IN THE SUPREME COURT OF FLORIDA

FRED LEWIS WAY,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 64,931
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

As its first witness the State called Randal Hierlmeier, an investigator with Tampa Electric Company. This witness testified that he saw smoke coming out of the Way residence and pulled into the driveway (R. 522-523). He saw Appellant standing at the front portion of the garage with a garden hose spraying the back portion of a car (R. 525-526). Mr. Hierlmeier indicated Appellant seemed very calm (R. 526). In response to questioning defendant said there was no one in the house but he did not respond when asked if anyone was in the garage (R. 527).

The witness heard a scream, then the defendant indicated his daughter was in the garage (R. 527). The scream sounded like that of a young female (R. 527, 538). Mr. Hierlmeier then hosed down Appellant and told him to go into the garage after his daughter (R. 528-529). The witness pushed the defendant into the garage; Appellant hit his head and came back out immediately (R. 529-530, 539).

Approximately four or five more screams were heard (R. 530,537). A body was seen in the garage; it was ablaze and trying to move (R. 530-531). The witness told the person to try to crawl, but the victim collapsed on the floor (R. 531). At this point, the partially opened garage door fell shut (R. 531).

Mr. Hierlmeier asked the defendant if he had a key to the back garage door and the defendant said he did not (R. 531-532). The witness broke the window to that door but the burglar bars were locked (R. 532). A crow bar was used to pry open the burglar bars (R. 533).

The second person on the scene was Mr. William Browne. When he approached the house Appellant was in the driveway with another person (R. 548). This witness observed heavy smoke but did not see any flames when he first arrived (R. 550). He observed Mr. Hierlmeier hosing down the defendant, and the defendant attempting to enter the garage. Appellant hit his head on the door and immediately came back out (R. 550). After the paramedics arrived, the people present attempted to enter the garage through the rear door by using a wrecking bar on the burglar bars; Appellant had said he did not have a key to that door (R. 551-552).

Mr. Browne indicated that the defendant appeared upset and anxious (R. 553). When Mr. Browne arrived on the scene he heard a conversation between Mr. Hierlmeier and Appellant concerning whether or not there were people in the garage or the house (R. 554). He heard Appellant say his daughter was in the garage (R. 555).

The State next called Mr. Ira McCorriston. Mr. McCorriston indicated he was the owner of the residence at 8030 Jackson Spring Road and had rented that house to Mr. Way (R. 559). He testified he had six keys for that residence, a key for each locked window and door gates (R. 562). He further indicated he showed the defendant where these keys were (R. 563). He specifically told the defendant of the key hanging on the wall in the garage that fit the rear garage door (R. 564). Mr. McCorriston indicated he had an occassion to use the rear garage door after the defendant had moved into the residence and that door was opened (R. 565-566).

The Way's next door neighbor, Mr. Bill Fickes was called as a witness (R. 572). He testified that he had seen the rear garage door with the burglar bars open on several occassions (R. 573-574).

Mr. Robert Blume with the Emergency Medical Service was called to testify. He indicated when he arrived the defendant appeared nervous (R. 577-578). The witness helped open the burglar bars with the crow bar (R. 578). Appellant told him that his wife and daughter were inside the garage and had been arguing, and the wife had fallen the day before (R. 579).

Another emergency medical service personnel person, Mr. William Corso, was called on behalf of the State. He stated Appellant seemed somewhat calm and subdued (R. 585). He likewise testified that the burglar bars were opened with the crow bar (R. 586). He also heard the defendant say his wife had fallen the day before and that morning. This information was given gratuitously, not in response to questioning (R. 587).

The State's next witness was Randy Castro of the fire department. Mr. Castro testified that he entered the garage by the back door and used water from the fire hose to put out the fire (R. 590). The heaviest concentration of fire was found in the northwest corner of the garage where a number of boxes were stacked (R. 596-597). He observed two bodies in the garage (R. 597). When asked how Appellant seemed, the witness indicated the Appellant appeared to be a bystander (R. 612-613).

Mr. Michael Tumbleson of the fire department stated he first saw Appellant after the fire was out; Appellant was attempting

to enter the garage (R. 615-616). Appellant appeared to be worried (R. 617-618). The witness stated, however, that Appellant did not act any differently from other people he had seen at fire scenes (R. 618).

Officer Kevin Nykanen of the Sheriff's Office testified Appellant identified the bodies in the garage as that of his wife and daughter (R. 626-627). Officer Nykanen indicated Appellant did not appear overly upset (R. 628). Appellant told him the mother and daughter had been arguing all morning (R. 628). The mother and daughter had been in a shoving match in the garage when the mother fell and hit her head on some weights. Appellant said he took off his shirt to give to his wife to stop the bleeding (R. 629). Appellant also said he tried to break up the fight but the mother told him to leave as she would handle it. Appellant then left (R 629).

Appellant further stated he went to the laundry area to get a clean shirt; he walked through to the patio and a few minutes later the fire started. He heard his second daughter yell that the garage was on fire (R. 629-630). Appellant further stated he went to the kitchen door leading to the garage and got burned because the fire was intense (R. 630). He was also told that the wife and daughter had an altercation the day before and the wife fell hurting her back (R. 631). Appellant gave a written statement (R. 633-634). During Nykanen's interview Appellant appeared glassy eyed, possibly consistent with shock (R. 635).

