IN THE SUPREME COURT OF FLORIDA

CROSLEY A. GREEN,

Appellant,

vs. CASE NO. 77,402

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's Statement of the Case, and accepts appellant's Statement of Facts with the following additions and qualifications:

While Hallock was only able to observe Green at the Holder Park scene, she observed him for about four to five minutes (R 2036). When Green first walked behind Flynn she saw his face for about fifteen seconds, and observed his face for another fifteen seconds after she got out of the truck (R 2039, 2041). Hallock observed Green in profile for about sixty seconds while he was tying Flynn's hands behind his back (R 2038).

Green had his gun in Hallock's side as he drove them from Holder Park to the orange grove, except for when he was shifting gears (R 596-98).

According to Hallock, she picked Green's picture out of the lineup in three to four minutes; according to her father, who was also present, it took her about one to two minutes, and according to the police officer present it was a very short time (R 2055, 2080, 2090).

Green's fact that he was not staying at Peterkin's house at the time of the incident (see Initial Brief, p. 14) came from the testimony of Peterkin, who is Green's sister.

Two of the witnesses who saw Green at Holder Park on the night of the incident contacted the police after seeing newspaper coverage (R 1264, 1288).

Randy Arieux of the Brevard County Sheriff's Office looked for Green and spoke with members of his family, but could not

find Green (R 1494). Deputy Ronald Walden, who serves warrants for the Brevard County Sheriff's Office, was looking for Green after the warrant was issued, and checked several places where he thought Green might be (R 1292). Deputy Walden knew where Green lived and looked in his neighborhood, and for three weeks after the crime deputies were looking for Green full time (R 1295). Detective Anthony Bolinger of the Titusville Police Department regularly looked for Green in places where he had been seen before, and also observed other agents actively looking for Green (R 1516-21). Scott Nyquist, a homicide investigator with the Brevard County Sheriff's Office, looked for Green where Green had lived, contacted three of Green's family members, and also went to South Carolina looking for Green (R 1526-26). There was publicity in the newspaper concerning the case and the suspect sought (R 1526).

SUMMARY OF ARGUMENTS

POINT 1: The trial court did not abuse its discretion in admitting evidence of dog scent tracking. A sufficient predicate was laid to support inferences that the trail had been left by the guilty party and that it was Green who was that guilty party. Even if the trial court erred, it was harmless at worst as the verdict could not have been affected.

POINT 2: Issues concerning Hallock's in and out of court identifications of Green are not cognizable since there was no contemporaneous objection when they were presented. Even if cognizable, the claims are without merit. The record supports the trial court's findings that the police procedures in obtaining the out-of-court identification were not unduly suggestive or conducive to mistaken identification and the witness' opportunity to observe provided indicia of reliability.

POINT 3: The trial court did not abuse its discretion in denying Green's motion for a jury view of the scene where there was no showing that the lighting conditions were the same, the lighting conditions were not in dispute, and reasonable jurors could envisage such conditions from the description given.

POINT 4: The trial court properly instructed the jury on flight where there was significantly more evidence of guilt, both direct and circumstantial, than flight standing alone. Further, the evidence of flight was presented without objection so could have been considered in any event, and in light of the other evidence, the instruction on flight, which told the jury nothing more than that flight could be considered, did not affect the verdict.

POINT 5: The trial court properly considered as separate aggravating factors that the murder was committed for pecuniary gain and was committed during the course of a kidnapping. This court has previously approved the finding of both factors. The factors relate to separate aspects of Green's crime and were properly given separate consideration.

POINT 6: The murder of Chip Flynn was especially heinous, atrocious or cruel. The record demonstrates there were additional acts which undoubtedly caused fear and anxiety to the victim, which sets this crime apart from the norm of capital felonies.

POINT 7: The trial court did not err in rejecting the mitigating evidence proffered by Green as it does not extenuate or reduce the degree of his moral culpability for the instant offense, nor does it in any way ameliorate the enormity of his guilt. The trial court properly rejected the mitigating factor that Green was under duress, as Green placed himself in the situation. Even if the trial court erred in failing to find any of these factors in mitigation it would not affect the sentence as little weight could be accorded these factors.

POINT 8: Compared with other cases where the jury has recommended death and the trial court has imposed it, Green's case warrants the death penalty so the sentence is proportional. The cases cited by Green are distinguishable as they involve heated domestic confrontations or substantial mitigating evidence, neither of which is present in the instant case.

POINT 9: This court's construction of heinous, atrocious or comports with constitutional standards.

POINT 1

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE DOG SCENT TRACKING.

Green contends that the trial court erred in admitting evidence of dog scent tracking where an insufficient predicate had been laid. Green does not take issue with the dog's qualifications, but claims that since the evidence could not be tied to him it was irrelevant and thus its admission was erroneous. The record demonstrates that a sufficient predicate was laid and the evidence was properly admitted.

The dog was not, as Green states, simply brought to "an area". Rather, the dog was brought to the first crime scene within several hours of the commission of the crime, and the scene had been secured by the officers and no other pedestrians had entered the scene after the officers' arrival (R 1025). Fresh tracks were observed coming to the scene, and the dog was ordered to track from that point (R 1489, 1330). The dog immediately picked up a scent and began to track (R 1332). The dog followed a continuous track, and never acted as if he had lost the track or was having difficulty following it (R 1334). The dog followed the trail directly to Green's sister, Celestine Peterkin's house (R 1492). There was testimony that Green lived at his sister's house (R 855, 1197), and he had been seen there the afternoon before the murder and the day after the murder (R 858, 1225).

