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IN THE SUPREME COURT OF FLORIDA

RONALD LEE WILLIAMS,

Appellant,

v. CASE NO. 78,249

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

TABLE OF CITATIONS (cont'd)

TABLE OF CITATIONS (cont'd)

STATEMENT OF CASE AND FACTS

I. Statement of Case

Appellant, Ronald Lee Williams, was indicted by an Escambia County grand jury for first degree murder[1], attempted first degree murder, and kidnapping. The indictment charged appellant with the premeditated murder or felony murder of Derek Devan Hill, Morris Alfonso Douglas, Michael Anthony McCormick, and Mildred Jean Baker; the attempted premeditated murder or felony murder of Amanda Merrill; and six counts of kidnapping as to those individuals and Darlene Crenshaw. The crimes are alleged to have occurred in Escambia County, Florida, on or about September 20, 1988. (R. 1047-1051.) Appellant was tried by jury and found guilty as charged on May 10, 1991 (R. 1275-1278). The jury recommended a life sentence (R. 1280). On June 21, 1991,

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'Four co-defendants were also indicted on the four homicides, to wit: Timothy Robinson, Michael Coleman, Darrell Frazier and Bruce Frazier. Robinson, Coleman and Darrell Frazier were convicted. They received a jury recommended sentence of life and each were sentenced to death by Circuit Judge Nickolas P. Geeker. A notice of appeal to this Court was filed by the co-defendants. The Robinson and Coleman appeals, Case Nos. 74,945 and 74,944 respectively, are still pending.

Jurisdiction was relinquished as to Darrell Frazier, Case No. 74,943. Re was resentenced by Judge Geeker subsequent to appellant's trial. He received a life sentence (Appendix, p. 1) and filed a notice of appeal to the First District Court of Appeal (Docket Nos. 91-2424, 91-2651).

As for co-defendant Bruce Frazier, the State permitted him to plead to the lesser included offense of second degree murder and he was sentenced to a term of fifty (50) years concurrent as to each homicide count (Appendix, p. 5).

Circuit Judge Nickolas P. Geeker adjudged appellant guilty of first degree murder and sentenced him to death (R. 1306-1314). Appellant was also adjudged guilty of attempted first degree murder and sentenced to a life term, and was adjudged guilty of the six kidnapping counts and sentenced to a life term, concurrent as to each and concurrent with the attempted first degree murder sentence. (R. 1294-1304.)

A notice of appeal was filed to this Court on July 1, 1991. (R. 1315.)

II. Facts

A. "Guilt" Phase

The crimes occurred on or about September 20, 1988, in a Pensacola apartment. Darlene Crenshaw (kidnapping victim) and Amanda Merrill (attempted murder/kidnapping victim) and the co-defendants Timothy "Red" Robinson, Michael "Mac George" Coleman, Darrell "Yoge" Frazier, and Bruce "Jit" Frazier testified for the State.

It was undisputed throughout the trial, that appellant was in Miami when the crimes occurred, "that Ronald Williams did not pull the first trigger or stab the first person" (R. 59). Consequently, Appellant was prosecuted as a principal.

To connect appellant to the Pensacola crimes of the four co-defendants, the State introduced evidence of two drive-by shootings committed four months previously in Jacksonville, Florida, by Bruce Frazier and Robinson. It is undisputed that appellant did not participate in those crimes, but the State

maintained that appellant was a principal as to those crimes as well. Appellant timely objected to the admission of the collateral crimes evidence (R. 195-203, 1192-1194).

The State called numerous witnesses to prove appellant's culpability as to the collateral crimes. The material facts pertaining to the collateral crimes will be discussed in more detail in relation to the Williams Rule issue, infra, the second point on appeal.

While several witnesses offered testimony relevant to the charged crimes, the facts and circumstances leading up to and surrounding the crimes were essentially related through the testimony of Crenshaw, Merrill and the Frazier brothers.

Darlene Crenshaw Testimony

On the morning of September 19, 1988, Morris Douglas and Derek Hill went to Crenshaw's house to open a safe they previously left at her house. She saw "some money and some drugs.'' A portion of the money was left with her. The drugs were placed in a duffel bag in her car trunk. (R. 441-444.)

Later that evening, she, Amanda Merrill, Douglas and Hill were at Hill's apartment. At approximately 11:10 p.m. there was a knock at the door. Hill opened the door. Pandemonium followed. Three men, armed with guns, came in. One began to inquire about "his stuff." A fourth armed man brought in Mildred Baker. The intruders pulled out the light cords, the occupants were required to undress, were tied up and made to lay on the floor. (R. 445-456.)

"One of the Frazier guys" seemed to be "doing all the talking." He kept saying he wanted "his stuff." Crenshaw indicated that she knew something and told him about the money. She did not mention the drugs (R. 446-447, 460).

She was allowed to dress, tied up, and carried out to a car. As they proceeded to her house, "the Frazier guy" told her he only wanted "his stuff," that she would not be hurt, and that he would "take care" of the guys. She told him where to find the money and drugs. Once at her house, he obtained the drugs, but needed her assistance to find the money. She was untied and located the money. As he left the house, he asked her to leave with him. She declined. (R. 447-450.)

Amanda **Merrill Testimony**

She recalls Hill opening the door and asking, "What's up?" A male said, "You know what's up." Other males then entered. All had guns. Robinson, whom she had never met before, was pointing a gun and advising they better talk. Hill pled ignorance. Robinson obtained a knife and started stabbing him. Crenshaw ("Tina") raised her hand and said she knew. Crenshaw was taken to a room for questioning. When Bruce Frazier came out and obtained her clothes, Robinson told him to tie Crenshaw **up** "real tight and make sure she don't get lost." (R. 469-474.)

After the Fraziers left with Crenshaw, Robinson commenced physically and verbally abusing Douglas and Hill. The women were raped. (R. 475-476.)

Soon thereafter Merrill heard someone come into the

apartment and say, "We got what we want. Come on, let's go." Another person said, "No, I'm going to do this." She heard a gunshot and saw Coleman come in with a knife. He cut her neck, left and then returned to cut her neck twice. He left again and then someone shot her in the back of the head. (R. 475-478.)

Prior to the attack, she heard "Mildred begging someone to not shoot her. She said don't -- she said, 'I'll tell you what I know. I'll tell you what I know.' And I know it was Red. He said, 'Get down, bitch.'" (R. 485-486.)

Despite her wounds, Ms. Merrill was later able to untie herself and call "911." (R. 478.)

Bruce Frazier Testimony

In February, 1988, Bruce Frazier established in Pensacola a drug organization for appellant. He rented an apartment, where he kept a safe. In September, 1988, Bruce Frazier had an argument with his girlfriend. Afraid she would turn informant, he moved the safe to McCormick's apartment on September 18. (R. 502-510.)

The safe was soon stolen. Bruce Frazier notified appellant in Miami. On September 19, 1988, Robinson, Darrell Frazier and Coleman met Bruce Frazier, McCormick and Baker at the Comfort Inn in Pensacola. When Darrell Frazier et. al. learned the safe was still missing, they decided everyone would go to McCormick's apartment to investigate. (R. 523-524.)

McCormick had a gun at the Comfort Inn. Bruce Frazier, at Robinson's request, borrowed the gun from McCormick. He gave it to Robinson. After they arrived at McCormick's apartment, Bruce

Frazier also borrowed from McCormick a shotgun which he then entrusted to Darrell Frazier. (R. 524-527.)