Rosalyn Staunko also from the Sheriff's Office indicated Appellant appeared calm and quite and was cooperative when she talked with him (R. 642). Appellant told her the same story concerning an argument between the mother and daughter (R. 645-647). Appellant indicated the mother fell accidentally then the daughter hit her over the head after she had fallen (R. 646). He asked the mother if he should take the daughter to Oklahoma, but the mother indicated she would handle it (R. 646). As Appellant was leaving the scene he heard the mother tell the daughter if she didn't straighten up she would kill her (R. 647).

Appellant told Officer Staunko that he and his wife had problems, and they had discussed divorce (R. 648). The next day Appellant told the officer that the wife had fallen in the garage before the daughter came in and he saw the daughter hit the wife as he was leaving (R. 649).

The State's next witness was William Myers of the Sheriff's Office. He testified that there was approximately ten to twelve feet between the two bodies (R. 662). There was a strong odor of gas in the area of the greatest concentration of burning which was the northwest corner of the garage (R. 671-673). No combustibles were found around the bodies (R. 670-671). From his observation it did not appear that there were any refinishing liquids used on the table (R. 679). Officer Myers testified that it was his opinion that the fire was the result of arson, and gas was used to start the fire (R. 681, 714). It was also his opinion

an accelerant came into contact with at least one of the victims (R. 697, 716). Officer Myers also observed injuries on the head of both victims (R. 683).

William Martinez from the Fire Marshall's office also indicated that the heaviest burn damage occurred in the northwest area of the garage (R. 708). He further testified that there was no fire damage in the areas surrounding the bodies (R. 706-708). Additionally, Mr. Martinez indicated from his observation there was no indication of refinishing liquids used on the table in the garage (R. 712).

Henry Regalado,an arson expert, testified concerning his observations and deductions concerning the fire. He also stated it was his opinion that the fire was the result of arson and the accelerant used was gasoline. His testimony was substantially the same as that of Officer Myers and Mr. Martinez (R. 734-753).

The stipulated testimony of Ismal Mami, a chemist, was read into the record. The chemist indicated that the clothing of both victims contained components of gasoline, but the amount could not be determined (R. 755). The chemist also indicated that the liquid found in State exhibit 19 was gasoline (R. 755).

The next witness was Dr. Charles A. Diggs, Assistant Medical Examiner for Hillsborough County. Dr. Diggs indicated he examined the bodies of both Carolyn Way and Adrienne Way. The mother was 5 feet 6 inches tall, 116 pounds and the daughter was 5 feet 5 inches, 121 pounds (R. 764-765). Both victims had multiple trauma to the head area: Trauma meaning blows, bruises or lacerations. (R. 765). The wounds to the wife indicated she had been struck

with a blunt instrument (R. 769). There were seven wounds to the head of Carol Way any one of which could have caused unconsciousness and was potentially lethal (R. 771-776). The wounds could have caused the victim to fall and could have produced blood (R. 776-784). It was possible that the victim could have screamed after receiving these wounds and the fire could have caused more pain; however, the possibility of screaming would have been remote after several minutes (R. 785, 815-816).

Examination of the mother's trachea, larynx and bronchi showed deposits of black soot (R. 786). The presence of this soot in these areas indicate that at some point during the fire the victim was alive (R. 786). The cause of death of the mother could be attributed to either the fire or the trauma or both (R. 787).

Dr. Diggs indicated that there were two blunt trauma wounds on the head of the daughter (R. 792). He indicated that the wound designated as number two could have caused the victim's death (R. 799). The wound designated number one could also have caused the victim's death and the victim would have dropped immediately (R. 801). With these type wounds the victim would have moved very little (R. 802). Examination of the trachea, larynx and bronchi of the daughter also indicated the presence of black soot. Therefore, this victim was also alive during part of the fire (R. 802-803). The daughter's death likewise could have been caused by either the fire or blunt trauma or both (R. 803-804). Dr. Diggs gave his considered medical opinion that the wounds on

the two victims probably were not made in mutual combat (R. 804-805).

Tiffany Way, the defendant's twelve year old daughter who was in the house when the fire began was called to testify. Tiffany indicated that her mother and Adrienne did a number of things together and she never saw her sister hit her mother (R. 830). She did not know if her mother and sister had been arguing that day (R. 831). She had on occassion seen her mother and father arguing while they lived in both Atlanta and Tampa (R. 831). While in Tampa, the mother threatened to leave the father, and she recalled an incident where her mother had a knife (R. 832-833).

On the morning of the fire, Tiffany indicated her father called her sister from the bedroom and told her, Tiffany, to stay in the bedroom (R. 837-838). Later she heard her sister scream Tiffy; it sounded like her sister was crying (R. 839). She then observed her father go into the bathroom and from there proceed to the patio (R. 840). Shortly thereafter she heard a scream and saw a can rolling from the garage and fire in the garage (R. 840-841). A couple of minutes elapsed between the time the father called the sister from the bedroom and she saw the fire in the garage (R. 843).

Tiffany testified she wanted to open the kitchen door leading to the garage but her father told her not to (R. 843-844). Tiffany called the fire department from three houses down although there was a phone in the kitchen; her father did not respond when she asked him about calling the police (R. 844). Her father later told her that her mother and sister had been fighting (R. 845).

Tiffany stated she initially told the detectives she heard her mother and father arguing, but all she really heard was her sister screaming; she did not hear an argument (R. 846). She indicated the scream had been Adrienne's (R. 860,864). She never heard her mother say anything after Adrienne left the room and she was pretty sure that the screams were Adrienne's (R. 873).

Mr. Wayne Mayo, who lived in the area, stated he saw a man and girl with a dog in front of the garage. The man told him to call the fire department (R. 876). The man was the defendant and he appeared calm (R. 876-877).