As these facts indicate, there was no hesitation on the dog's part in backtracking the trail that led directly from

Peterkin's house, where Green had been staying, to the crime scene. *See, Tomlinson v. State,* 129 Fla. 658, 176 So. 543 (1937); *Edwards v. State,* 390 So.2d 1239 (Fla. 1st DCA 1980). The fact that the trail led directly to the crime scene, and could not have been made by the victims, supports an inference that it was left by the guilty party. *See, Murray v. State,* 180 Ga.App. 493, 349 S.E.2d 490 (1986). Likewise, the fact that Green had been at Peterkin's house supports an inference that the track was made by him. *Id.; see also, People v. Malgren,* 139 Cal.App.3d 234, 188 Cal.Rptr. 569 (1st District 1983); *People v. Harper,* 43 Mich.App. 500, 204 N.W.2d 263 (1972). Thus, the trial court properly admitted the dog track evidence.

Even if this court determines that it was error to admit the evidence, appellee submits it was harmless at worst. Other evidence of guilt includes an eyewitness identification (R 595), and that witness' description of the clothes Green was wearing that night was the same as the description given by two other people who had seen Green that evening (R 1266, 1289). In fact, those witnesses contacted the police after reading the description or seeing the sketch of the attacker in the paper (R 1264, 1288).[1] Sheila Green testified that Green told her he had "shot a dude" after the man had pulled a gun on him and told the girl to run for help (R 857). In the early morning after the shooting Green stated he had "fucked up" (R 869, 873). Green

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[1] Dale Carlile directly testified to this this, and while Willie Hampton's trial testimony is not crystal clear, it certainly supports such inference, and his statement clearly demonstrates that he contacted the police after seeing the sketch (R 2888-90).

told another person he had shot a man and was "going to disappear" (R 1231), and did. Thus, the evidence of the dog track could not have affected the verdict. *State v. DiGuilio,* 491 So.2d 1129 (1986).

POINT 2

THE TRIAL COURT CORRECTLY DENIED GREEN'S MOTION TO SUPPRESS PHOTOGRAPHIC IDENTIFICATION AND SUBSEQUENT IN-COURT IDENTIFICATION OF HIM BY KIM HALLOCK.

As Green states, counsel objected to the in-court identification and photo lineup. However, the objection (R 1033) did not come until well after Hallock had identified Green (R 725) and testified about the lineup (R 722-24) (and finished testifying altogether), and the lineup had been admitted into evidence (R 788).[2] As such, the issue has not been preserved for appellate review. *Castor v. State,* 365 So.2d 701 (Fla. 1978). *See also, Correll v. State,* 523 So.2d 562 (Fla. 1988) (even where a prior motion *in limine* has been denied, failure to object to collateral crimes evidence at the time it is introduced at trial waives the objection); *Roban v. State,* 384 So.2d 683 (Fla. 4th DCA 1980) (failure to renew objection at trial, even though prior motion to suppress filed, precludes appellate review); *Grant v. State,* 555 So.2d 435 (Fla. 3d DCA 1990) (objection during opening statement does not satisfy requirement of contemporaneous objection when evidence is presented). *Compare, Jackson v. State,* 451 So.2d 458 (Fla. 1984) (objection made during impermissible line of questioning sufficiently timely). Even if this court finds the issue is cognizable, relief is not warranted.

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[2] Counsel specifically stated he had no objection to the lineup, and while he later stated he had a conditional objection on the basis that it may not have been the same lineup, that issue has not been persued (R 788, 790).

The ruling of a trial court on a motion to suppress comes to an appellate court clothed with a presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling. *McNamara v. State,* 357 So.2d 410, 412 (Fla. 1978). Likewise, a trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. *Blanco v. State,* 452 So.2d 520, 523 (Fla. 1984). In denying Green's motion to suppress, the trial court found:

> A. The pretrial photographic identification of the defendant was not obtained by an unnecessarily suggestive procedure.
>
> B. The procedures used by police officers in obtaining a pretrial photographic identification of the defendant were not unnecessarily conducive to mistaken identification and therefore did not constitute a denial of due process of law.
>
> C. The identifying witnesses' opportunity to observe the defendant provided indicia of reliability (footnote omitted).

(R 2649). The record supports the trial court's findings and Green has failed to demonstrate that the trial court abused its discretion in admitting the photographic lineup evidence and subsequent in-court identification.

A suggestive confrontation procedure by itself is not enough to require exclusion of the out-of-court identification. *Grant v. State,* 390 So.2d 341, 343 (Fla. 1980), citing *Manson v. Brathwaite,* 423 U.S. 98, 110, 97 S.Ct. 2243, 2250, 53 L.Ed.2d 140

(1977). The out-of-court identification is admissible, despite its suggestive aspects, if it possesses certain aspects of reliability. *Id.* The appropriate test is twofold:

> (1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification.

Id. The second part of the test need not be addressed where there has not been unnecessarily suggestive procedures utilized in obtaining the out-of-court identification. *Id.* at 344. The factors to be utilized in evaluating the second part include:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 343, quoting, *Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972).

The trial court properly found that the police did not employ unnecessarily suggestive procedures in obtaining Hallock's out-of-court identification, so this court need only address the first step in the analysis. The lineup consists of six same-sized photographs of black males with similar characteristics in similar poses. *See, e.g., Lewis v. State,* 572 So.2d 908 (Fla. 1990). The fact that Green's photograph is darker than the rest does not make it stand out in the sense of waving a red flag in front of

the witness as to which one to choose, particularly where there is no evidence that Hallock's attention was directed to that photograph. *See, Cikora v. Dugger,* 840 F.2d 893 (11th Cir. 1988). Appellee submits that if any of the photographs could be said to stand out in terms of a suspect it would be number five, which is clearly a "mug shot".

