. Dr. Land's testimony reveals that the defendant is anything but immature, and that she is not dependant upon any relationship, Moreover, the testimony of the defendant herself refutes this claim. For all the reasons already articulated herein above,

> the court finds this mitigating circumstance does not apply.
>
> 26. Joshua Fulgham, the co-defendant, actually killed Heather Strong. The jury found the defendant guilty of first degree murder. The issue of whether the defendant committed the crime has been litigated and decided. The overwhelming evidence was that the defendant participated in planning and carrying out the murder of Heather Strong. By her own statements, the defendant tried to break Heather Strong's neck before she gave Joshua Fulgham the tape to secure the plastic bag over Heather Strong's head, and she taped the hands and feet of Heather Strong so Strong could not move. This argument is essentially a residual or lingering doubt argument. The Florida Supreme Court has repeatedly held that lingering doubt is not a mitigating factor. *Aldridge v. State,* 503 So. 2d 1257 (Fla.1987); *King v. State,* 514 So. 2d 354 (Fla. 1987); *Way v. State,* 760 So. 2d 903 (Fla. 2000); *Darling v. State,* 808 So. 2d 145 (Fla. 2002); *Duest v. State,* 855 So.2d 33 (Fla. 2003). Nonetheless, even if it were a mitigating circumstance *in* this case, this court finds there is overwhelming evidence of the defendant's planning and participation in the murder of Heather Strong such that little weight would be given to the proposed mitigating circumstance, which is essentially that the defendant did not actually tape the bag over Heather Strong's head. The evidence is the defendant did everything but that, and tried to break her neck before assisting with completing the task of taping the bag over the victim's head.
>
> (V10, R1945-46, 1947, 1948).

Those facts, which Carr does not challenge demonstrate the proportionality of her death sentence. *See Walker v. State*, 957 So. 2d 560, 585 (Fla. 2007) and cases cited therein.[56]

[56] After the conclusion of postconviction proceedings, the trial court granted Walker a new penalty phase. Walker appealed the remaining claims and the State cross-appealed. See Case No. SC10-638.

Carr argues that the fact that she was a sexual abuse victim it "perhaps most important[]." *Initial Brief,* at 89. If it is true (something that is at least up for debate, Vol ?? R1950, as the sentencing court noted), it is inexcusable that Carr was subjected to such treatment. The murder of Heather Strong is also inexcusable, and that murder took place long after any abuse ended. What remains (assuming that the abuse claim is true) is a fact about Carr's life that, while there is no excuse for it, in no way mitigates her culpability for the murder that she committed. The death sentence is proportional.

IX. THE *RING V. ARIZONA* CLAIM

On pages 90-92[57] of her brief, Carr asks this Court to "reconsider its position" in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), as

[57] The *Ring* argument contained in Carr's Initial Brief in claim IX incorrectly cites to V.I, R54-64, 105-6, 110-17 as containing pre-trial *Ring* Motions. However, it is the record on appeal in Case No. SC06-1550, *Aguirre-Jarquin v. State*, at V.I, R54-64, 105-6, 110-17, that contains those specific citations to *Ring* motions. Carr's claim IX also references that "None of the challenges were successful and Appellant was ultimately sentenced to death on **both murder convictions" (Initial Brief at 90) and "**Appellant points out that **neither jury recommendation for his death sentences** was unanimous" (Initial Brief at 91). It is apparent that the *Ring* Argument in Carr's brief was the same, verbatim, as raised in claim XI in *Aguirre-Jarquin's* Initial Brief at pages 85-87. Appellee points out that Carr filed a pre-trial motion raising the *Ring* claim in V2, R260-75. The claim was argued on November 2, 2010, and denied. (V15, R69-72).

to the applicability of *Ring v. Arizona*, 536 U.S. 584 (2002) to Florida's death penalty act.

Carr's claim appears to be a general claim that the Florida death penalty statute is unconstitutional. *See, Initial Brief*, at 91-2. Regardless of the nuances to the claim, the fact remains that Carr was convicted of the underlying felony of kidnapping, and that conviction takes her case outside any possible reach of *Ring*:

> This Court has consistently held that a defendant is not entitled to relief under *Ring* if he is convicted of murder committed during the commission of a felony, or otherwise where the jury of necessity has unanimously made the findings of fact that support an aggravator. *See Baker*, 71 So. 3d at 824 ("[W]e have previously explained that *Ring* is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony."); *see also Douglas v. State*, 878 So. 2d 1246,1263–64 (Fla. 2004) (rejecting *Ring* claim where jury convicted defendant of committing murder during the commission of sexual battery); *Caballero v. State*, 851 So. 2d 655, 663–64 (Fla. 2003) (rejecting Ring claim where defendant was convicted by unanimous jury of committing murder during the commission of burglary and kidnapping); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). Accordingly, under this Court's precedent, Ellerbee is not entitled to relief under *Ring.*

Ellerbee v. State, 2012 WL 652793, 13 (Fla. March 1, 2012). *Caylor v. State*, 78 So. 3d 482, 500 (Fla. 2011) ("Furthermore, Caylor was contemporaneously convicted of aggravated child abuse

and sexual battery involving great physical force by a unanimous jury during the guilt phase of his trial. *Ring* is not implicated when, as here, the trial court has found as an aggravating circumstance that the murder was committed in the course of a felony that was found by the jury during the guilt phase. *See McGirth v. State*, 48 So. 3d 777, 795 (Fla. 2010), *cert. denied*, ––– U.S. ––––, 131 S.Ct. 2100, 179 L.Ed.2d 898 (2011).”). Carr’s *Ring* claim is foreclosed by binding precedent.

CONCLUSION

Carr’s conviction and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Christopher Quarles,** 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 on this _____day of April, 2012.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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