Detective John Marsicano of the Sheriff's Office testified he arrested Appellant on July 13, 1983 and removed from him the set of keys. These keys were given to Mr. Andrews, the defendant's father-in-law (R. 883). Later the detective received from Mr. Andrews three keys which fit the burglar bars of the garage (R. 884-886).

On July 12, 1983 Appellant had told the detective that his wife and daughter constantly fought (R. 890). Appellant told him that on the day of the fire while he was working near the garage he heard his wife fall and went into the garage to help her, it was at this point that he got blood on his shirt (R. 893-894). His daughter Adrienne was not in the garage at this time (R. 894). The wife, however, wanted Adrienne so he called her into the garage (R. 894-895). When the daughter came in the garage, the wife and daughter immediately started arguing, and the daughter hit the wife with something (R. 896). The Appellant indicated it

sounded like something made of metal (R. 897). Appellant stated he separated the two but the wife told him to leave as she would take care of the situation (R. 897). When Appellant exited the garage he could still hear the two arguing (R. 898).

Appellant told Detective Marsicano that he told Tiffany to call the fire department (R. 899). He indicated that his daughter Adrienne was violent (R.901). The Appellant's shirt was found under a pile of sheetrock in the garage (R. 903).

Check Scheer, a locksmith, was called to testify on behalf of the state. He indicated that three keys he had received from Detective Marsicano fit the deadbolt on the burglar bars (R. 927).

William Davis, a detective with the Sheriff's Department, testified he was sent to the defendant's residence to search for evidence. He saw a hammer on the other side of the privacy fence beyond the patio area (R. 930-932). At the scene an FDLE agent did a presumptive test on the hammer for blood and it was positive (R. 938). He also observed foot prints in this area (R. 941). Leslie Bryant, from the Florida Department of Law Enforcement, testified no prints were found on the hammer (R. 946).

Larry Bedore of the Florida Department of Law Enforcement was called to testify. He indicated he was a specialist in blood stain pattern analysis (R. 952, 957). Mr. Bedore indicated there were blood stains on the left side and wheel of the Ford Fiesta in the garage (R. 961-963). There were also blood stains in the garage (R. 969). He stated there was blood on the hammer found by Detective Davis and there was blood on Appellant's shirt that

was found in the garage (R. 986-987).

Ruth Walbarger, a Serologist with the Florida Department of Law Enforcement, was called to testify (R. 997). She testified there was blood on the hammer found by Detective Davis (R. 1001). The hammer tested negative for human blood; however, she indicated heat or weather could affect that test (R. 1001).

Jacqueline Andrews, the mother of Carol Way was called to testify. She indicated there was a normal mother/daughter relationship between Carol and Adrienne, and they did things together (R. 1015). She was told by Appellant at the scene that there had been an argument between Carol and Adrienne (R. 1019). She also indicated Appellant said there was no key to the garage burglar bars (R. 1020). Mrs. Andrews stated the defendant told the children, Tiffany and Fred, Jr., the story concerning the fight between Adrienne and her mother (R.1021). The witness indicated that the defendant's jeans were wet so she washed them (R. 1022).

Carol Way's father, George Andrews, was also called to testify. He indicated he removed two keys from a jewelry box which also contained Appellant's watch (R. 1043-1044). He gave a detective those two keys plus one key he had taken from Appellant's key ring (R. 1044). This was the key ring that Appellant had given him upon his arrest. Mr. Andrews said he tried one of the keys and it fit the burglar bar gate (R. 1045). At trial Mr. Andrews said the defendant appeared mildly upset and did not give the appearance of a bereaved husband (R. 1049-1050). However, he had said on deposition that the Appellant was a bereaved husband

(R. 1050). He also said on deposition that the defendant was dumb struck, amazed, upset, in mild shock (R. 1050).

The State's last witness in its' case in chief was Fred Way, Jr., Appellant's son. Fred Jr. testified he had seen his mother and father having violent arguments (R. 1069). His mother had threatened to leave his father (R. 1071). Fred stated he had seen his father open the garage burglar gate (R. 1072). He stated his father was excited and enthusiastic about a job offer he had received in South America (R. 1073).

On the morning prior to the fight his father had told him it might be a good idea to play basketball (R. 1078). After the fire, his father was mumbling that the mother and sister had been in a fight (R. 1081-1082). Later that day when he, his father and his grandfather went to clean up at the house, he saw his father with the hammer, and saw his father throw the hammer over the fence (R. 1083-1084).

When he was initially questioned, Fred Jr. described Adrienne as a violent person. He did so because he was mad at her because of what he thought she had done (R. 1087). When he arrived at the scene of the fire, he observed that his father looked upset (R. 1101).

After a motion for judgment of acquittal was denied, the defense presented its' case. The first witness called was Ruth Wise, a neighbor. She testified she heard Appellant calling for help; he sounded like he really meant it (R. 1121). When she saw Appellant he had tears in his eyes and he felt very bad (R. 1122-1123).

Ms. Rice stated she saw no one suspicious in the neighborhood (R. 1122).

Trudy McFadden from the Women's Survival Center was the defense's second witness. She testified that Carol Way came to the center in May and that at that time Carol was very nervous and upset (R. 1125). In June, however, she seemed changed and in very good spirits (R. 1126). On cross-examination Ms. McFadden acknowledged that the center helped people who are contemplating divorce (R. 1127-1128).

Mr. William Dugan, an employee with the FAA testified defendant told him his relationship with his family improved after his wife went to the Survival Center (R. 1133). When defendant told him of the death of his wife and daughter, Appellant was very emotional and crying (R. 1137).

