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IN THE SUPREME COURT OF FLORIDA

CARLIS LINDSEY,

Appellant,

v. CASE NO. 79,933

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

CARLIS LINDSEY,	:	
Appellant,	:	
v.	:	CASE NO. 79,933
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Carlis Lindsey is the appellant in this capital case. The record on appeal consists of 14 consecutively numbered volumes, and references to it will be indicated by the usual "R."

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Columbia County on June 6, 1991 charged **Carlis** Lindsey with two counts of first degree murder (R 1559). He pled not guilty to those charges (R 1568) and subsequently he and the state filed the following motions or notices relevant to the case:

a. Motion to appoint defense expert in the field of serology and blood splatter analysis (R 1646-47). Granted (R 1656).

b. Motion to appoint psychiatric expert (R 1614-15). Granted (R 1610-11).

c. Motion for additional peremptory challenges (R 1651-53). Granted (R 1625). Lindsey was given a total of 12 peremptory challenges.

d. Notice of intent by the state to offer Williams rule evidence (R 1666).

e. Motion to suppress statements made by the defendant (R 1680-81). Denied (R 1688).

f. Motion to suppress evidence from an unlawful search (R 1682-84). Denied (R 1687).

Lindsey proceeded to trial before the honorable E. Vernon Douglas and was found guilty as charged on both counts (R 1703). The jury also recommended the court impose a sentence of death for both convictions (R 1704). It followed their recommendation and justified its decision by finding in aggravation that:

a. Lindsey had a 1952 conviction for second degree murder.

b. As to count II, Lindsey had a "previous" conviction of first degree murder, i.e. count I.

(R 1712).

In mitigation the court found:

> a. Lindsey's age of 66 or 67 was of some but not much weight.
>
> b. Lindsey's extremely poor health. He has a 50% chance of living more than one year and a life expectancy of no more than five years (R 1713).

This appeal follows.

STATEMENT OF THE FACTS

May 1991 found **Carlis** Lindsey living in Lake City with Lizzette Row, his girlfriend of several months (R 1252). She was 21; he was in his mid 60s and in generally poor health, being on several medications (R 1250-51). He had recently gone to Arcadia to bring her home, and he had also given her a small blue car for her to use (R 811-12). A month or so earlier, Row returned the car for him to repair and walked away from Lindsey's house with her sister while the defendant and two other men worked on the vehicle. A short time later, the two men also left, and they stopped the women to talk with them. As Row and her sister stood in the street talking, Lindsey drove the blue car around a corner and came at them. They quickly moved to the sidewalk, and he drove the car onto it, but stopped about 8 or 10 feet from them (R 818, 865, 867-68). He said something to Lizzette and appeared upset (R 868). Sometime about then, a friend also saw him with a **.12** gauge shotgun (R 1012).

On May 23, about 7 a.m. Row had apparently driven to where her family lived to get her brother so he could help her carry her clothes (R 898). The two left the house, and sometime later Lindsey was seen following Row to his house (R 899, 904). He was driving a station wagon, and she the blue car (R 885). After they returned to Lindsey's home, Stewart and her sister were killed by a shotgun (R 691, 697).

Lindsey was asleep, and when he heard the blasts, he woke up, found the two bodies and called the police (R 749, 756-58).

They showed up a few minutes later (about **7:23),** and when asked, he told them he thought the killing was a murder-suicide, even though the murder weapon was never found **(R** 719). He said he did not think he had committed the murders (R 715). He was also nervous, shaking, and rambling in his conversation (R 766).

SUMMARY OF THE ARGUMENTS

Carlis Lindsey presents four guilt phase and one penalty phase issue for this court to consider. In the first issue, he argues that the trial inpermissibly allowed the state to introduce evidence that about a month before the murders, Lindsey had run the blue car he had given Row onto a sidewalk and stopped it about 8-10 feet away from where she and her sister were standing. Ostensibly this incident had relevance to prove his motive in killing Row and her brother. The event had no relevance to this case because there was as innocent a conclusion to be inferred from this incident as there was a sinister one. The scanty evidence simply does not support the conclusion Lindsey was jealous of Row. That implication arises only (and then weakly) if we assume the defendant knew Row was planning to leave him, and that her departure would be permanent. There is, however, no evidence Lindsey knew anything about her long term plans.