Robinson decided they should proceed next door to Rill's apartment to investigate further. Hill opened the door and they charged in. Robinson told the occupants to undress and lay on the floor. Robinson started to tear sheets and cords and tying up people. Bruce Frazier grabbed their clothing and put it to the side. A girl jumped up, indicating she had information. She was interviewed in a back room. As she and the Fraziers left the apartment, Robinson told him "to kill the girl" if police got behind them. (R. 527-530.)

They recovered the drugs and money from Crenshaw's house, left her there and returned to Hill's apartment.

Upon returning to the apartment Bruce Frazier went to the back bedroom. He saw a girl laying on the bed with her neck cut. He went to the kitchen and saw Hill on the floor with his neck cut. He also noticed that McCormick had been stabbed in the back. (R. 531.)

Darrell Frazier announced that "we had got the stuff, and then Timothy Robinson mentioned that we got one more thing to take care of before we leave." At that point Coleman shot McCormick in the head. Bruce Frazier went out of the house. Later Darrell Frazier came out. Bruce Frazier "heard a couple more shots" and Robinson and Coleman came out. (R. 532.)

Bruce Frazier left Pensacola for Miami. In Miami at appellant's home, he, Gwen Cochran, Darrell Frazier and appellant

got "high snorting some cocaine" and talked about the homicides. Cochran mentioned that she could get charged with accessory to murder and appellant "told her that he could get the most time out of all of us because he ordered for the people to be killed." (R. 535-537.)

When his brother and two companions arrived in Pensacola, Bruce Frazier thought their purpose was simply to investigate. His intent was that there would be no killing if he got his "stuff" back. He had not been told by the appellant to kill anyone (R. 553-556).

Appellant paid Bruce Frazier $3,000 for what happened in Pensacola. Frazier felt he was shorted and should have been treated better. (R. 538, 557.)

Prior to the trial, Bruce Frazier had been a fugitive from justice for two years and the subject of an intensive manhunt. (R. 559.)

Darrell Frazier Testimony

On the day appellant learned of the theft, appellant Darrell Frazier and Robinson held a conference at appellant's house in Miami. They discussed possible suspects. Appellant allegedly indicated that if McCormick had anything to do with the missing drugs Darrell Frazier and Robinson were to "drop" him. The next morning they held another conference at appellant's house. Coleman was in attendance. Appellant stated that McCormick was a "big guy" and they would have to tie him up to obtain information from him. They also discussed obtaining

McCormick's firearms. (R. 607-616.)

Darrell Frazier, Coleman and Robinson flew to Pensacola. As noted above, they went to the Comfort Inn first and ended up at Rill's apartment. When Hill responded to a knock on the door, Darrell Frazier, armed with a shotgun, went in and pushed Hill out of the way. Coleman and Robinson followed him in. Coleman "told everybody to take their clothes off." Hill asked, "What is wrong?" Darrell Frazier said, "Man, you know what we're here for, man. We want our shit." He pumped the shotgun one time. Whereupon Crenshaw said, "I think I know what you're talking about." She was taken to a back room. (R. 617-618.)

Meanwhile, Robinson, who went in the kitchen to get knives, stabbed Hill. Darrell Frazier told Robinson to calm down, there was too much noise. (R. 619-620.)

Crenshaw told Darrell Frazier "the stuff" was at her house. He asked whether McCormick had anything to do with the matter. She answered affirmatively. Darrell Frazier yelled to Coleman that McCormick was involved too. Coleman ordered McCormick to disrobe also. Coleman stabbed McCormick with a knife and he started bleeding, saying "Please don't kill me. Please don't kill me." (R. 620).

The Frazier brothers took Crenshaw to her house. Darrell Frazier obtained the drugs and money. Be told her that everyone at the apartment would be okay (R. 637).

The Fraziers returned to Hill's apartment. Robinson and Coleman were advised that Crenshaw was not dead. Darrell Frazier

said, "Let's go, man. We got what we came for." Coleman said, "No, man, the nigger told us we got to drop them, man." Robinson also said appellant told them "to drop them." (R. 622-623.)

Darrell Frazier asked Baker for her car keys. Robinson told her, "I ain't going to kill you, where are your keys." She said, "Red, please don't kill me, **please** don't kill me." **Darrell** Frazier went to the kitchen to look for the keys. Be heard a gunshot. He went outside and heard another gunshot. The others came out and they left in two vehicles. (R. 623.)

Robinson, Coleman and Darrell Frazier left for Jacksonville and caught a plane to Miami the next day (R. 623-624). That same day appellant paid Coleman, Robinson and **Darrell** Frazier $9,000 each (R. 631).

B. Penalty Phase

The State presented no additional evidence at the penalty phase of the trial. Appellant called five witnesses to provide mitigation.

Eartha Copeland

Ms. Copeland is 70 years old. She has known Ronald Williams since he was child, She testified that he came from a good family that loved and cared for him. (R. 965, 967.)

Alfred Lee Wright

Mr. Wright has known his cousin, Ronald Williams, for twenty-nine years. They grew up together in Vidalia, Georgia. He testified that Ronald had never been in trouble with the law before moving to Miami. (R. 969.)

John Morris

He is a friend of the Williams family. He has known Ronald Williams for nearly eight years. He testified that Ronald Williams treated him nice and asked that Williams' life be spared. (R. 971-972.)

Shirley Williams

Ronald Williams' sister. McCormick was the father of her children. Williams, she said, is "one of the most kindest, gentle-mannered people that I knows who can never hurt anybody, never. He's never did anything too disruptive in his whole life that I know of, anything at all. He's my kids' favorite uncle. And that's all they talk about." (R. 978-979, 985.)

Louise Williams

Ronald Williams' mother. She testified that he had a normal childhood. Be dropped out of school around the tenth grade and began working with her brother. He was compassionate towards his siblings and helped the family as best he could. Ronald Williams was also charitable towards his neighbors. (R. 992-994.)

In addition to the testimony above, in penalty phase argument to the jury, defense counsel noted that the State had sought and obtained the death penalty for Darrell Frazier, but the reality was that Darrell Frazier and Bruce Frazier would probably not get death. Defense counsel also stressed the fact that appellant was not the triggerman. (R. 1032-1033.)

In overriding the jury's life recommendation, the trial court weighed six aggravating factors. No statutory mitigating

factors were found to exist, but the trial court did find a nonstatutory mitigating factor was established by the evidence, namely, that appellant has been "a loving son to his mother and a good family member to other relatives." (R. 1309.)

On the question of culpability, the trial court found that appellant "without question master-minded and directed that the capital felones be carried out" and should receive the same punishment as Robinson and Coleman (R. 1312.) The trial court did not discuss the culpability of Darrell Frazier, whom he had previously sentenced to death, or the culpability of Bruce Frazier. Also, any disparate treatment the Frazier brothers would receive was not considered by the trial court.

SUMMARY OF ARGUMENT

This appeal presents six issues.

1. Improper judicial commentary

The trial court's duty to maintain the appearance of impartiality in the presence of the jury was breached. Without prior objection by the prosecutor, the trial court intervened during cross-examination of a key State witness. As defense counsel was suggesting that the witness had answered an important question differently at a pre-trial deposition, the trial court "objected" to the defense counsel's impeachment effort. Under the circumstances, the jury could construe the trial court's sua sponte intervention as a commentary on the witness's credibility, to wit: the problem was with defense counsel, the witness was truthfully answering the questions. Therefore, the trial court erred in denying appellant's motion for mistrial on this ground.

2. **Williams Rule**

Proof of two drive-by shootings that occurred in Jacksonville, Florida, in April-May, 1988, over four months prior to the charged crimes, was admitted into evidence. The trial court determined that it was relevant to the issue of identity and that under the federal evidentiary standard, which is less rigorous than the Florida standard, the State's proof of appellant's culpability was sufficient to warrant admission of the collateral crime evidence.