William Barnes, an employee with the United States Postal Service, testified he saw a teenage boy in the neighborhood on July 11, 1983 (R. 1140). The next day he saw the same boy, defendant's son, who told him on the day of the fire the mother had been refinishing furniture and had been smoking (R. 1145). Mr. Douglas Wilson testified that on July 9, two days before the fire, he saw a young man at Appellant's house (R. 1148-1150).

Raymond Pomeroy, an investigator and fire consultant testified he examined the fire scene on August 18, 1983. He could not determine the origin of the fire because the scene had been disturbed (R. 1154). He also stated that in the past he had been able to make determinations concerning fires even on unsecured

scenes (R. 1156-1157). James Miller, from the Sheriff's Office, indicated he had wanted the scene secured (R. 1158). However, on the day of the fire, he did not suspect the victims' death to be homicide (R. 1159).

The defense next called Dr. William Gibson, a pathologist. He testified that one of the wounds was not consistent with a hammer blow (R. 1171). He did however, state that the wound could have been inflicted with some part of the hammer other than the head (R. 1197). Dr. Gibson indicated the wife could have still defended herself after eleven of the blows (R. 1172). However, after all twelve she would have been unconscious (R. 1172). It was his considered opinion that the wounds could have been inflicted in mutual combat (R. 1177). His examination of the bodies of the victims had taken forty-five minutes (R. 1170).

Dr. Gibson stated he had been the medical examiner for Hillsborough County in 1974. He either resigned and/or his appointment was rescinded after one month (R. 1179). He stated that the most severe wound on each victim's head would have to have been inflicted simultaneously if inflicted in mutual combat (R. 1198-1199). It was also possible that these wounds were inflicted by a third person (R. 1202).

Mr. Joseph Dunville testified the defendant was an honest person (R. 1231). He stated that Appellant was a calm person who took everything in stride (R. 1231).

Detective Davis stated that the Andrews, Appellant's in-laws did not mention that defendant had a job offer in South America (R. 1233). He also stated that he did not go to

the Andrews' residence to interview them. He went there to pick up evidence (R. 1234). Officer Marsicano also testified the Andrews did not tell him about the job offer but he likewise did not extensively interview them (R. 1236).

Fred Way, Sr. was called to testify in his own defense. He indicated his wife was very emotional after they moved to Tampa (R. 1253). Things got better however, after she started going to the Survival Center (R. 1255). Appellant stated he did not have a job offer to work in South America (R. 1258).

On the night before the fire Appellant stated his wife tripped and bumped her head. He also believed the son had spilled some gas in the garage (R. 1265). At two in the morning, his wife woke up stating she wanted to talk to the daughter about sneaking out of the house. The three of them, Appellant; his wife and his daughter had a discussion and argument concerning this problem. Appellant went back to bed after an hour (R. 1266). The wife told him later that morning that she and Adrienne had stayed up until four o'clock talking (R. 1266).

Later that morning the wife was working in the garage and spilled paint thinner or gasoline. She used some newspaper to blot it up. The defendant was outside of the garage working (R. 1275). He heard his wife yell; she had bumped her head and fallen. He took off his shirt so that the wife could use it to stop the bleeding (R. 1276). Mrs. Way asked him to call Adrienne into the garage (R. 1276-1277). The wife and daughter began arguing and pushing and shoving. He saw the daughter swing at her mother

but he didn't see a weapon (R. 1278-1279, 1341, 1343). Appellant grabbed his daughter and told her to calm down. He offered to take the daughter to Oklahoma with him but his wife said no (R. 1279).

Appellant left the garage area and went to the patio to smoke a cigarette. He heard Tiffany crying and yelling he ran back into the house and saw smoke. He told Tiffany to get out of the house and call the fire department (R. 1280). He tried the garage door but smoke was billowing out, so he got out the garden hose. He then saw someone come to the premises (R. 1281-1282).

When Mrs. Andrews came to the scene of the fire, he told her about the argument between Carol and Adrienne (R. 1284-1285, 1309). He also told the two surviving children about the fight (R. 1310). Appellant indicated he was upset and crying (R. 1286). When he later went back to the house to clean up he got some keys off of Carol's key ring (R. 1287). During the fire he received some superficial burns when he tried to get into the garage (R. 1291). Only a few minutes elapsed from the time he left the garage to his first indication of a fire (R. 1303). Appellant stated he did not know of any keys to the burglar bar gate on the rear door of the garage (R. 1308).

Although the laundry was kept in the garage area, Appellant indicated he did not see any towels or rags and for this reason he gave his wife his shirt (R. 1313). Although there was a phone on the wall in the kitchen, he asked his daughter

to call the fire department because he wanted her out of the house and he never really thought about the phone being there (R. 1314-1315). Earlier the morning of the fire he had sent the children out of the room while he talked with the wife; however, he could not specifically remember why he asked them to leave the room (R. 1317). On cross-examination Appellant also indicated that the key taken from his key-ring by his father-in-law was the same key he had taken from his wife's key ring (R. 1325).

Appellant agreed that he had never seen his daughter strike his wife prior to this incident (R. 1329). They had done the normal mother/daughter things together. Appellant indicated he had no reason to keep the hammer and that was why he threw it away (R. 1333). He further indicated that he did not however, throw any other things over the fence (R. 1333-1334). Appellant indicated his daughter was mean and violent when she was mad (R. 1350).

Defense counsel wanted to call as a witness Dr. Sidney Merin, a psychologist. He wanted to call him to testify concerning a psychological evaluation done of Appellant. His testimony was proffered, and it was essentially that Appellant had a very toned down personality and he did not outwardly show signs of stress and anxiety (R. 1360-1392).