Likewise, the fact that Hallock was told that there was a suspect in the lineup does not render the procedure impermissibly suggestive. *Bundy v. State,* 455 So.2d 330 (Fla. 1984); *Cikora, supra.* The fact that there is a suspect in the lineup is inherent in such procedure. Obviously the police are not going to show a witness a lineup that does not contain a suspect. A witness knows that he or she is there to identify a suspect (which is the reason why such lineups cannot be impermissibly suggestive), so telling a witness something she already knows certainly cannot affect anything. Because Green has failed to show that the police used an impermissibly suggestive procedure in obtaining an identification, Hallock's identification testimony was properly admitted. *Bundy, supra.*

Further, the trial court properly determined that the procedure used in this case did not give rise to a substantial likelihood of an irreparable mistaken identification. *Manson v. Braithwaite, supra.*

1. <u>The opportunity to view</u>. Hallock was able to observe Green for four to five minutes while they were at Holder Park (R 2036). When Green first walked behind Chip, Hallock could see his face for about fifteen seconds (R 2041). Green looked at her

while she was seated in the truck and told her to scoot over (R 2011). After Hallock got out of the truck she was able to observe his face for ten to fifteen seconds (R 2039). Hallock could see his profile for about sixty seconds when he was tying Chip (R 2038). Hallock was able to give a physical description, a description of Green's clothing, and was able to assist in putting together a sketch. While it was dark outside, Hallock was able to catch the wallet that Green threw to her and was able to count the money contained in it (R 2015-16). Hallock also testified that when Green looked in the truck the light illuminated him (R 2013-14). Thus, there was sufficient time and light for Hallock to view Green. *See, Bundy, supra.*

2. The degree of attention. Hallock's attention was focused on Green. She watched him for approximately sixty seconds while he tied up Chip. She looked directly at his face on two other occasions. Hallock was also able to give a detailed account of the events, thus indicating that she was paying attention to what was going on.

3. The accuracy of the description. The only discrepancy that Green can point out between his characteristics and Hallock's description is his hair. There is no claim that Green does not possess the other physical characteristics described by Hallock. *See, Bundy, supra; Manson, supra.* Significantly, elsewhere the record demonstrates that two witnesses contacted the police with Green's name as a result of the publicized description given by Hallock, and there is no claim that the hair description played any part in these identifications.

4. The witness' level of certainty. All of the witnesses agreed that Hallock picked Green's photograph out of the lineup in a very short amount of time, with her dad saying from one to two minutes and her saying three to four minutes (R 2055, 2080, 2090). Hallock first stated that she was pretty sure and then she stated that she was positive. She never again hesitated.

5. The time between the crime and the confrontation. Hallock's description was given several hours after the attack and the photo identification was made two days later. This is the same amount of time that passed for the identification in the *Manson* case, and the Court found that this factor was satisfied on that basis.

Under these circumstances, it cannot be said that there is a very substantial likelihood of misidentification. Short of that, such evidence is for the jury to weigh. *Manson, supra. See also, Perez v. State,* 539 So.2d 600 (Fla. 3d DCA 1989). Thus, Hallock's out-of-court identification of Green was admissible, as was her in-court identification based on her ability to observe Green at the crime scene.

Even if the point is preserved and one or both of the identifications were improperly admitted, the verdict would not be affected. *DiGuillo, supra.* Green was at the park the night of the crimes, the description of the clothes he was wearing matched that of the assailant's clothes. Green made admissions to three people, and disappeared. The dog followed a track directly from the crime scene to the house where Green had been staying.

POINT 3

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GREEN'S MOTION FOR A JURY VIEW OF THE SCENE.

Green contends that the denial of his request for a jury view was error. The primary purpose of a view by the jury is to assist it in analyzing and applying the evidence taken at trial. *Rankin v. State,* 143 So.2d 193 (Fla. 1962). As Green recognizes, the decision to grant a jury view is left to the sound discretion of the trial judge. *Bundy v. State,* 471 So.2d 9 (Fla. 1985); *Rankin, supra; Taylor v. State,* 139 Fla. 542, 190 So. 691 (1939). The record demonstrates there was no abuse of discretion in denying a jury view of the scene.

Defense counsel moved the court to allow the jury a viewing of both crime scenes at a time consistent with the time the crimes occurred (R 1622). The purpose was for the jury to see how dark it was out there (R 1622). The trial court noted that there was currently a full moon, and defense counsel noted that at the time of the crime there was a quarter moon (R 1623). The trial court denied the motion, stating that the darkness could not be duplicated (R 1624). The trial court later reiterated its finding, stating that the purpose of the request was to show the relative darkness of the areas involved, and there had been no predicate to show the moon was the same, and there was a substantial likelihood of showing the jury something other than what existed at the time (R 1645-46). Defense counsel moved for a mistrial, and the trial court asked him if he was able to represent that the lighting conditions were the same as at the

time of the crime, and counsel replied that he could not, and there had been additional light poles erected since the time of the crime (R 1647).