But The modus operandi for the drive-by shootings and the crimes that occurred months later in the Pensacola apartment were very different. Therefore, the collateral crime evidence was irrelevant.

Moreover, because there was no evidence that appellant participated in the drive-by shootings, and because the State failed to prove by clear and convincing evidence, as required by Florida law, that appellant was a principal to the drive-by shootings, appellant's culpability for the drive-by shootings was not established. Consequently, admission of the collateral crime evidence was not warranted.

In addition, the probative value of collateral crime evidence was outweighed by the danger of unfair prejudice.

3. Slappy question

The State peremptorily challenged a minority juror. A facially neutral reason was proffered. In evaluating the credibility of the asserted rationale, the trial court considered only the voir dire of the challenged juror. The voir dire as a whole established two Slappy factors that are not rebutted by the record. Therefore, under Florida law the proffered reason was a mere pretext and the trial court erred in sustaining the peremptory challenge.

The peremptory challenge is invalid under federal law as well since the totality of relevant facts shows that the St te purposefully discriminated against the challenged minority juror.

4. Weighing of unproven aggravating factors

The trial court found six aggravating factors were proven beyond any reasonable doubt. The record demonstrates that four of the aggravating factors were not proven and that due to lack of any proof thereof no reasonable sentencer would have applied those factors. The trial court erred in relying upon those factors in imposing a death sentence.

5. Jury override improper

The jury's life recommendation was reasonable.

The relative culpability and disparate treatment of an accomplice are mitigating factors. The four co-defendants were the actual killers. The trial court did not evaluate the relative culpability of two of the triggermen: 1. Darrell Frazier, who acted as a leader at the crime scene and played a primary role as a planner and as a triggerman; and 2. Bruce Frazier, who procured the firearms used to commit the crimes and fully participated as a triggerman.

The trial court also did not evaluate the very obvious fact that the Frazier brothers would avoid the death penalty via resentencing or plea bargaining, even though each was death eligible under Enmund / Tison standards.

The jury could reasonably conclude that the Frazier brothers were at a minimum equally culpable, and would likely receive disparate treatment. Those mitigating factors, and the mitigating factor that appellant was a good family member, are reasonable grounds for the jury's life recommendation. Reasonable persons may disagreee with the life recommendation, but reason was its polestar.

6. Errors in noncapital sentences

The noncapital sentences are illegal in three respects: The life sentence for the attempted first degree murder conviction exceeds the maximum provided by law; the life sentence for the kidnapping convictions exceeds the legal maximum of a term of years not to exceed life; and the three (3) year minimum mandatory is illegal since appellant did not personally possess a firearm or weapon when the offenses occurred.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A TRIAL BEFORE AN IMPARTIAL TRIBUNAL BY INTERRUPTING, WITHOUT OBJECTION HAVING FIRST BEEN MADE BY THE PROSECUTOR, DEFENSE CROSS-EXAMINATION OF A KEY STATE WITNESS AND AFFIRMING THE WITNESS' CREDIBILITY.

It is a violation of a defendant's right to a trial before an impartial tribunal under the Fourteenth Amendment of the United States Constitution and Aritcle I, Section 9, of the Florida Constitution for a trial court to intimate its opinion as to the credibility of a witness. Raulerson v. State, 102 So.2d 281 (Fla. 1958); Seward v. State, 59 So.2d 529 (Fla. 1952); Leavine v. State, 147 So. 897 (Fla. 1933). Especially in a criminal case the trial court should exercise great caution to avoid suggesting to the jury its opinion of a witness' credibility. Whitfield v. State, 452 So.2d 548, 549 (Fla. 1984). The trial court occupies such a dominant position that its commentary on evidence overshadows the testimony of witnesses and argument of counsel so as to deny the accused his right to an impartial trial. Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959).

> . . . The judge must above all be neutral and his neutrality should be of the tough variety that will not bend or break under stress. He may ask questions to clarify the issues but he should not lean to the prosecution or defense lest it appear that his neutrality is departing from center. The judge's neutrality should be such that even the defendant will feel that his trial was fair. In the trial of a

capital case the judge's attitude or demeanor may speak louder than his words; in fact it may speak so loud that the jury cannot hear what he says.

Williams v. State, 143 So.2d 484 (Fla. 1962).

Darrell Frazier was the State's key witness. He was the only witness present at the Miami conferences in appellant's house prior to the killings. During his cross-examination the judge became prosecutor:

Q. Ronald Williams told you to "get my stuff back," didn't he?

A. Yes, he did.

Q. He never told you to kill anybody, did he?

A. Yes he did. He told us to drop them.

Q. Page 57, lines 9 through 10, take a look at that and see if that refreshes your memory about what he told you.

A. Question, "What did Trick tell you?" **Before we got ready to go -- before we got ready to go --"

Q. Just this right there.

A. Right there? He said, "Yoge, make sure you get my dope back".

Q. Okay. That's the question I posed to you?

THE COURT: No, it wasn't, Mr. Etheridge. That's not the question you posed. You asked him a follow-up question, too.

THE WITNESS: That's right.

MR. ETHERIDGE: What was my follow-up, Your **Honor?**

THE COURT: You asked him if Mr. Williams asked him to kill anybody, and he said -- and he answered --

MR. ETHERIDGE: That was the question, asked him to kill anybody, and he said no, Your Honor. That was the question I followed up on specifically to him.

MR. PATTERSON: Lines 12, 13 and 14, Your Honor.

MR. ETHERIDGE: The State may redirect if they want to, Your honor. I asked him whether he told him to kill anybody.

MR. PATTERSON: Your Honor, I think that's improper impeachment.

THE COURT: Well, you may proceed, pursue it further, Mr. Patterson. As a matter of the fact, members of the jury, why don't you step out just for a minute and let me handle this outside of the jury's presence.

(Jury out)

(R. 646-647, Emphasis supplied.)

The trial court's intervention in the cross-examination, without an objection having first been made by the prosecutor, was error. James v. State, 388 So.2d 35 (Fla. 5th DCA 1980). See also, Wilkerson v. State, 510 So.2d 1253 (Fla. 1st DCA 1987); Tyndall v. State, 234 So.2d 154 (Fla. 4th DCA 1970). Under the totality of the circumstances above, the trial court's rebuke of defense counsel's impeachment effort was the equivalent of expressing an opinion that Darrell Frazier was testifying truthfully and that defense counsel's cross-examination was mere chicanery. Thus, the admonishment could have been interpreted by the jury as commentary on Darrell Frazier's testimony or credibility. See Millett v. State, 460 So.2d 489 (Fla. 1st DCA 1984); Gordon v. State, 449 So.2d 1302 (Fla. 4th DCA 1984); Robinson v. State, 161 So.2d 578 (Fla. 3d DCA 1964).

In Millett the trial court made several comments, in response to defense objections to the prosecutor's questions,

that intimated that the defendant was not being responsive to the prosecutor's questions on cross-examination, The First District held that the exchanges amounted to comments upon the defendant's veractiy and were improper. In this case, the trial court's intervention in cross-examination of a key prosecutorial witness had the same effect. By challenging the fairness of the cross-examination without the prosecutor first having objected, the judicial editorial was that the witness was being responsive, defense counsel was acting improperly.

In Gordon, on redirect of the defendant the following colloquy took place:

> Q. In fact, you have been consistent with what your statement is except for the demonstration?
>
> A. Right.
>
> MRS. BOAGUE: Objection, Your Honor, that's not true.
>
> THE COURT: Not only that, it's very leading. The objection is overruled and it isn't true.