At the conclusion of all the evidence defense counsel again moved for a judgment of acquittal which was denied (R. 1398-1399).

During the penalty phase of the trial, the defense presented two (2) witnesses. Charles Spresser testified he knew Appellant from 1979 as an associate at FAA (R. 1649). He stated Appellant was well thought of throughout the region (R. 1650). Appellant's nephew, Buddy Powell, also testified (R. 1652). Powell testified Appellant's father died when Appellant was nine years old and his mother's source of income was Social Security (R. 1653). Presently, Appellant's mother is confined to a nursing home with hardening of the arteries, arthritis and heart problems (R. 1653).

ARGUMENT

ISSUE I

WHETHER THE FIRE RESULTING FROM THE FIRST DEGREE ARSON OF WHICH APPELLANT WAS CONVICTED CREATED A GREAT RISK OF DEATH TO MANY PERSONS. (As stated by Appellant).

Section 921.141(5)(c), Florida Statutes, provides the following as a possible aggravating circumstance in capital murder cases:

> (c) The defendant knowingly created a great risk of death to many persons.

This Court in Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979) defined this circumstance to mean more than a mere possibility but a likelihood or high probability of death to many persons. This definition was reaffirmed in Lusk v. State, 446 So.2d 1038, 1042 (Fla. 1984).

More particularly, in King v. State, 390 So.2d 315, 320 (Fla. 1980) this Court held the offense of arson in connection with the murder satisfied this statutory aggravating circumstance. The circumstance was found despite the fact that no one other than the murder victim was in the house. The Court held:

> ...when the appellant intentionally set fire to the house, he should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call. (emphasis added).

Accord Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981) wherein the defendant set fire to the victim's bed, and there were six

elderly people asleep in the building in which the victim's condominium was located. In Delap v. State, 440 So.2d 1242, 1256(Fla. 1983) this circumstance was found to exist where the defendant was struggling with the victim causing him to drive erratically on the highway.

The matter sub judice is both factually and legally similar to King and Welty. Here, Appellant set his garage afire while the two murder victims, his wife and older daughter, were there. In addition he and a younger daughter were in the house. While the fire was still raging, at least five (5) other persons were within close proximity to the fire. Prior to the arrival of the fire department, Randal Hierlmeier attempted rescue by breaking the window on the garage door and helping to pry open the burglar bars (R. 532-533). Also present during this rescue attempt were Robert Blume, William Corso, William Browne and Randy Castro.

Thus, it is abundantly clear from the facts of this case that at least seven (7) persons were in danger from this fire. Based on this Court's interpretation of this aggravating circumstance, it was highly probable that there was a great risk of harm to these persons and others. King v. State, supra, and Welty v. State, supra.

ISSUE II

WHETHER THE TRIAL COURT ERRONEOUSLY GAVE A FELONY MURDER JURY INSTRUCTION DURING THE PENALTY PHASE OF APPELLANT'S TRIAL. (As stated by Appellant).

and

ISSUE III

WHETHER THE TRIAL JUDGE ERRED IN FINDING THAT THE CAPITAL CRIME WAS COMMITTED WHILE APPELLANT WAS COMMITTING AN ARSON. (As stated by Appellant).

Both of these issues concern whether or not the capital murder of Adrienne Way was committed during the felony of arson. For the sake of brevity and clarity these issues will be argued together in this brief.

Appellee respectfully submits Appellant's entire argument and thus his conclusion is based on two erroneous premises. Appellant is saying that in order for the court to find or the jury be instructed on the aggravating circumstance enunciated under Section 921.141(5)(d), Florida Statutes, the other felony, in this instance the arson, must be the cause of death. Secondly, he incorrectly names an instruction on this circumstance a felony murder instruction.

Section 921.141(5)(d) provides:

> 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 any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

Appellant was charged with not only the first degree murder of his daughter, but also first degree arson in the burning of his residence (R. 13-14) (R. 99-100). The trial judge said:

> A capital felony of murder in the first degree was committed while the defendant engaged in the crime of arson. There was a causal relation between the felony of arson and the murder in the first degree. It was all part of the res gestae of the felonious conduct to conceal and/or complete the murder in the first degree (R. 119).

There can be no doubt that Appellant committed an arson during the same criminal episode in which the murder was committed.

An analysis of some of the cases wherein this Court has upheld the Court's finding Section 921.141(5)(d) as an aggravating factor demonstrates the other committed felony need not be the cause of death. In O'Callaghan v. State, 429 So.2d 691, 696 (Fla. 1983) this Court upheld a finding that the capital murder was committed while the defendant was engaged in a kidnapping. The murder victim was forced from the public area of a bar to the kitchen, where he was severely beaten. He was taken while unconscious to an isolated area and shot twice.

In Quince v. State, 414 So.2d 185 (Fla. 1982) the finding of murder during the commission of a rape was sustained on the following facts. An eighty-two year old woman was found dead in

her bedroom with bruises on her forearm and under her ear. There were also a small abrasion on her pelvis and lacerations on her head severe enough to cause death. The victim had been sexually assaulted while alive; however, it could not be determined if she was conscious. The cause of death was strangulation.

The defendant in Adams v. State, 412 So.2d 850, 854 (Fla. 1982) offered his eight year old victim (he knew the child) a ride home from school. He started toward the victim's home, then turned toward a shopping center. Additionally, the defendant admitted he tried to rape the victim but couldn't. The cause of death was strangulation. Under these facts this Court said there was sufficient evidence of a capital felony committed during the commission or attempted commission of rape or kidnapping.