Appellee would first point out that there was no dispute in the testimony as to the lighting conditions at the crime scene, and any reasonable juror would be able to envisage such conditions from the description given. *See, Rankin, supra* (where jury view requested of scene of murder at a prison, it would not be sufficiently difficult for a jury of intelligent persons to envisage the stark appointments of the "cage" to require a look at the place, even though there was some disparity in the testimony about its size). Further, there was no showing that the lighting conditions were the same as at the time of the crime, and all statements indicate that it was different. Consequently, the trial court did not abuse its discretion in not assembling the jury at midnight to take a trip to a crime scene which was not shown to be in the same condition as it was on the night of the crime. *Id.; Bundy, supra; Taylor, supra.* Even if the trial court erred, it was harmless at worst in light of all the evidence (see Point 1). *DiGuilio, supra.*

POINT 4

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FLIGHT.

An instruction on flight is an exception to the general rule prohibiting the trial court from commenting on the evidence, and is permitted where there is significantly more evidence against the defendant than flight standing alone. *Whitfield v. State,* 452 So.2d 548 (Fla. 1984). The record in the instant case supports the giving of an instruction on flight. In reviewing this evidence, it must be remembered that while there was an objection to the instruction on flight, there was no objection to the evidence thereof, nor has such the admission of such been raised on appeal. *Compare, Merritt v. State,* 523 So.2d 573 (Fla. 1988) (error in admission of flight evidence compounded by jury instruction on flight).

As to flight, Green's sister Sheila testified that she saw Green the day after the murder at their sister's house, where Green had been staying, and she mentioned to him she had heard a rumor that Green had "shot a dude" (R 855-56, 858). Alan Murray, who knows Green, testified that Green said he had killed a man and was "going to disappear" (R 1231). Randy Arieux of the Brevard County Sheriff's Office looked for Green and spoke with members of his family, but could not find Green (R 1494). Deputy Ronald Walden, who serves warrants for the Brevard County Sheriff's Office, was looking for Green after the warrant was issued, and checked several places where he thought Green might be (R 1292). Deputy Walden knew where Green lived and looked in

his neighborhood, and for three weeks after the crime deputies were looking for Green full time (R 1295). Detective Anthony Bolinger of the Titusville Police Department regularly looked for Green in places where he had been seen before, and also observed other agents actively looking for Green (R 1516-21). Scott Nyquist, a homicide investigator with the Brevard County Sheriff's Office, looked for Green where Green had lived, contacted three of Green's family members, and also went to South Carolina looking for Green (R 1526-26). Nyquist further testified that there was publicity in the newspaper concerning the case and the suspect sought (R 1526).

Other evidence of guilt includes an eyewitness identification (R 595), and the description of the clothes Green was wearing that night given by the eyewitness was the same as the description given by two other people who had seen Green that evening (R 1266, 1289). In fact, these witnesses contacted the police after reading the description of the attacker in the paper (R 1288).[3] Sheila Green testified that Green told her he had "shot a dude" who pulled a gun on him and told the girl to run for help (R 857). In the early morning after the shooting Green stated he had "fucked up" (R 869, 873). Green told another person he had shot a man (R 1231). Green was seen at Peterkin's house at about 3:00 p.m. the afternoon preceding the murder, and

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[3] As noted in Point 1, these witnesses contacted the police after reading the paper, but Willie Hampton's trial testimony is not as clear on this issue as his statement is (R 2888-89).

the dog followed a track from the crime scene to Peterkin's house (R 1225, 1330-35).

On the basis of this record, it is reasonable that a jury could infer such evidence to be evidence of guilt. *Bundy v. State,* 471 So.2d 9 (Fla. 1985). Green was aware that he was the subject of a criminal investigation, there were clear indications that he had in fact fled or was concealing himself, and his flight or concealment was immediately after he was suspected of the crime. *Id; see also, Fenelon v. State,* 575 So.2d 264 (Fla. 1991). Further, there exists in the record significantly more evidence, both direct and circumstantial, than flight standing alone. *Whitfield, supra; Proffitt v. State,* 315 So.2d 461 (Fla. 1975). *Compare, Jackson v. State,* 575 So.2d 1181 (Fla. 1991) (flight instruction improper where the only evidence to tie the defendant to the crime is circumstantial and the evidence of flight is no more consistent with guilt than with innocence).

As stated, there was no objection to the admissibility of the evidence concerning flight, so it could have been considered in any event. It cannot be said that the instruction unduly influenced the jury to conclude that Green fled out of a sense of guilt or to give undue influence to the fact that he left the scene of a crime. *See, Haywood v. State,* 466 So.2d 424 (Fla. 4th DCA 1984). The instruction simply told the jury what flight is and that it is all right, if the jury finds that there was flight, to take that fact into account with all of the other evidence. *Id.* As that court stated:

> Without such an instruction, it seems to us just as likely a jury might find flight where there was none and to give it too much weight as it is that they would not consider flight at all and give it no weight.

Id. at 426. The instruction at issue specifically left to the jury the matter of the weight to be accorded the evidence of flight. *Feimster v. State,* 491 So.2d 321 (Fla. 3d DCA 1986).

The case relied upon by Green, *United States v. Barnhart,* 889 F.2d 1374 (5th Cir. 1989), is distinguishable, because the defendant in that case turned himself in two days after he was notified that a warrant had been issued. Further, in that case the court found that even though the flight instruction was erroneous, it was harmless at worst, since the evidence relied upon to support the instruction was admissible on grounds other than flight, and there was overwhelming evidence of guilt. *Id.* at 1379. Likewise, in the instant case the evidence of flight was presented without objection so could have been considered by the jury in any event, and in light of the other aforementioned evidence there is no possibility that the flight instruction affected the verdict.

POINT 5

THE TRIAL COURT PROPERLY CONSIDERED AS SEPARATE AGGRAVATING FACTORS THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN AND THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A KIDNAPPING.