During the state's case, Willie Jenkins testified that on the morning of the murder he heard what sounded like one gunshot. At deposition, he had said that two shots had been fired. Seeking to clarify why this witness had changed his story, he elicited from him that the local gossip was that Lindsey "would get even with whoever said something about him." While evidence of threats show a defendant's consciousness of his guilt and therefore are admissible, in this case, what Jenkins heard people say Lindsey had said was not. First, Lindsey never made the threats, the town gossips apparently did

so. Second, the evidence amounted to a comment on his reputation and that was inadmissible. Moreover, the relevance of this testimony became even weaker when Jenkins said what Lindsey ostensibly said had no effect on him.

The court also admitted evidence that Lizzette Row was planning to leave Lindsey. That was irrelevant because there was no showing the defendant knew of her plans. Moreover, whatever were Row's intentions, they cannot be admitted to prove the defendant's state of mind.

The state also failed to provide sufficient evidence Lindsey killed Row and her brother with a premeditated intent. This is essentially a "black box" case. We know three people went into Lindsey's house together on the morning of the murder, but only one came out. The other two were killed. We do not know how they died or why. They could have been deliberately and coldly murdered, or their deaths could have been the result of a heated argument about Row leaving Lindsey or the last Super Bowl. We simply do not know, and just because two people were killed does not by default mean the defendant in this case committed two first degree murders.

If Lindsey had not had a prior second degree murder this case would not merit two death sentences. Murders arising out of domestic squabbles tend not to justify capital punishment. When this case is compared with others similar to this one, Lindsey does not deserve to die.

The conclusion remains the same even though the defendant has a prior murder conviction. That crime occurred 40 years

earlier, and since then the evidence showed he had lived a law abiding life. When this court has affirmed death sentences where the defendant has killed a spouse, lover, or "significant other" it has done so because he had a recent past filled with violent criminal behavior. In this case, Lindsey's past was a generation removed from the current murders, and it should not prevent this court from reducing his death sentence to life in prison.

ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING EVIDENCE THAT AT LEAST A MONTH BEFORE THE MURDERS LINDSEY HAD DRIVEN A CAR ONTO A SIDEWALK AND STOPPED ABOUT 10 FEET FROM WHERE LIZZETTE ROW AND HER FRIENDS WERE TALKING.

Finding a motive for these murders was the state's key problem in this case. It apparently settled on a theory that Lindsey killed Lizzette Row and her brother in a jealous fit because she had planned to leave him (R 1367). The only evidence supporting that motive came from Row's sister, Shirley Johnson, who testified (over objection) about an incident that occurred at least a month before the killings.

Lindsey had given Row a blue car, but sometime in April or early May it developed problems, and he told her to bring it by his house so he could look at it (T 865-66).

Row and Johnson left the car and walked away. Two men who were at the defendant's house, one of whom was a mechanic Lindsey had asked to look at the car (R 878), followed the two women in a car (R 866, 869). Lindsey, in turn, followed the two men in the blue car (R 866). A short time later, the women were standing in the street talking to the men who were in the car when the defendant turned a corner and approached. The men drove off, and the women had to move off the street and onto a sidewalk. Lindsey also drove onto the sidewalk, but he stopped the car about 8-10 feet from where the women were standing and appeared upset (R 818, 867-68, 872).

Also, by this time, Lindsey and Row were either living together or about to do so (R 864). She would stay with him for a while then live with her mother or someone else (R 874). She also wanted to have a child by him, but her family and particularly Johnson tried to dissuade her from selecting Lindsey as the father (R 876).