And in Scott v. State, 411 So.2d 866, 867 (Fla. 1982) the other felony committed was robbery and/or burglary. The victim's nude body was found at his residence. His hands and feet were tightly bound, and he had been brutally beaten about his head, chest and arms. The head injuries were the cause of death. The perpetrators rummaged through the victim's house. On the same night, the killers went to the victim's flower shop and took the gold that was there.

In none of the above-cited cases was the death of the victim directly attributable to or caused by commission of one of the enumerated felonies. All of these cases demonstrated the felony committed or attempted by the respective defendants and found as an aggravating circumstance were committed during the criminal episode wherein the capital murder occurred.

There is no doubt, even from the facts indicated in Appellant's brief, that the capital murder of Adrienne Way occurred during the same criminal episode as the first degree arson. Therefore, the trial court properly instructed the jury and found as an aggravating circumstance that the capital murder was committed during the perpetration of an arson.

ISSUE IV

WHETHER THE TRIAL COURT ERR-
ONEOUSLY INSTRUCTED THE JURY
THAT IT COULD CONSIDER WHETHER
APPELLANT'S CAPITAL CRIME WAS
ESPECIALLY HEINOUS, ATROCIOUS
OR CRUEL. (As stated by Appellant).

and

ISSUE V

WHETHER THE TRIAL JUDGE ERRED
IN FINDING THAT THE CAPITAL
CRIME WAS ESPECIALLY HEINOUS,
ATROCIOUS AND CRUEL. (As
stated by Appellant).

These two issues concern whether or not there was sufficient evidence to support a finding that the capital felony was especially heinous, atrocious, or cruel. Section 921.141 (5)(h), Florida Statutes. To avoid repetition, the two issues will be argued together in this brief.

During final argument in the penalty phase of the trial, the prosecutor described the heinous, atrocious or cruel aspect of this case as follows:

> Recall the testimony of Dr. Charles Diggs. There were two blows to Adrienne's head. One blow, the hammer went right into her brain. The other blow, the higher blow on her head, Dr. Diggs told you could have caused a great deal of pain, could have knocked her down to the ground, she could have been dazed, in pain, on the ground as this man rammed the head of that hammer into her brain with that savage second blow.

> And after that, after that pain, ladies and gentelemen, that she suffered, as she was heaving her last breath, in pain, he burned her. He doused her with gasoline and he burned her.
>
> You recall the testimony of Randall Hierlmeier as he looked under that garage door at the body near the car, the body that was of Adrienne Way, he saw her engulfed in flames, struggling to get up and then collapsing. Collapsing to struggle no more. There was no doubt that this killing was especially heinous, atrocious and cruel. (R. 1658-1659).

Additionally, Tiffany Way testified she heard Adrienne screaming and crying shortly after she was called to the garage (R. 839-841). See trial court's sentencing order (R. 119-121).

In State v. Dixon, 283 So.2d 1 (Fla. 1973) and its progenies this Court defined heinous to mean "extremely wicked or shockingly evil"; atrocious to mean "wicked and vile"; and cruel to mean "infliction of a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." Accord Maggard v. State, 399 So.2d 973,977 (Fla. 1981). Appellee submits the above description of Adrienne's death demonstrates the applicability of this aggravating factor to this case.

Even in situations where there is a single stab wound or gunshot wound, if there exists additional acts by the defendant, the murder could be found to be heinous. See Harvard v. State, 414 So.2d 1032 (Fla. 1982) and Breedlove v. State, 413 So.2d 1 (Fla. 1982). The victim in Harvard was the former wife of the defendant; the death was almost instantaneous from a gunshot wound. However, the defendant's acts of lying in wait and stalking her

added to his previous harassment of her was found to be sufficient "additional acts" to justify a finding of heinous, atrocious or cruel. This aggravating factor was found in Breedlove where the victim was attacked while asleep and death resulted from a single stab wound. The victim did not die immediately and suffered considerable pain. See also Mason v. State, 438 So.2d 374, 379 (Fla. 1983).

It has also been held that fear and emotional strain preceding a victim's death, even where death is almost instantaneous, may be considered in determining heinous, atrocious or cruel. Adams v. State, supra, at 857 and Francois v. State, 407 So.2d 885 (Fla. 1981). In Adams an eight year old girl was screaming while being strangled by an adult man. And in Francois the court considered the mental anguish suffered by the victims as they waited for their "executions".

The circumstances of the capital murder in Welty v. State, supra, at 1164 were also found to be heinous. The defendant therein picked up a hitch-hiker and accompanied him to his condominium to engage in homosexual activities. After sleeping with the victim for several hours, Welty left, taking the victim's stero and car. He returned to the condo with one of his roommates to steal other items. Once there he struck the decedent several time in the neck and set his bed on fire.

Sub judice, Appellant calls his unsuspecting victim into the family garage. He strikes his screaming daughter twice with a blunt instrument. Appellant pours gasoline on her and sets

her afire, and he leaves the area. Minutes later the victim is still screaming and struggling to get out of the garage. This murder was heinous, atrocious or cruel. State v. Dixon, supra.

ISSUE VI

WHETHER THE TRIAL JUDGE ERRED IN EXCLUDING THE TESTIMONY OF APPELLANT'S EXPERT CLINICAL PSYCHOLOGIST. (As stated by Appellant).