Green contends that the trial court erred in considering as separate aggravating factors that the murder was committed for pecuniary gain and that the murder was committed during the course of a kidnapping because the indictment alleges that the underlying intent for the kidnapping is to commit a robbery. Green acknowledges that the kidnapping allegation also contains the option that the kidnapping was done with the intent to terrorize, but argues that since there is no jury finding on which theory existed the finding of both aggravating factors must be disapproved. Green further claims that since the jury was not instructed to consider these two aspects as a single aggravating factor its recommendation was tainted. Green's contentions are without merit.

Finding pecuniary gain in aggravation is not error when several felonies, including robbery, have occurred. *Bates v. State,* 465 So.2d 490 (Fla. 1985). This court has previously approved the separate findings of pecuniary gain and during the course of a robbery and kidnapping. *Id.; Bryan v. State,* 533 So.2d 744 (Fla. 1988); *Routly v. State,* 440 So.2d 1257 (Fla. 1983); *Stevens v. State,* 419 So.2d 1058 (Fla. 1982). Green's claim that both factors cannot be considered because there is no jury finding as to which theory of kidnapping it found is without merit since the jury does not have to specify what factors it relied on in making its

recommendation, *Occhicone v. State,* 570 So.2d 902 (Fla. 1990), and the state need not charge and convict of a felony in order for the court to find that the murder was committed during the course of a felony. *Hitchcock v. State,* 578 So.2d 685 (Fla. 1990).

Likewise, Green's reliance on *Cherry v. State,* 544 So.2d 184 (Fla. 1989), is misplaced, as that case is distinguishable. There, this court found that the aggravating factors that the murder was committed during the course of a burglary and was committed for pecuniary gain were based on the same aspect of the criminal episode and should have been considered as a single factor, since the sole purpose of the burglary was pecuniary gain. *Id.* at 187. The evidence in the instant case shows that the offense of kidnapping had broader purpose than simply providing the opportunity for a robbery, and in fact occurred after Green had the victims' money. *Brown v. State,* 473 So.2d 1260 (Fla. 1985). The trial court found:

> After he had the money the defendant ordered Hallock to start the truck. Ignoring pleas from Flynn that Hallock be left behind, the defendant ordered Flynn and Hallock back into the truck...The defendant drove the truck between two and four miles to a citrus grove in North Brevard County, requiring his victims to keep their heads down so as not to see where they were going while holding the pistol to Hallock's side...Upon coming to a stop the defendant got out of the truck and pulled Hallock out through the door telling Flynn to stay in the truck. As he tried to close the door behind them, Flynn blocked the door. Hallock broke away and tried to escape, but the defendant threw her to the ground, and while holding the gun to her head, told her, 'you are a slut, and you'll do what I say or I'll blow your brains out."

(R 2839). On the basis of these facts, the kidnapping factor and the pecuniary gain factor were separate characteristics of Green's crime and were properly given separate consideration. *Brown, supra.*

Since it was proper to give these two factors separate consideration, there was no error in instructing the jury on both. Even if for some reason this court determines that it was improper to give these factors separate consideration, it does not change the weight that would be accorded if only one had been considered. It is well settled, as the trial court recognized (R 2846), that the imposition of the death penalty is a weighing, not a counting process. *Porter v. State,* 564 So.2d 1060 (Fla. 1990). Thus, whether considered as pecuniary gain and kidnapping or simply during the course of two felonies, the weight in favor of the death penalty does not change.

POINT 6

THE MURDER OF CHIP FLYNN WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

When a trial judge, mindful of the applicable standard of proof, finds that an aggravating factor has been established, the finding should not be overturned unless there is a lack of competent, substantial evidence to support it. *Bryan v. State,* 533 So.2d 744 (Fla. 1988); *Swafford v. State,* 533 So.2d 277 (Fla. 1988). In determining whether the heinous, atrocious, or cruel aggravating factor applies, the mind set or mental anguish of the victim is an important consideration. *Harvey v. State,* 529 So.2d 1083 (Fla. 1988). This factor rests not on the actual method of killing but on additional acts setting the crime apart from the norm of capital felonies. *Copeland v. State,* 457 So.2d 1012 (Fla. 1984). This court finds this factor applicable 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 consciousless or pitiless crime that is unnecessarily torturous to the victim, or where the victim agonizes over impending death. *Douglas v. State,* 575 So.2d 165 (Fla. 1991). *See also, State v. Dixon,* 283 So.2d 1 (Fla. 1973). The record in the instant case demonstrates that the capital felony was accompanied by additional acts which set it apart from the norm of capital felonies and that Chip Flynn suffered mental anguish and agony over his impending death, so the trial court properly found that the murder was heinous, atrocious or cruel.

Flynn first encountered Green as he stood outside his truck, and told Green to "hold on", "wait a minute", and "put it down". This action prompted Hallock, who was seated in the truck, to get a gun out of the glove box (R 581). Green then told Flynn to get on his knees, which he did (R 583-84). Green was holding a gun to Flynn's head, and Hallock gave Green five dollars that she had in her purse (R 585). Green looked in the truck, saw the Flynn's shoes, and told Hallock to remove one of the laces, which she did and gave it to him (R 586). Green tied Flynn's hands with the lace, and as he was doing so his gun went off (R 587-90). Green then pulled Flynn's wallet from his pocket, threw it to Hallock and ordered her to count the money in it (R 590-91). Hallock gave Green the $185.00, and Green told her to start the truck (R 592). Flynn told Green to let Hallock go and take him and the truck and the money and do whatever he wanted, but just let Hallock go (R 593). Green then ordered the pair into the truck, and Hallock started to get in but Green pulled her back out and told Flynn to get in first so that Hallock was seated in the middle next to Green (R 594).