Gordon, at p. 1303. In the case below, the trial court also went beyond ruling upon a prosecutor's objection: No objection was made by the prosecutor. The trial court's sua sponte interruption on behalf of the State of defense counsel's impeachment effort was as much a judicial stamp of approval of the witness's credibility as the commentary in Gordon was a mark of judicial disapproval.

In Robinson the defendant's counsel was cross-examining a state witness when the trial court remarked:

> "The witness Tymes is an honest, poor man, who has

> had a very hard time getting an education. He is not as well educated as we are and for that reason his answers may not appear to be like those of an educated man. He is doing the best he can."

Robinson, at p. 579. The Third District concluded that the commentary amounted to the judge vouching for the witness's character. In the trial below, the judge in effect indirectly vouched for Darrell Frazier's credibility. In the absence of any prosecutorial objections, the judge's critique of defense counsel's questioning strongly suggests that the witness was doing the best he can and that defense counsel's effort to challenge the witness's credibility was off base.

Accordingly, appellant was denied a fair trial under the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution; and it was a fundamental error for the trial court to deny appellant's motion for mistrial on the ground that the court had improperly commented upon the witness's credibility (R. 659).

ISSUE 11

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES OCCURRING IN A DIFFERENT LOCALE APPROXIMATELY FOUR MONTHS PRIOR TO THE CHARGED CRIMES AND ALLEGEDLY INVOLVING APPELLANT.

Section 90.404(2)(a), Florida Statutes codifies the Williams Rule, Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86, and provides:

> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible solely to prove bad character or propensity.

Relevancy is the test of admissibiility of collateral crime evidence. The collateral crime evidence must tend to prove some material fact in issue, for example, motive, intent, knowledge, lack of mistake or identity. Henry v. State, 574 So.2d 73 (Fla. 1991); Heuring v. State, 513 So.2d 122, (Fla. 1987). The standard of relevance is a strict one. Similar fact evidence of a collateral crime must be strikingly similar to and share with the charged offense some unique characteristic or combination of characteristics which sets them apart from other offenses. Heuring v. State, supra. See also State v. Lee, 531 So.2d 133 (Fla. 1988). Mere general similarity of offenses is insufficient where identity is a material issue. Drake v. State, 400 So.2d 1217 (Fla. 1981); McCullough v. State, 390 So.2d 1225 (Fla. 1st DCA 1980); Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979). The evidence must be so similar as to suggest the perpetrator of

the collateral crime was the perpetrator of the charged offense. Buenoano v. State, 527 So.2d 194 (Fla. 1988).

Before admitting collateral crime evidence the trial court must determine whether there is proof of connection between the defendant and the collateral occurrences. Under the federal rule the prosecution need only establish sufficient evidence for a jury to find that the defendant in fact committed the collateral offense. Buddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). But Florida has long required clear and convincing evidence. Reams v. State, 279 So.2d 839 (Fla. 1973); State v. Norris, 108 So.2d 541 (Fla. 1964); Parnell v. State, 218 So.2d 535 (Fla. 3d DCA 1969).

But even if relevant, the collateral crime evidence must be excluded if the danger of unfair prejudice outweighs its probative value. Carr v. State, 578 So.2d 399 (Fla. 1st DCA 1991). Erhardt, Florida Evidence, s. 404.9 (1992 Edition).

The State introduced testimony at trial pertaining to two drive-by shootings that occurred in Jacksonville, Florida, several months prior to the killings in Pensacola. The targets of the drive-by shootings were a Vernon McClendon and a Honey Rose Hurley.

In 1986, McClendon rented to appellant Jacksonville property he owned to be used as a situs for the sale of drugs. He later joined appellant's enterprise. After approximately nine months, McClendon withdrew from the enterprise. Bruce Frazier, who was working for appellant, picked up from McClendon drugs and

drug paraphernalia of appellant. McClendon "hadn't took anything" belonging to appellant. (R. 265-278.)

On April 29, 1988, Honey Rose Hurley, McClendon's girlfriend, was traveling on an interstate in Jacksonville. As she approached a bridge toll plaza a car pulled to the side of her vehicle and someone in the car started to shoot at her. Ms. Hurley could not identify her assailants. (R. 288-296.)

Approximately two weeks later McClendon was shot six times while sitting in a stopped truck at a street intersection in Jacksonville. He does not know who shot him (R. 272-277).

On July 17, 1988, in Miami a police officer noticed a parked automobile. Appellant was in the driver's seat. Darrell Frazier was in the back seat. Frazier's movements in the vehicle caused the officer to order him to exit. The officer found on the rear floorboard a .45 Uzi. Appellant did not claim ownership of the firearm. (R. 307-309.) Darrell Frazier was arrested on a bench warrant and for possession of cocaine and possession of a firearm (R. 309, 602).

The Uzi was the weapon used in the April 29, 1988, attack on Ms. Hurley. It had been purchased at Southside Gun in Jacksonville on April 28, 1991 (R. 283-286, 295-301). According to Bruce Frazier, appellant was present when the Uzi was bought and gave him the purchase money. The gun was bought to "take care of a matter" between McClendon and appellant (R. 539-540).

Bruce Frazier participated in the shootings. On the day of the Hurley incident, Bruce Frazier and Robinson went to

McClendon's house to blow up his truck. They ran out of gas and went to a gas station to get more. When they saw Ms. Hurley they followed her and the gun assault ensued. Frazier notified appellant of the shooting. Appellant allegedly ordered that they shoot McClendon. They did so. (R. 540-543.)

Rufus Williams, the only other witness to implicate appellant in the drive-by shootings, testified that appellant wanted McClendon "dropped" to avoid competition. (R. 692-694.)

For several reasons, the evidence of the Jacksonville shootings was inadmissible.

First, the strict relevancy standard was not met: The modus operandi of the collateral and charged crimes were not so unusual that it is reasonable to conclude that the same person committed both crimes. See Erhardt, Florida Evidence, s. 404.10 (1992 Edition). In Jacksonville, no one was compelled to disrobe, no stabbings occurred, no one was bound with tape or electrical cord, and no throats were slit. Moreover, in Pensacola a single shot to the back of the head, not a fusillade of bullets, occurred. and there was no attempt to torch a motor vehicle. The modus operandi were dissimilar.

Second, even if the crimes involved similar motives, proof of a dissimilar collateral crime, or proof of a collateral crime with superficial similarity, is nothing more than proof of a propensity to commit crimes. See Peek v. State, 488 So.2d 52 (Fla. 1986); State v. Ramos, 579 So.2d 360 (Fla. 4th DCA 1991); Carr v. State, 578 So.2d 398 (Fla. 1st DCA 1991);. The Ramos and

Carr decisions are particularly instructive.

In Ramos the defendant was charged with trafficking in cocaine and conspiracy to traffic in cocaine. An accomplice testified that she met the defendant in a bar five or six months prior to their arrest, that she became hooked on cocaine and sold it for the defendant and another individual. The accomplice further testified that the defendant was the supplier for the undercover drug transaction. The motive for the prior drug sale and the undercover drug transaction was the same, namely, profit. However, the modus operandi were not unique. Therefore, proof that the defendant was the supplier for prior sales showed only a propensity to deal in drugs. Consequently, the Fourth District held that the collateral crime evidence was inadmissible. Similarly, in the trial below, evidence of the drive-by shootings permitted the jury to infer that appellant had a propensity to commit violent crimes and therefore, must have committed the crimes charged as alleged by his accusers.

Collateral crime evidence was admitted in Carr to rebut the defense that the contraband had been planted on the defendant. The district court held:

> In the instant case the trial court admitted evidence of appellant's prior conviction for possession of cocaine for the purpose of showing knowledge of cocaine. Here . . . the real jury issue was appellant's credibility as opposed to that of the state witness who testified against him. Evidence of appellant's prior conviction for possession of cocaine was not related to the charge being tried, and permitted the jury to infer guilt of the present charge on the basis of evidence which suggested appellant has a propensity to commit this kind of crime.