Appellant's argument that he should have been allowed to call a psychologist to testify that he had a low-keyed personality is without merit. Section 90.702, Florida Statutes provides:

> Section 90.702. Testimony by experts
> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Both the statutory and case law allows expert testimony when the subject is beyond the common understanding of the average layman. Sea Fresh Frozen Products, Inc. v. Abdin, 411 So.2d 218 (Fla. 5th DCA 1982); Johnson v. State, 393 So.2d 1069 (Fla. 1980)and Buchman v. Seaboard Coast Line R. Co., 381 So.2d 229 (Fla. 1980). Appellee submits no specialized knowledge was needed in this case to assist the trier of fact to determine any issue.

Several witnesses for the State and the defense testified concerning their observations of Appellant's apparent emotional

state at the time of the fire. Some witnesses stated he was calm, while others opined he was emotionally upset. Randal Hierlmeier testified Appellant was very calm (R. 526). On the other hand, William Browne said Appellant was upset and anxious (R. 553). Robert Blume said Appellant was nervous, so forth (R. 577-578). Yet, William Corso said he was somewhat calm and subdued (R. 585).

One witness, Randy Castro, said Appellant appeared to be a bystander (R. 612-613). However, Michael Tumbleson, a witness with the Fire Department who had observed people at a number of fires, opined Appellant did not act any differently from other people in the same type situation (R. 618). Although Kevin Nykanen testified Appellant did not appear overly upset, he later stated on cross-examination that Appellant appeared glassy-eyed possibly consistent with shock (R. 635). Rosalyn Staunko characterized Appellant as being calm and quiet (R. 642).

Mr. Wayne Mayo, the person Appellant told to call the Fire Department, said Appellant appeared calm (R. 876-877). Contrarily, Ruth Rice testified Appellant was calling for help like he really meant it; she also said Appellant had tears in his eyes and felt very bad (R. 1121-1123). The father-in-law stated Appellant appeared mildly upset and did not give the appearance of a bereaved husband (R. 1049-1050). However, he admitted he said on deposition Appellant was dumbstruck, amazed, upset, in mild shock (R. 1050).

The son, a witness for the state, testified his father appeared upset (R. 1101). Mr. William Dugan, from the FAA, said Appellant was emotional and crying when he told the witness of the deaths of his wife and daughter (R. 1137). Joseph Dunville testified Appellant was a calm person who took everything in stride (R. 1231). Appellant himself testified he was upset and crying when he related events to his in-laws and children (R. 1286).

Thus, it is readily apparent the jury heard a number of accounts of Appellant's emotional reactions to the fire and the deaths. Unlike the battered wife syndrome in Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982) and the Indian Culture evidence in the case from Washington State, observed emotional reactions can be understoody by the average layman. The average person can understand that because each person is a unique individual, reactions to a similar set of circumstances can widely vary. How many of us have told a loved one or friend during a tragic situation to let themselves cry, etc. to vent pent-up emotions?

The trial court has broad discretion to determine whether expert testimony should be allowed into evidence; that decision will not be disturbed on appeal absent a clear showing of error. Rodriques v. State, 413 So.2d 1303 (Fla. 3rd DCA 1982); Johnson v. State, supra, and Williams v. State, 397 So.2d 1049 (Fla. 4th DCA 1981). Appellant has not demonstrated an abuse of discretion by the trial court's exclusion of the psychologist's testimony.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR SUMMARY JUDGMENT OF ACQUITTAL (As stated by Appellant).

When a defendant moves for a judgment of acquittal, he admits all facts in evidence and every reasonable inferance therefrom which is favorable to the state. Knight v. State, 392 So.2d 337 (Fla. 3rd DCA 1981); Rodriquez v. State, 379 So.2d 657 (Fla. 3rd DCA 1980); and Smith v. State, 320 So.2d 420 (Fla. 2d DCA 1975). A jury verdict will not be disturbed on appeal if there is any evidence from which all of the elements of the crime may legally have been found or inferred. Smith v. State, 63 So.2d 138 (Fla. 1913).

Appellant's argument is essentially that the State's circumstantial evidence does not exclude every reasonable hypothesis of innocence. Appellee submits the trier of fact was under no compulsion to accept Appellant's version of events since the circumstances indicated that version was false. McArthur v. State, 351 So.2d 972 (Fla. 1977).

The hypothesis of innocence espoused by the Appellant was the mother and daughter, in mutual combat, beat each other over the head, and the mother either intentionally or accidentally set the garage on fire. Appellant's story of a fight between the mother and daughter, while initially corroborated by Tiffany and Fred, Jr., was unsupported. Tiffany originally told the de-

tectives she heard her mother and sister arguing, but at trial she stated this was what her father, Appellant, had told her (R. 845-846). All she really heard was her sister screaming; she never heard an argument at all (R. 846-854). She never heard her mother say anything after Adrienne left the bedroom; she was pretty sure the screams were Adrienne's (R. 873).

Appellee further submits the evidence adduced by the State together with reasonable inferences therefrom formed a web of truth identifying Appellant as the murder. The State produced evidence that Carol Way was struck twelve times on the head with a blunt object (R. 769). Any one of these wounds could have caused unconsciousness and was potentially lethal (R. 775-776). There were two blunt trauma wounds on the head of the daughter (R. 792). Either one of these wounds could have resulted in death (R. 799-801). Dr. Diggs, the Medical Examiner, testified these wounds were probably not made in mutual combat (R. 804-805).

The wounds to the victims' heads were consistent with having been inflicted with a hammer (R. 769, 793-794). Fred Way, Jr., testified on the evening of the fire and murders, he, his father and grandfather went to the house at 8030 Jackson Spring Road to clean up and secure the house. He saw his father throw a hammer over the fence (R. 1083-1084). That hammer was later found by Detective William Davis of the Sheriff's Office (R. 930-932). The hammer was tested for blood and showed positive (R. 938, 986-987, 1001). Although the test for human blood was negative, the test could have been affected by the heat from the fire and

the hammer being exposed to weather for several days (R. 1001).