Green ordered the pair to keep their heads down and drove to an orange grove, holding a gun in Hallock's side as he drove (R 596-98). Green pulled Hallock out of the truck and Flynn tried to get out but Green told him to stay in the truck (R 599). Hallock pulled away from Green and ran around the truck and got one foot in the passenger door when Green pulled her back out, pushed her to the ground, put the gun to her head and told her that she was a slut and would do what he wanted or he would blow

her brains out (R 615). Flynn, with his hands tied behind his back, shot at Green who let go of Hallock (R 616). Flynn dove out of the truck, Hallock jumped in, locked the door and saw Green firing the gun (R 616). Hallock heard Flynn yell "go" and she drove for help (R 617). She arrived at Flynn's friend's home around 12:30 or 1:00 a.m. and called the police (R 494). Flynn was still alive when the police arrived, and he told them he wanted to go home, but he then stopped breathing and had to be resuscitated, and by the time paramedics arrived at the scene at 1:57 a.m., he was not breathing, had no pulse, and was clinically dead (R 849).

These additional acts by Green, which undoubtedly caused great fear and anxiety to the victim, are what sets this crime apart from the norm of capital felonies and makes it heinous, atrocious, and cruel. Green had already relieved Flynn and Hallock of their money, and the fact that he transported them to another, more isolated location would certainly have indicated to Flynn that something more was going to occur, which is evidenced by his statements to take him and do whatever. The gun had already gone off once, so Flynn knew it was loaded and could well go off again either by accident or design. Flynn also would have suffered anguish over what was going to happen to Hallock, as is evidenced by his statements to let her go, and his anguish no doubt increased after hearing Green call her a slut and tell her she would do what he wanted or he would blow her brains out. Flynn had his hands tied behind his back, and no doubt knew he had to act at that time, but that if his first shot did not hit

his assailant, he would die. Finally, Flynn was left lying in the isolated orange grove, not knowing whether his assailant would return to finish him off or whether help would arrive in time to save his life.

This court has found the factor of heinous atrocious or cruel applicable in similar circumstances where even though death resulted from a gunshot wound, the victim suffered mental anguish before hand. *Farinas v. State,* 569 So.2d 425 (Fla. 1990) (victim's pleas for mercy ignored, fact that victim jumped from car and ran while screaming indicates victim was in frenzied fear for life, after victim paralyzed from waist down with gunshot wound to spine defendant approached her and fired two shots into the back of her head after unjamming the gun three times and victim was conscious while he unjammed gun and was aware of her impending death); *Harvey, supra* (elderly people accosted in home aware of impending deaths because defendants discussed disposing of witnesses and in desperation they ran away but were shot and when not yet dead shot again at point blank range); *Douglas, supra,* (victim driven around, forced to have sexual acts with another in presence of defendant then hit in head with gun and shot); *Koon v. State,* 513 So.2d 1253 (Fla. 1987) (victim subjected to hours of torture before death where accosted by man he had reason to fear, beaten, taken at high speed across state, marched to a swamp and killed); *Mills v. State,* 462 So.2d 1075 (Fla. 1985) (victim knew he would be killed after abductors reached destination and fact that he died almost immediately after an "execution style" shotgun blast did not negate mental anguish suffered beforehand); *Bryan,*

supra (victim kidnapped and held for hours under physical duress and fear for life, transported to open area and marched at gunpoint to creek bank, hit in back of head and killed with shotgun blast to face); *Copeland, supra* (victim's ordeal before being shot three times); *Routly v. State,* 440 So.2d 1257 (Fla. 1983) (victim must have known that defendant had one reason for binding, gagging and kidnapping him, and after arriving at isolated area victim forcibly removed from trunk and shot without slightest mercy-terror felt by victim during ride and immediately precedent to his death is beyond description). Likewise, the evidence in the instant case supports the conclusion of horror and contemplation of serious injury or death. *See also, Sochor v. State,* 16 F.L.W. 299 (Fla. May 2, 1991); *Swafford, supra; Chandler v. State,* 534 So.2d 701 (Fla. 1988); *Preston v. State,* 444 So.2d 939 (Fla. 1984), and cases cited therein.

The cases cited by Green are distinguishable. In *Kampff v. State,* 371 So.2d 1007 (Fla. 1979), *Menendez v. State,* 368 So.2d 1278 (Fla. 1978), *Lewis v. State,* 377 So.2d 640 (Fla. 1979), *Simmons v. State,* 419 So.2d 316 (Fla. 1982), and *Teffeteller v. State,* 439 So.2d 840 (Fla. 1983), there were no additional acts preceding the death or cause of death to set the crime apart. In *Herzog v. State,* 439 So.2d 1372 (Fla. 1983), there was evidence that the victim was under heavy influence of methaqualone previous to her death, had apparently inflicted self-injury, was unconscious when killed and semiconscious at best during the rest of the incident. In *Robinson v. State,* 574 So.2d 108 (Fla. 1991), there was no evidence that the victim labored under the apprehension that she was to be

murdered. In the instant case, it cannot be said with certainty that this is not the kind of killing which the legislature intended to be punished by death, so the trial court's determination should be left undisturbed. *Perry v. State,* 522 So.2d 817, 819 (Fla. 1988).