Carr, at p. 400. Although appellant did not testify below, the central issue was the credibility of his accusers. Either the jury believed their testimony or they did not. Accomplice testimony implicating appellant in the drive-by shootings could not bolster accomplice testimony on the issue of identification in the Pensacola kidnappings and murders: Evidence that appellant committed prior crimes involving a different modus operandi does not support the inference that he committed the charged crimes. See Erhardt, Florida Evidence, s. 404.10 (1992 Edition) ("Evidence that the defendant has committed prior crimes, without evidence of a similar modus operandi, does not raise the same inference (of identification).")

The sole purpose of proof of the drive-by shootings was to permit the jury to infer guilt on the basis that appellant was a bad actor, a drug kingpin, in the prosecutor's words, "the boss of bosses" (R. 903), with a propensity for violence.

Furthermore, the probative value of the drive-by shootings was outweighed by its unduly prejudicial nature. The drive-by shootings and Pensacola crimes arose from different matters. The drive-by shootings related to a turf battle that threatened the very existence of the Jacksonville drug operation -- whereas the Pensacola crimes related to stolen contraband that was only a drop in the bucket of the Pensacola drug business, which grossed $50,000 to $60,000 per week. (R. 504.)

Moreover, the probative value of the collateral crime evidence is further diminished by the fact the modus operandi were entirely different and proof of appellant's involvement in

the drive-by shootings consisted only of the suspect testimony of accomplices uncorroborated by physical evidence or the testimony of disinterested parties. Consequently, the collateral crime evidence had little probative value and was unduly prejudicial. Cf. Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974).

In addition, the trial court erred in applying the federal rather than the Florida evidence standard in determining the admissibility of the collateral crimes. (R. 203.) The State's proof of appellant's involvement in the drive-by shootings was neither clear nor convincing.

The only proof of appellant's involvement was the testimony of accomplices and a convicted felon: Bruce Frazier, who literally sweated on the witness stand (R. 552), Darrell Frazier, looking for a way to get off Death Row (R. 555) and Rufus Williams, previously sentenced to fifteen (15) years for drug trafficking, who hoped his testimony would secure him a reduced sentence (R. 709-710). Their testimony may have been sufficient to permit the State to avoid a directed verdict in a hypothetical trial of the collateral crimes. But in the absence of any corroborating physical evidence or disinterested witnesses, their testimony fell short of being clear and convincing. Cf. Dinkens v. State, supra.

In brief, the trial court erred in admitting evidence of the drive-by shootinqs; and appellant was thereby denied his right to a fair trial under the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and the Article I, Section 9, of the Florida Constitution.

ISSUE III

THE TRIAL COURT ERRED IN PERMITTING THE STATE, OVER TIMELY OBJECTION, TO PEREMPTORILY CHALLENGE A JUROR SOLELY ON THE BASIS OF RACE.

Appellant is black. During voir dire the State peremptorily challenged a black juror, Ms. Daisy Rankins:

> MR. PATTERSON: (Ms. Stopler,) (w)ith regard to the death penalty, do you have any personal opposition to the death penalty?
>
> PROSPECTIVE JUROR: I don't know how I feel one way or the other, to tell you the truth.
>
> MR. PATTERSON: You don't know how you feel?
>
> PROSPECTIVE JUROR: No, sir.
>
> MR. PATTERSON: Let me jump right in. You have been listening to us questioning -- asking questions about this and it may be an issue that clearly you don't think about or confront every day, but it's very important that you do so now. It's possible at the conclusion of this trial you'll be called upon to make a decision whether or not the evidence is sufficient in your mind to merit the imposition of the death penalty. Do you think under the appropriate circumstances you would be able to do that?
>
> PROSEPCTIVE JUROR: I could make a decision, yes.
>
> MR. PATTERSON: Pardon me?
>
> PROSPECTIVE JUROR: Yes, sir, I could make a decision.
>
> PROSPECTIVE JUROR: Yes, **sir.**
>
> MR. PATTERSON: Thank you. Ms. Rankins, do you understand the questions I just asked Ms. Stopler?
>
> PROSPECTIVE JUROR: Yes.
>
> MR. PATTERSON: Do you have any different answers? Could you fairly consider the death penalty as an appropriate penalty?
>
> PROSPECTIVE JUROR; Yes, I guess if I have to.

MR. PATTERSON: Well, let me ask it to you, let me make just on a personal, an individual level. Can you imagine a situation where you under the appropriate circumstances could vote to impose the death penalty?

PROSPECTIVE JUROR: Yes, **I** guess so.

THE **COURT:** Pardon me?

PROSPECTIVE JUROR: Yes.

(R. 136-138.)

* * *

MR. **PATTERSON:** I wanted to ask Ms. Whidden one question. **A** minute ago **I** think I was asking Ms. Stopler a question and you were shaking your head. Was that about anything that I was saying?

PROSPECTIVE JUROR: Well, just that you said even though the evidence didn't show that it might have a need for it, that -- the death penalty, and I was thinking well only if the evidence showed.

MR. **PATTERSON:** **I** probably said it wrong. Okay.

(At the bench:

* * *

MR. PATTERSON: Judge, I challenge Ms. Rankins peremptorily.

THE COURT: All right. Since she's black, even though there are three other blacks already seated, let me go ahead and ask you to provide a reason for her being stricken.

MR. PATTERSON: I'm glad you did that, Your Honor, because I'm afraid the record might not adequately reflect her responses on the death penalty. As the Court is aware, when I asked her that, about the death penalty, there was a long pause. She shook her head both ways, is my recollection, both no and up and down. I got the distinct impression that she had great trouble pertaining to the discussion about the death penalty, and for that reason **I** would strike her peremptorily.

MR. **ETHERIDGE:** Your Honor, I would note for the record that she answered affirmatively when asked by

> the Court whether she could follow the law and apply the law to the facts of this case and, therefore, I don't think it's given a Consitution race neutral issue by the State . . .
>
> THE COURT: Mr. Patterson is correct. The manner in which she responded was not only dilatory but equivocal. the responses she ultimately did give were not sufficient under Whitherspoon or any of the following cases to constitute sufficient reason to strike her for cause, but certainly her equivocation on the death penalty issue I feel would be sufficient reason for the Court to want to strike her peremptorily, and I'll, therefore, sustain the strike. So Ms. Rankins --
>
> MR. PATTERSON: Tender, Your Honor.

(R. 142-144, Emphasis supplied.)

It is well established under Florida and federal precedent that the equal protection clauses of the state and federal constitutions preclude a prosecutor from peremptorily challenging a juror in a criminal case **solely** on the basis of race. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Slappy, 522 So.2d 18 (Fla. 1988), cert. den., 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988).

Under **Florida** law, the defense must make a prima facie showing that there has been a strong likelihood that the jurors have been challenged because of their race. If the court makes that finding, the burden shifts to the prosecution to show a valid non-racial reason for the challenge. State v. Neil, 457 **So.2d** 481 **(Fla. 1984)**. Here the need for a prima facie showing was rendered moot by the trial court's directing the prosecutor to offer non-racial reasons for the peremptory challenge and the prosecutor's doing so without objection. Thus, the trial judge only had to determine whether the proffered reasons were

non-racial and not a pretext. Slappy, at p. 22.

In Slappy, at p. 22, this Court noted that the presence of one or more of five factors would tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext. Two of those factors are present in this case.