The state justified asking the court to admit this evidence because it showed that "approximately a month or so prior to killing the victims, [Lindsey tried] to kill or hurt the victim, because, most likely, because of jealousy, which would be one of the theories in the State's case, in trying to run over her and her sister because she was talking to some younger men." (R 823)[1]

The court erred in admitting this evidence, even though it gave a limiting instruction (R 824) because it had no relevance to prove Lindsey's motive for killing Row and her brother.

Evidence of Lindsey's alleged bad acts is ostensibly admitted under the authority of section 90.404(2) Fla. Stat. (1991):

> (2) OTHER CRIMES, WRONGS, OR ACTS.-
> (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 when the evidence is relevant

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[1]One of the "younger" men was in his mid thirties, the other about 47 (R 870-71). Both were considerably older than Lizzette.

solely to prove bad character or propensity.

If the state had evidence Lindsey was jealous of Row the court could have admitted it because of its tendency to explain why he killed her. See, Jackson v. State, 522 So. 2d 802, 806 (Fla. 1988) (Evidence of prior assault on victim admissible to show revenge motive.) Section 404.14 "Evidence of Other Crimes, Wrongs or Acts-Motive," Ehrhardt On Evidence. The state argued that Lindsey's jealousy so consumed him that for Row to merely talk with other men so enraged him that he tried to run her down. If his anger so drove him then, he would have murdered her a month later after learning she was planning to leave him.[2] What Lindsey did a month before the killings, however, did not tend to show any alleged jealousy. The car incident was an ambiguous event from which the state must make several inferences to reach its conclusion that Lindsey was jealous of Row.

Primarily, the evidence does not show Lindsey tried to hit Row with his car. True, he had run it onto the sidewalk, but he had also stopped short of hitting Row and her sister by 8-10 feet (R 818). It is just as reasonable to believe, as counsel suggested at trial, that the incident was the result of bad driving (R 824). Or, perhaps he tried to avoid an accident. Recall that Row and her sister were standing in the street,

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[2]There is no evidence Lindsey knew Row planned to leave him.

talking to the two men in the car when the defendant came around the corner (R 815-16, 871). Though the women moved to the sidewalk when they saw the car, and the car sitting in the street also moved away, Lindsey may very well have believed he was faced with an imminent collision. He was, after all, 67 years old and in poor health, so he may have over reacted by driving onto the sidewalk. This conclusion has some support from the additional information that he was upset when he stopped the car. Why he was so was not explained, and he could have been distraught over narrowly avoiding an accident as much as it was seeing (at best fleetingly) Row talking with other men.

Also, the evidence does not show with any convincing power that the defendant followed Row because he was suspicious of her. She had returned the blue car, which Lindsey had given her, to him to fix, and after leaving it with him she and her sister walked away. The two acquaintances Lindsey had flagged down to look at the car (one was a mechanic (R 878)) left sometime later. Lindsey could have followed Row to return the car to her, having already repaired it.

Johnson, Row's sister, said Lizzette planned to leave Lindsey. She never testified, however, that the defendant knew that, and in any event, Row had left Lindsey before but

returned to him.[3] There is nothing to indicate that if he knew she was leaving him again, her departure would be permanent and that fact would drive him to murder.

Finally, the month span between the car incident and the murders emphasizes the ambiguous relevance the former had to the latter. At trial, the state cited three cases to bolster admitting the Williams rule incident, but those cases not only are distinguishable, they emphasize the problems the challenged evidence had. Jackson v. State, 522 So. 2d 802 (Fla. 1988); Kinq v. State, 436 So. 2d 50 (Fla. 1983); Santana v. State, 535 so. 2d 689 (Fla. 3rd DCA 1988).

In Jackson, the defendant killed McKay, but about two weeks before the murder he had assaulted the victim. This court held that the earlier assault "was not so remote in time as to be irrelevant and supported the state's theory that Jackson's motive for killing . . . McKay was his belief that they were stealing his drugs and taking advantage of him." Id. at 806. The uncontroverted assault by Jackson on McKay readily distinguishes that case from this because in this case there is a question of whether a assault ever occurred.