When the first person arrived on the scene, Appellant was standing at the front of the garage (R. 525). Appellant said there was no one in the house, but he did not respond when asked about persons in the garage (R. 527). Only after a scream was heard did Appellant state his daughter was in the garage (R. 527). After an attempt to get into the garage from the front proved futile, Appellant said he did not have a key to the back door of the garage. He (Appellant) said the owner never gave them one (R. 531-532). The door was opened only after the emergency medical people arrived and used a crowbar (R. 533, 551-552, 578, 586).

The owner of the house stated he specifically showed Appellant the key for that door (R. 564). Both the owner and a neighbor had seen that door open since the Ways had moved in (R. 565-566, 573-574). The son also testified he had seen his father open the garage burglar gate (R. 1072). Appellant's father-in-law gave the police three keys that fit the garage burglar bar gate. Two of the keys were taken from a jewelry box containing Appellant's watch (R. 1043-1044). The other key was taken from the keyring Appellant gave his father-in-law when he was arrested (R. 1044).

The state introduced into evidence the shirt Appellant had worn on the day of the murders and fire. This shirt was tested for blood and showed positive (R. 987). William Myers testified an accelerant came into contact with at least one of

the victims (R. 697). The chemist, Ismail Mami, stated the clothing of both victims contained components of gasoline (R. 755).

There was some testimony of arguments between Appellant and his wife (R. 831, 1069). The mother had threatened to leave the father (R. 832-833, 1071). Carol Way went to the Women's Survival Center (R. 1125).

The defense, of course, attempted to rebut some of the evidence, especially with the testimony of Dr. William Gibson. Dr. Gibson, a pathologist, testified the mother and daughter could have injured each other in mutual combat (R. 1177). However, on cross-examination he conceded the most severe wound on each would have to have been inflicted simultaneously in a mutual combat situation (R. 1198-1199). He further conceded it was possible the wounds were inflicted by a third party (R. 1202).

Appellant wanted the jury to believe that after seeing his daughter strike the mother, he calmly left the two of them arguing while he changed clothes. During the few minutes that elapsed between the time he left the garage and saw the fire, the victims literally beat each other senseless, doused each other with gasoline, doused the boxes in the northwest corner of the garage with gasoline and started a fire.

Under our system of jurisprudence the trier of fact, in this instance, the jury, is the sole arbiter of believeability and credibility of witnesses. State v. Smith, 249 So.2d 16 (Fla. 1971). Conflicts in testimony are left to the jury to re-

solve, and they can accept or reject any testimony. Appellant's version of events was rejected as wholly incredible, given the totality of the other evidence.

In reviewing sufficiency of the evidence the court in Tibbs v. State, 397 So.2d 1120 (Fla. 1981) said:

> As a general proposition an appellate court should not retry a case or re-weigh conflicting evidence submitted to a jury or other trier of fact. Rather the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the virdict on appeal. There is substantial competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal. (text at p. 1123).

There was sufficient competent evidence from which the jury could find all the elements of first degree murder and find Appellant committed that murder.

ISSUE VIII

WHETHER THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD CONSIDER WHETHER APPELLANT'S CAPITAL CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. (As stated by Appellant).

and

ISSUE IX

WHETHER THE TRIAL JUDGE ERRED IN FINDING THAT THE CAPITAL CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. (As stated by Appellant).

The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be disturbed unless there is a lack of competent evidence to support such finding. Sireci v. State, 399 So.2d 964 (Fla. 1981) and Lucas v. State, 376 So.2d 1149 (Fla. 1979). The aggravating factor of cold, calculated and premeditated, Section 921.141(5)(i), Florida Statutes, relates to the intent and state of mind of the killer at the time the murder is committed. Combs v. State, 403 So.2d 418 (Fla. 1981).

In Mason v. State, supra, the defendant broke and entered the home of the decedent and armed himself with a knife taken from the kitchen. He proceeded to Ms. Chapman's bedroom

where he stabbed her by lifting his arm up and coming down deliberately and with great force. The victim was not sexually assaulted nor was the premises robbed. There was nothing to indicate the victim in any way provoked the attack. The defendant had no reason to commit the murder. On these facts cold, calculated and premeditated was sustained. Mason v. State, 438 So.2d at 379.

A cold, calculated and premeditated finding was also upheld in Squires v. State, 450 So.2d 208, 212 (Fla. 1984). The victim in Squires was shot once in the shoulder. While he lay on the floor screaming in pain, the defendant shot him four times in the head at close range, not more than two inches. See also O'Callaghan v. State, supra; Hill v. State, 422 So.2d 816 (Fla. 1982) and Jent v. State, 408 So.2d 1024 (Fla. 1981).

Sub judice, Appellant struck the mother in the head twelve times. He then called the daughter into the garage, and immediately hit her twice. Gasoline was deliberately poured over the body and the garage and body set afire. And while the victim was still alive and screaming, Appellant impeded the rescue attempt by saying he did not have a key to the back garage door. Appellant acted in a deliberately cold, calculated and premeditated manner. Combs v. State, supra.

CONCLUSION

Based on the foregoing arguments and citations of authorities, this Court should affirm Appellant's conviction for first degree murder and his sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand delivery to Simon Unterberger, Esquire, 725 East Kennedy Boulevard, Suite 302, The Legal Center, Tampa, Florida 33602, this 27th day of September, 1984.

Of Counsel for Appellee