Even if this aggravating factor was stricken by this court on direct appeal, appellee submits that it was not error to instruct the jury on it as Green contends. Evidence of this factor was presented at trial, and a trial court is required to instruct on all aggravating and mitigating factors or which evidence is presented. *Stewart v. State,* 558 So.2d 416 (Fla. 1990). The evidence was sufficient to present a jury question on heinous, atrocious or cruel. *Haliburton v. State,* 561 So.2d 248 (Fla. 1990). The jury was not urged to find this factor and could not have found it on the basis of impermissible factors, as was the case in *Jones v. State,* 569 So.2d 1234 (Fla. 1990) and *Omelus v. State,* 16 F.L.W. 455 (Fla. June 13, 1991). The facts are there, they go directly to this factor, and the trial court found that they supported this factor, so it was not error to instruct the jury that such factor could be found.

Even if this court determines that the finding of this factor was error, it was harmless at worst. What remains is three aggravating factors and nothing in mitigation. *See, Young v. State,* 579 So.2d 721 (Fla. 1991); *Robinson, supra; Porter v. State,* 564 So.2d 1060 (Fla. 1990); *Reed v. State,* 560 So.2d 203 (Fla. 1990); *Rivera v. State,* 561 So.2d 536 (Fla. 1989); *Rivera v. State,* 545 So.2d 864 (Fla. 1989); *Hamblen v. State,* 527 So.2d 800 (Fla. 1988); *Rogers*

v. State, 511 So.2d 526 (Fla. 1987). *See also, Clemons v. Mississippi,* 110 S.Ct. 1441 (1990). While the instant crime involves a felony murder, it is not simply a robbery that "got out of hand". *See, Hansbrough v. State,* 509 So.2d 1081 (Fla. 1987). This crime is one of those for which the death penalty is deserved. *Dixon, supra.*

POINT 7

THE TRIAL COURT DID NOT ERR IN REJECTING THE MITIGATION PROFFERED BY GREEN.

Green contends that while the trial court could have given his proffered mitigation little weight, it was not permitted to simply reject it, and its findings are in violation of *Campbell v. State,* 571 So.2d 415 (Fla. 1990). In terms of nonstatutory mitigation, Green presented evidence that several years ago he saved his friend from drowning when they were swimming together; that when Green was a teenager his father killed his mother and committed suicide; and that he has what his sister termed a "loving relationship" with his six-year-old son. Green also argues that the trial court should have found that he acted under extreme duress as it is likely he was provoked into shooting the victim when the victim initiated the gunfire.

In *Campbell, supra,* and *Rogers v. State,* 511 So.2d 526 (Fla. 1987), this court formulated guidelines for findings in regard to mitigating evidence to assist trial courts. *Lucas v. State,* 568 So.2d 18, 23 (Fla. 1990). In *Lucas,* the court stated that in *Campbell* it had noted broad categories of nonstatutory evidence that *may* be valid, but reiterated that "[m]itigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." *Id.* at 23, quoting, *Eutzy v. State,* 458 So.2d 755, 758 (Fla. 1984). This court, as a reviewing and not fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in a particular case, and because each case is unique, determining what evidence might mitigate each

individual defendant's sentence must remain within the trial court's discretion. *Id.* The trial court must first consider whether the facts alleged in mitigation are supported by the evidence, and if so determine whether the established facts are of a kind capable of mitigating the defendant's punishment,[4] then determine whether or not they outweigh the aggravating factors. *Rogers* at 534. The trial court properly determined that the facts before it are not the type capable of mitigating Green's punishment.

The fact that Green once saved his drowning friend, at no apparent risk to himself, does not extenuate or reduce the degree of his moral culpability for the instant murder, *Rogers, supra,* nor does it in any way ameliorate the enormity of his guilt. *Lucas, supra.* While Green may have once saved a friend's life, the fact remains that he took a stranger's, and there is absolutely no correlation between the two. Just as age is not a mitigating factor unless relevant to a defendant's moral and emotional maturity and ability to take responsibility for his own acts, *Eutzy, supra,* neither is the instant evidence, which has no relationship to Green's culpability for the instant murder, mitigating. The testimony establishes Green's character to be no more good than society expects of the average individual. *Zeigler v. State,* 16 F.L.W. 257 (Fla. April 11, 1991).

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[4] These are "factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed."

Likewise, the record does not support a conclusion that the fact that Green's father killed his mother and committed suicide produced any effect on Green relevant to his character, record, or the circumstances of the offense so as to afford some basis for reducing a sentence of death. *Rogers, supra* at 535. The record demonstrates that this incident occurred while Green was a teenager (he was 31 at the time of the instant offense), serving time for an offense committed up in New York, prior to which he had been living with his grandfather in New York (R 2224-25). Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. *Sochor v. State,* 16 F.L.W. 297 (Fla. May 2, 1991) (no abuse of discretion in finding that testimony related to defendant's physical abuse by father, financial support of family when father unable to work, alcohol problems, violent temper and mental instability did not rise to the level of a mitigating circumstance). *See also, Valle v. State,* 16 F.L.W. 303 (Fla. May 2, 1991) (no error in judge's findings that testimony about defendant's lack of love and attention by his parents, discipline by father, life during teen years and high school were not relevant mitigating circumstances). Likewise, Green has failed to demonstrate that the trial court abused its discretion in rejecting this evidence as a mitigating factor. For the same reasons, the trial court did not abuse its discretion in finding that Green's relationship with his son did not mitigate the instant offense.