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[3]The state through sheer speculation argued in closing that Lindsey's jealousy and possessiveness explained why Row left him but would return (R 1367). No evidence exists Lindsey ever forced Row to live with him, or that he kept her in some sort of virtual slavery to him from which she would periodically escape. To the contrary, she was "free to come and go as she liked." (R 1253)

In King, the defendant had beaten the victim 23 days before he murdered him. The evidence of the earlier beating was admissible because it showed the defendant's motive and it helped rebut the defense of misidentification.

Finally, in Santana, evidence of an earlier shooting months before the homicide was admissible to negate the defendant's claim of accident in the charged incident.

In these cases, the earlier incidents clearly were crimes. In Jackson, the defendant assaulted the victim; in King, he beat him, and in Santana, the victim was shot months earlier by the defendant. In this case, what Lindsey did was not so clearly criminal. If the crucial portion of the definition of an aggravated assault is the "intentional, unlawful threat by word or act to do violence to the person of another," section 784.021 Fla. Stat. (1991) then what Lindsey did was not so clearly intentional or unlawful. The circumstances of his driving onto the sidewalk show that what he did may have been nothing more than an inappropriate reaction to a perceived dangerous situation and hence was not an aggravated assault. See, **DuPree** v. State, 310 So. 2d 396 (Fla. 2d DCA 1975); Munday v. State, 254 So. 2d 33 (Fla. 3d DCA 1971).

The remoteness in these three cases between the time of the earlier crime and the charged one became a relatively unimportant point because the Williams rule incidents were so obviously criminal that they readily exhibit the criminal mind. In this case the inherent ambiguity of what Lindsey did the month before the murders elevates the significance of the

remoteness. If, for example, the state had presented evidence that he had done the same thing a day or hours before the murders, then the latent ambiguity of the alleged assault would not have been so important. Common experience confirms that people may stay mad at someone for a few hours or even a day or two, but the white hot flame of revenge tends to die with the passage of time.

So here, where there is precious little evidence of Lindsey's intent when he drove onto the sidewalk, that event casts no light on what was jelling in the recesses of his mind more than a month later.

The State, however, has a more fundamental problem than simply whether the inferences were justified by the evidence. There simply were too many of them the jury had to accept to connect the car incident with the later murder. They had to infer that Lindsey was possessively jealous of Row, that he knew that the two men he had flagged down had left to talk with only Row, that he followed them because he was suspicious of why they left, that he drove onto the sidewalk to either hit or scare Row (and not her sister), and that his jealousy created such a rage within him that he wanted to run down Row, a girl he supposedly had tender feelings for.

This court has consistently rejected the pyramiding or concatenation of inferences. Decidue v. State, 131 So. 2d 7 (Fla. 1961). Where conclusions of an ultimate fact are based on circumstantial evidence, as they were here, and they are susceptible of more than one conclusion, as they were also

here, the resulting logical framework collapses. It is too weak to justify admitting the questioned evidence. C.f., Hall v. State, 500 So. 2d 661 (Fla. 1st DCA 1986); Benson v. State, 526 So. 2d 948 (Fla. 2d DCA 1988).

In this case, the only way the court could justify admitting the car incident was by accepting the inferences listed above. Not only were they based on circumstantial evidence, but, as shown, they could have had either a neutral interpretation or certainly a different one than the state imputed.

This evidence only raised the specter of the defendant's bad character and paraded it before the jury. It was therefore inadmissible in the guilt phase of the trial,

Of course the default argument remains that, even if the trial court erroneously admitted evidence of this incident, such was only a harmless mistake. While this position has become a standard ploy of the state, and one that often has merit, it fails in this case because the court's error fatally prejudiced the jury.