First, the challenged juror was not questioned as to why she was reluctant. It is only natural for a juror to pause before answering a death penalty question. After all, as the prosecutor noted, it is not a matter a juror normally confronts.

With regard to the black juror's headshaking, as in the case of Ms. Whidden, further questioning may have addressed the prosecutor's concern. Yet there was no follow-up.

Thus, the "prosecutor's own conscious or unconscious racism may (have led) him easily to the conclusion that (the) prospective black juror (was) "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically," Batson v. Kentucky, 90 L.Ed.2d at p. 94 (Marshall, J., concurring).

Second, the reasons proferred by the prosecutor were equally applicable to two unchallenged jurors: The ambivalent Ms. Stopler and Ms. Alvarez, a juror who was extremely equivocal on the death penalty, were not challenged. Asked whether she agreed with her church's position against the death penalty, Ms. Alvarez answered, "Up to now I thought I would disagree with it." (R. 93-94.) Subsequently, and prior to the voir dire of the challenged black juror, the following colloquy occurred:

(At the bench:

THE COURT: Back to you, Mr. Patterson.

MR. PATTERSON: Your Honor, at some point I would like to ask Ms. Alvarez to come up to the bench. **She looks like she is about to burst to say something.**

* * *

(At the bench:

THE COURT: Was there anything else you needed to explain to us maybe a little bit more fully about your feelings? I know you said you had kind of changed your mind after you sat in the box and started thinking about the early questions.

PROSPECTIVE JUROR: **I just wanted to make you aware that I may have some reservations about my -- the death penalty and I don't know whether I could go through with it or not.**

(R. 111-112, Emphasis supplied.) Ms. Alvarez was then questioned at length at the bench and she repeatedly equivocated -- stating six times that she was uncertain as to whether she could impose the death penalty. (R. 111-114.)

Under Florida law, where two unrebutted Slappy factors exist, the state's explanation must be deemed a pretext. Slappy, at p. 23. Thus, the trial court's sustaining the peremptory challenge of the minority juror violated the appellant's right under the Florida Constitution to an impartial trial. Article I, Section 16, Florida Constitution.

Furthermore, the totality of relevant facts shows that the facially valid explanation was a mere pretext for purposeful discrimination. Hence, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution was violated. Hernandez v. New York, 500 **U.S.** __, 111 S.Ct. __, 114 L.Ed.2d 395, 408 (1991); Batson v. Kentucky, supra.

ISSUE IV

THE TRIAL COURT ERRED BY WEIGHING AGGRAVATING CIRCUMSTANCES NOT PROVEN IN SENTENCING APPELLANT TO DEATH.

In sentencing appellant to death, the trial court weighed six (6) statutory aggravating factors. The State failed to prove four of those factors beyond a reasonable doubt.[1]

The trial court found that the killings were committed to avoid or prevent a lawful arrest, Section 921.141(5)(e), F.S. (R. 1309). The State did not argue below for application of this factor. Nevertheless, the trial court concluded that because "the killings of the four victims were without provocation and senseless since the stolen contraband had been recovered . . . the killings occurred to prevent arrest or detection" (R. 1309). There is insufficient evidence in the record to support this aggravating factor.

In Perry v. Smith, 522 So.2d 817 (Fla. 1988), this Court held:

> . . .In applying this factor where the victim is not a law enforcement officer, we have required that there be strong proof of the defendant's motive,

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[1] The first aggravating factor found by the trial court, namely, prior conviction of capital or violent felony, Section 921.141(5)(b), F.S., is supported by the record.

The trial court's second aggravating factor was that the crimes were committed in the commission of a robbery, sexual battery, burglary and kidnapping, Section 921.141(5)(d), F.S. The State did not argue below that robbery, sexual battery and burglary applied in this factor. Appellant's culpability as to those offenses was not proven. However, the matter is moot. The crimes occurred during a kidnapping.

> Riley v. State, 366 So.2d 19 (Fla. 1978), and that it be clearly shown that the dominant or only motive for the murder was the elimination of the witness. Bates v. State, 465 So.2d 490 (Fla. 1985); Oats v. State, 446 So.2d 90 (Fla. 1984). We have also held that the mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest. Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Riley.

See also, Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988); Garron v. State, 528 So.2d 353, 360 (Fla. 1988); Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985); Griffin v. State, 474 So.2d 777, 781 (Fla. 1985). Inasmuch as appellant was in Miami when the murders were committed, it is ludicrous to suggest that he ordered any of the victims killed to avoid identification of himself. There is no record evidence to support this conclusion.

However, this is not to say that the trial court erred in finding that the killings "were without provocation and senseless since the stolen contraband had been recovered." Appellant agrees that the killings were senseless due to the recovery of the stolen property. Indeed, the trial court's finding to that effect meshes perfectly with appellant's defense below, to wit: Appellant sought only to recover his property, no killing was to occur if the property was recovered.

While one may plausibly argue that the actual killers' motive was to avoid arrest or identification, the record shows that the dominant reason for the killings occurring is that Robinson and Coleman went berserk. They stabbed the male victims and raped two women. Although they knew that an eyewitness, Crenshaw, had been released, they were so caught up

in their frenzy of violence they killed impusively. "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection." Doyle v. State, 460 So.2d 353 (Fla. 1984).

Next, the trial court found that since robbery was present in this criminal episode the pecuniary gain factor should be applied (R. 1309), Section 921.141(5)(f), F.S. An essential element of the crime of robbery is the taking of the property of another. Section 812.13(1), F.S. The record clearly shows that the only property appellant sought to obtain was his property; and there is no record evidence that anyone asserted an ownership or custodial interest in the stolen contraband.

Of course, proof of robbery per se does not establish a pecuniary gain motive; the State must prove that a primary motive for the killings was pecuniary gain. Scull v. State, 533 So.2d 1137 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. den., 484 U.S. 1020, 108 S.Ct. 733. The trial court's conclusion that the killings were committed for pecuniary gain is contradicted by its earlier finding that the killings were "senseless since the stolen contraband had been recovered." The killings cannot simultaneously be seen as "senseless" due to recovery of the sought-after-gain and a logical and necessary step to obtain the missing property. The record shows that the trial court was correct in the first instance: The killings were senseless.

The trial court further found that the four killings were especially heinous, atrocious and cruel (R. 1310), Section 921.141(5)(h), F.S.[2]

The State failed to prove beyond a reasonable doubt that appellant knew beforehand that anyone would be disrobed or receive any stab wound, let alone multiple stab wounds. Per Darrell Frazier's testimony, only the use of cords and guns was discussed beforehand with appellant. Moreover, the knives used by the actual killers were obtained from the kitchen at the apartment where the crimes occurred. When Darrell Frazier et. al. arrived in Pensacola their primary concern, insofar as weapons were concerned, was to obtain McCormick's firearms. In fact, it appears that even Darrell Frazier did not previously know anyone would be stripped and that knives would be used. The decision to take such action was apparently made spontaneously at the apartment by Robinson and/or Coleman -- just as they unilaterally decided to sexually assault Amanda Merrill and Mildred Baker. Appellant was in Miami when these events unfolded, totally unaware of the actual killers' on-the-spot decisions. Under these circumstances, vicarious application of

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[2] The sentencing order refers to the "mutilated bodies of Hill, Douglas, McCormick and Baker" (R. 1308). The victims' bodies were not dismembered. Mildred Baker had superficial injuries to the head and face. A gunshot wound to the left side of her head was the cause of her death. The three male victims had multiple stab or knife wounds and a gunshot wound to the head. (R. 732 -744.)

the especially heinous, atrocious or cruel aggravating factor is inappropriate. Omelus v. State, 16 F.L.W. S455 (Fla. 1991).