The trial court also properly rejected the mitigating factor that Green acted under duress. Just as a claim of duress

will not afford a valid excuse when a defendant has recklessly or negligently placed himself in a situation in which it was probable that he would subject himself to duress, *United States v. Blanco,* 754 F.2d 940 (11th Cir. 1985), it should not mitigate a crime which resulted from a situation created by the defendant's intentional acts. The victim in no way instigated this crime and was murdered as he tried to defend his girlfriend and save himself from further harm, and Green should not benefit from the course of events he initiated. *See also, Wilson v. State,* 436 So.2d 908 (Fla. 1983) (not error for court to reject factor that victim participated in the incident by having brought a gun into the room and participating in fight with defendant where victim did not instigate criminal episode and was murdered as he tried to defend his wife from defendant's attack).

Even if the trial court erred in failing to find any of the foregoing in mitigation, it certainly did not commit reversible error. Under Green's reasoning, the trial court was required to find these factors, but could give them little weight. Appellee submits that at best, very "little weight" is all they should be accorded, and it is far outweighed by the four applicable aggravating factors. There is no possibility of a different sentence. *Rogers, supra.*

POINT 8

THE DEATH SENTENCE IS PROPORTIONAL.

Proportionality review is not a comparison between the number of aggravating and mitigating circumstances, but is a thoughtful, deliberate process of considering the totality of circumstances in a case and comparing it with others. *Porter v. State*, 564 So.2d 1060 (Fla. 1990). Green asserts that his death sentence is proportionally unwarranted because there exists but two valid aggravating circumstances and there also exists valid mitigation. As demonstrated in the previous three points, there are four valid aggravating factors and nothing in mitigation.

Compared with other cases where the jury has recommended and the trial court has imposed a death sentence Green's case warrants the death penalty. *See, Young v. State*, 579 So.2d 721 (Fla. 1991) (victim shot after catching defendant in process of burglarizing car-during a burglary, pecuniary gain, and avoid arrest remain after cold, calculated and premeditated stricken, little in mitigation); *Carter v. State*, 576 So.2d 1291 (Fla. 1989) (grocery store clerks shot by borderline mentally retarded defendant with deprived childhood-during a robbery, prior felony and under sentence of imprisonment far outweigh the mitigation); *Freeman v. State*, 563 So.2d 73 (Fla. 1990) (two aggravating factors and noncompelling mitigation); *Brown v. State*, 565 So.2d 304 (Fla. 1990) (three valid aggravating factors are not overcome by the mitigation); *Hamblen v. State*, 527 So.2d 800 (Fla. 1988) (victim died from single gunshot wound during robbery-prior felony and during a robbery); *Diaz v. State*, 513 So.2d 1045 (Fla. 1987)

(shooting during a robbery-under sentence of imprisonment, prior felony, during a kidnapping and pecuniary gain); *Jackson v. State,* 502 So.2d 409 (Fla. 1986) (victim shot during a robbery-during a robbery and prior conviction remain after striking avoid arrest and heinous, atrocious or cruel stricken, against no mitigation); *Blanco v. State,* 452 So.2d 520 (Fla. 1984) (victim shot during a burglary after a scuffle-two valid aggravating factors remain after striking heinous, atrocious or cruel and cold, calculated and premeditated, against no mitigation).

Further, the cases Green relies on are distinguishable. *Blakely v. State,* 561 So.2d 560 (Fla. 1990), *Farinas v. State,* 569 So.2d 425 (Fla. 1990), and *Wilson v. State,* 493 So.2d 1019 (Fla. 1986), all involved heated domestic confrontations. *Livingston v. State,* 565 So.2d 1288 (Fla. 1988) and *Fitzpatrick v. State,* 527 So.2d 809 (Fla. 1988), both involved extensive mitigating factors, none of which are present in the instant case. The death penalty is proportionally warranted.

POINT 9

THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS OR CRUEL IS NOT UNCONSTITUTIONALLY VAGUE.

Green contends that the aggravating factor of heinous, atrocious or cruel is vague and that the limiting construction used by this court both facially and applied is too vague and indefinite to comport with the Eighth and Fourteenth Amendments as set forth in *Maynard v. Cartwright,* 486 U.S. 356 (1988), *Godfrey v. Georgia,* 446 U.S. 420 (1980), and *Shell v. Mississippi,* 111 S.Ct. 313 (1990). Green's claim is without merit. *Smalley v. State,* 546 So.2d 720 (Fla. 1989). In *Smalley,* this court found that its narrowing construction of this aggravating factor had been upheld in *Proffitt v. Florida,* 428 U.S. 242 (1976), and the fact that *Proffitt* is still good law today is apparent from the *Maynard* decision, where the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. *Smalley* at 722. The *Shell* decision does not change this fact, as it was decided on the basis of *Maynard.*

Further, the United States Supreme Court recently upheld the Arizona Supreme Court's construction of this aggravating factor, noting that it was similar to Florida's construction which was approved in *Proffitt. Walton v. Arizona,* 110 S.Ct. 3047, 3057-58 (1990). This clearly indicates that *Proffitt* continues to be good law today, and that this court's construction of the heinous, atrocious or cruel aggravating factor comports with constitutional standards. The trial court expressly set forth in the record the justification for finding such factor, and it is

clear that he was aware of the construction given to it by this court. *See, Sanchez-Velasco v. State,* 570 So.2d 908 (Fla. 1990).

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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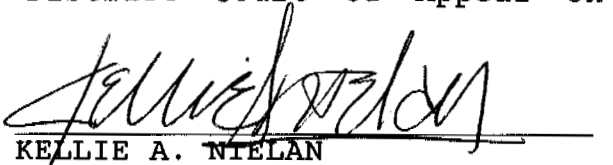
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by hand delivery to Michael S. Becker, Assistant Public Defender, in the Public Defender's in-box at the Fifth District Court of Appeal on this 12th day of August, 1991.



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