The trial court also found that the four killings were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, Section 921.141(5)(i), Florida Statute. The indictment charged the defendant with first degree murder in the alternative, premeditated murder or felony murder (R. 1047). The jury was instructed as to both (R. 917-918). The verdict form provided for each theory (R. 1275-1276). A special verdict form was not used. Whatever theory the jury relied upon, the trial court found that the killings were "clearly calculated acts done with premeditation" (R. 1310).

The trial court's finding is inconsistent with its previous finding that the killings were "senseless since the stolen contraband had been recovered" (R. 1309). Implicit in the latter finding is that no one was to be killed if the stolen property was retrieved, which further suggests that appellant did not give a categorical order to kill; it also implies that the decision to kill was made by the actual killers in Pensacola, who, as pointed out to them by Darrell Frazier, had the choice of recoginizing their mission was accomplished and leaving the apartment without committing further harm.

Moreover, the trial court's finding beyond a reasonable doubt that the killings "were clearly calculated acts done with premeditation" (R. 1310) is totally at odds with conflicting

whether the defendant gave an unqualified order to kill whoever stole his drugs and money. Specifically, on cross-examination Bruce Frazier admitted that at a pre-trial deposition he testified that the decision to kill was made at the scene (R. 553-554). His deposition testimony is substantive evidence of the facts contained therein, as well as impeachment evidence. Section 90.801(2), F.S.; Ehrhardt, Florida Evidence, s. 801.7 (1992 Edition).

In addition, Darrell Frazier testified as follows:

> ***Q.*** Thank you. So basically back to my original question. You weren't to **kill anyone unless you couldn't *get* your stuff back?**
>
> **A. Right.**
>
> Q. You didn't have any guns with you when you first arrived there at the motel, did you?
>
> A. No, we didn't.
>
> Q. The decision to kill these people was made by the person or persons who actually did the shooting, correct?
>
> A. The decision to kill the people came when we was in Miami when (the defendant) gave us the order to kill the people if they had anything to do with his shit being stolen.
>
> MR. ETHERIDGE: Okay. Your Honor, page 67, lines 18 through 20. Once again if I may approach the witness.
>
> Q. (By Mr. Etheridge) Mr. Frazier, read the question I asked you and what your response was.
>
> A. Okay.
>
> Q. 18 and go to 20.
>
> A. **"Who made the decision to kill these** people? **The people** who killed them."
> Q. Thank you. (The defendant) wasn't there in Pensacola, was he?

A. No, sir.

Q. He was in Miami?

A. Yes, he was.

Q. And I believe your earlier testimony was that you felt the whole time that if you got the dope back, that nothing was going to happen, right?

A. That's what I felt.

(R. 650-651, Emphasis supplied.) In fact, upon returning from Crenshaw's home to the crime scene Darrell Frazier insisted that they leave because the money and drugs had been recovered (R. 622).

According to Frazier, Coleman said, "No man, the nigger told us we got to drop them, man" and Robinson gave a similar response (R. 622-623).

The only reasonable basis for Darrell Frazier's "feeling" that no one was to be killed if the property was recovered is that was the result appellant intended. If killing whoever took the property was a foregone conclusion, Darrell Frazier would not have felt that no one would be harmed upon return of the property -- and he would not have urged Robinson and Coleman to leave far that reason.

As for the Robinson and Coleman statements, several points must be noted. First, based upon Frazier's testimony, they obviously either misunderstood appellant's intent or chose to ignore it and exceed the scope of his intent. Second, Darrell Frazier's testimony as to their answers may be an error in recollection or a complete fabrication. Amanda Merrill, who had no interest in the trial outcome, recalls hearing somone saying,

"We got what we want. Come on, let's go" and another person saying, "No, I'm going to do this" (R. 477). Merrill's recollection is corroborated by Bruce Frazier's testimony:

> Q. What happened then?
>
> A. And then (Darrell Frazier) had told him that they had -- that we had got the stuff, and then Timothy Robinson mentioned that we got **one more thing to take care of before we leave.**

(R. 532, Emphasis supplied.)

Whatever premeditation may be found in appellant's request that only if the property was not recovered were those involved to be killed, the fact remains that the drugs and money were recovered and that appellant had as much reason as Darrell Frazier to feel that no killings were to occur. Consequently, the State failed to prove "heightened premeditation'' beyond a reasonable doubt and the cold, calculated and premeditated factor is not applicable. Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. den. 484 U.S. 1020, 108 S.Ct. 733.

Based upon the foregoing analysis, it is apparent that four of the six aggravating factors were not proven beyond a reasonable doubt. Under Florida law, the court erred in weighing those factors in the sentencing process.

In addition, inasmuch as there in no evidence to support the trial court's findings no reasonable sentencer would apply those four aggravating factors, and any death sentence based thereon would violate the guarantee of the Eighth and Fourteenth Amendments against the arbitrary or capricious imposition of the death penalty.

ISSUE V

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S LIFE RECOMMENDATION AND IMPOSING A DEATH SENTENCE UPON APPELLANT.

The standard for review in a jury override case is whether the facts in support of death are so clear and convincing that virtually no reasonable person could disagree. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The death sentence must be vacated if there is any reasonable explanation for the life recommendation. Cooper v. State, 581 So.2d 49 (Fla. 1991); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Hallman v. State, 560 So.2d 223 (Fla. 1990); Walsh v. State, 418 So.2d 1000 (Fla. 1982). Mitigating evidence must be examined to determine if it provided the jury a reasonable basis for the life recommendation. Hegwood v. State, 575 So.2d 170 (Fla. 1991); Carter v. State, 560 So.2d 1166 (Fla. 1990).

Mitigation

A. Accomplice Culpability

The degree of a defendant's participation and the relative culpability of an accomplice may serve as a reasonable basis for a jury's life recommendation and preclude an override and imposition of a death sentence. Harmon v. State, 527 So.2d 182 (Fla. 1988). Proof that a defendant was not the triggerman is a valid nonstatutory mitigation when a co-defendant gets a lesser sentence or is not prosecuted at all, Downs v. State, 572 So.2d 895 (Fla. 1990); Campbell v. State, 571 So.2d 415 (Fla. 1990); Slater v. State, 316 So.2d 539 (Fla. 1975). Similarly,

conflicting evidence as to the identity of the killer can form the basis for a life recommendation, Cooper v. State, supra.

The identity of the killers in this case is uncontroverted: The Frazier brothers, Robinson and Coleman. The jury could reasonably conclude that Robinson and Coleman, whose violent frenzy led to their "senseless" decision to kill even though the stolen property had been recovered, were more culpable than appellant.

With regard to the Fraziers, if not more culpable, the jury could reasonably find them to be, at a minimum, equally culpable accomplices because of their major role in the planning and execution of events.

After leaving appellant's home, Darrell Frazier plotted with Robinson and Coleman at the Miami airport. If murder was truly on their agenda, Darrell Frazier had ample opportunity to contemplate the subject at the airport and during the flight to Pensacola. Moreover, in at least one victim's eyes (Crenshaw's), Mr. Frazier was the group's leader -- and on cross-examination he admitted telling appellant he was "the one in charge of getting the drugs back" (R. 645). He was a strong leader. He burst into the apartment with a shotgun; ordered Robinson to calm down; interrogated Crenshaw; escorted her home to recover the stolen property; and ignored the victims' pleas.

Despite his best effort, Bruce Frazier could not hide his significant role in events: He procured the firearms used to hold the victims hostage; he brought Ms. Baker into the

apartment: chauffeured Crenshaw to her house to recover the drugs and money: and stood idly by as his accomplices stabbed the male victims. He did more. Upon returning to the apartment from Crenshaw's he saw the victims' condition. Their need for medical attention was plain to see. Bruce Frazier did not call "911." Instead, he fled from Pensacola -- and did not stop running for two years.

While the Fraziers could not control events when away from the apartment, much occurred before and after they went to Crenshaw's home. They were present when the victims were disrobed, bound and stabbed. Except for Darrell Frazier, who, out of concern for the noise of the victims' outcries and not for humanitarian reasons, ordered Robinson to calm down, the Frazier brothers never lifted a finger to aid the victims.

In contrast, appellant did not knife or rape anyone or have any reason to predict such activity would occur; had never met Crenshaw, Merrill or Douglas; and did not hear anyone plead for their life -- and, as noted in argument on Issue TV, appellant did not want anyone killed if the stolen property was recovered.

Moreover, regardless of whether the actual killers went beyond the scope of appellant's intent by killing despite recovery of the stolen property, the jury could reasonably find that the four "actual triggermen" at the scene ultimately made the decision to kill; that appellant was not a driving force at the scene encouraging anyone to kill; and that the actual killers were not coerced into committing these crimes.

The jury could also reasonably find that Darrell Frazier, Robinson and Coleman were not robotic terminators and that any decision reached by them and appellant in Miami before the killings was a shared decision.

Nevertheless, the trial court totally disregarded the relative culpability of the Frazier brothers and found that appellant's punishment "should be equal to that of Robinson and Coleman, the actual triggermen. . ." (R. 1312). But there were four triggermen. The Frazier brothers were as eligible for the death penalty as Robinson and Coleman: They were major participants in the kidnappings and demonstrated a reckless indifference to human life, each playing an integral role in these crimes. Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); Jackson v. State, 502 So.2d 409 (Fla. 1986). Indeed, Darrell Frazier admitted participating in the planning and commission of the crimes. Presumably that is why the trial court below originally sentenced Darrell Frazier to death and Bruce Frazier feared the same result. Yet the trial court failed to weigh the Fraziers' relative culpability in sentencing appellant.

In addition, the trial court implicitly found that appellant was equally culpable as Robinson and Coleman. But, as noted above, the jury could reasonably conclude that those accomplices were more culpable: If, as the judge found, the killings were senseless due to recovery of the property, the jury could reason that the actual killers who made the decision were more culpable

and that the nontriggerman, who was not consulted when the decision was made, should not receive the same punishment.

B. Disparate Treatment of Accomplices.

"The disparate treatment of equally culpable accomplices can serve as a valid basis for a jury's recommending life imprisonment," Fuente v. State, 549 So.2d 652 (Fla. 1989); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Brookkngs v. State, 495 So.2d 135 (Fla. 1986); Malloy v. State, *382* So.2d 1190 (Fla. 1979). Disparate treatment was argued to the jury by appellant. The Fraziers obviously hoped their testimony would produce a lenient sentence, and it was reasonable for the jury to expect their wish would be granted. Subsequent events confirm the jury's wisdom. The same trial court that placed Darrell Frazier on Death Row took him off (Appendix, p.1). As for Bruce Frazier, he was allowed to plead to four counts of second degree murder and was sentenced by the trial court below to fifty (50) years concurrent as to each count (Appendix, p. 5).

c. **Reasonableness of Life Recommendation.**

Based upon the foregoing, it was reasonable for the jury to ask, "Why should appellant, a good family person, die if two of the actual killers, the Frazier brothers, who are at least equally culpable as appellant, are allowed to live?'' and answer the question by recommending a life sentence.

The record does not indicate whether the jury found appellant guilty of premeditated or felony murder. Based upon the evidence adduced at trial, the jury may have found appellant

guilty of only felony murder, namely, that he set in motion a kidnapping, the objective of which was to retrieve his stolen property, that simply got out of hand. If the jury so found, the jury could reasonably conclude that it would be inappropriate to execute appellant and not Darrell Frazier and Bruce Frazier, both of whom played a major role in the kidnapping and killings and would probably not be executed. Cf. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) (Jury override and imposition of death penalty for killing arising from robbery that got out of hand held to be erroneous in light of mitigation).

Even if the jury found that the killings were premeditated, under the totality of circumstances the jury could find that the relative culpability of the actual killers and likely disparate treatment of the Frazier brothers, together with appellant's being a good family person, outweighed any and all applicable statutory aggravating factors. Dolinsky v. State, 576 So.2d 271 (Fla. 1991).

In Dolinsky three people were killed. The defendant was found guilty of second-degree felony murder as to two killings and first-degree premeditated murder as to the other killing. A co-defendant, who was an admitted participant and in one instance a triggerman, testified for the State and received only five years probation. The other co-defendant, who masterminded the operation and played a primary role as a triggerman, had not been apprehended at the time of trial. The jury recommended life sentence for the defendant, who participated willingly and was a

triggerman (he shot the victim in the head and chest). The trial court's override was found to be error.

Unlike Dolinsky, appellant was not a triggerman in the killings below. While he allegedly instigated the killings, he did not play a primary role as triggerman. Darrell Frazier, Robinson and Coleman, on the other hand, not only participated in the planning stage, they played primary roles as triggermen. Darrell Frazier was the leader on the scene. Robinson and Coleman literally pulled the triggers. Bruce Frazier was less involved in the planning than the other triggermen, but he played an active role as triggerman (see discussion above).

In striking down a mandatory capital punishment statute a plurality of the United States Supreme Court wrote:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). There are four triggermen in this case. Two face execution; two will live. If, as the trial court reasoned, appellant, the nontriggerman, is to receive the same punishment as the triggermen, which punishment is he to receive?

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140, 1170 (1982) Justice O'Connor, in a dissenting

opinion, concluded that "because of the unique and complex mixture of facts involving a defendant's actions, knowledge, motives, and participation during the commission of a felony murder . . . the factfinder is best able to assess the defendant's blameworthiness." The jury did not cut the baby in half. It had a difficult decision to make and responsibly discharged its duty, weighing all mitigating factors and making a recommendation, supported by reason, that a life sentence for appellant was appropriate.

Hence, under Tedder and its progeny, the trial court erred in overruling the jury's life recommendation.

ISSUE VI

THE SENTENCES IMPOSED UPON APPELLANT FOR THE NONCAPITAL OFFENSES ARE ILLEGAL.

First, the life sentence for the attempted first degree murder conviction exceeds the legal maximum of thirty (30) years. Viers v. State, 362 So.2d 472 (Fla. 3d DCA 1978); Sections 777.04(4)(a) and 775.082(3)(b), F.S.

Second, the life sentence for the kidnapping charges exceeds the legal maximum of a term of years not to exceed life. See Sections 787.01(2) F.S. The offense cannot be reclassified as a life felony under Section 775.087(1), F.S., because appellant did not personally use any weapon or firearm in the commission of the offenses. State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991). Cf. Earnest v. State, 351 So.2d 957 (1977). But see Robins v. State, 16 F.L.W. D2670 (Fla. 1st DCA 1991).

Third, the three (3) year minimum mandatory sentences are illegal since appellant did not possess a firearm during the commission of the offenses, Earnest v. State, supra.

CONCLUSION

For the reasons presented in Issues I, 11, and/or III of this brief, appellant asks this Court to reverse his convictions and to grant him a new trial and, for double jeopardy purposes, to reverse his death sentences as well.

In the alternative, appellant asks that his death sentences be reversed and reduced to a life sentence; and that his non-capital sentences be reversed and remanded for proceedings consistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302, and Ronald L. Williams, #076275, Florida State Prison, P.O. Box 747, Starke, Florida, 32091, by U.S. Mail this 24th day of March, 1992.

SPIRO T. KYPREOS