It does so because the state, even with the inadmissible evidence of the encounter a month before the killings considered, had a difficult time inferring Lindsey's motive or intent in killing the brother and sister. Its theory as developed during closing was that the defendant killed his girlfriend because he was possessively jealous of her. The only evidence of that compulsion came from the objected to incident involving Lindsey's poor driving. Without it, the

state and ultimately the jury could only speculate about what happened inside his house on the day of the murder. The killings could have been committed as the state suggested, but as likely they could have been accidental, or done in a moment of intense provocation (manslaughter), or with a depraved mind (second degree murder). Without Shirley Johnson's testimony, the state's case against Lindsey amounted to one which Hercule Poirot or Jane Marple may have solved to a believing reader's satisfaction, but it is one the law in Florida says was insufficient. The trial court's ruling fatally undermined the reliability of the jury's verdict in this case.

Even if the evidence was harmless in the guilt portion of the trial, it was unfairly prejudicial in the penalty phase of the trial because there is no way this uncharged crime could have been admitted. "Hearing about other alleged crimes could damn the defendant in the jury's eyes and be excessively prejudicial." Robinson v. State, 487 So. 2d 1040, 1042 (Fla. 1986).

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN ALLOWING STATE WITNESS JENKINS TO TESTIFY ON REDIRECT EXAMINATION THAT HE HAD HEARD THAT LINDSEY HAD SAID "HE WOULD GET EVEN WITH WHOEVER SAID SOMETHING ABOUT HIM."

As part of its case in chief, the state called Willie Jenkins to testify about some noises he had heard about the time the murders occurred. On direct examination, he said that, although he could not "remember too good," he stepped out of his house after six a.m. on the day of the murders (R 980). He heard a noise coming from somewhere that sounded like a gun shot (R 982). Using Jenkins' deposition, the state refreshed his memory that he had earlier said he had heard two shots (R 984).

On cross-examination, the witness admitted that when he gave his deposition, he was drunk and said some things "that just weren't true." (R 986) Now, he could not remember precisely when after six o'clock he had left his house, and he was not sure if the noise he had heard was a gun shot (R 986).

Seeking to clarify why Jenkins changed his story other than that he was drunk, the state on re-direct examination brought out (over strenuous defense objection (R 989-992, 995-999)) that between the time he had given his deposition and trial he had heard "a few people talk." (R 999)

> Q. Did you hear some people say some things about what Mr. Lindsey might do?
>
> A. Yes.
>
> Q. What did they say?

A. They said he would get even with whoever said something about him.

Q. They said what?

A. He would get even with whoever says something about him.

Q. Now, if you would please speak a little bit more slowly and speak a little bit more clearly and tell us what they told you?

MR. HUNT: I object to the form of questioning. He never said they told him anything.

THE WITNESS: They didn't tell me.

BY MR. DEKLE [the prosecutor]:

Q. Sir?

A. They didn't tell me.

Q. All right, sir. Speak a little bit more slowly and a little bit more clearly and say what they said in your presence and what you heard.

A. I heard that they said he would get even with whoever said something to him, or said something about him.

Q. Were the exact words, that he was going to get even with the people that told on him?

A. That's right. I don't know whether it's true or not.

Q. You said, they said that?

A. Yes, sir.

Q. Did more than one person say that in your presence?

A. There was some talking. I don't know who it was.

Q. Sir?

A. They were talking.

Q. They were talking?

A. That's right.

Q. Now, these statements that you heard them say about Mr. Lindsey getting even with the people that told on him, is that what made you decide to change your testimony?

A. No.

Q. You're sure about that?

A. That's right.

Q. That had nothing to do with it?

A. No.

Q. And you're absolutely positive that had nothing to do with it?

A. Yes, sir.

(R **999-1001).**

On further cross-examination, Jenkins admitted that what he had heard was "just gossip" coming from people he did not know and who were not talking to him (R 1003). For several reasons the court erred in admitting this part of Jenkins' testimony.

The law in this area is simple and direct. Evidence that the defendant threatened a witness shows the defendant's consciousness of his guilt. Koon v. State, 513 So. 2d 1253, 1255-56 (Fla, 1987); Manuel v. State, 524 So, 2d 734 (Fla. 1st DCA 1988). Significantly, the defendant must have either made the threats or had someone else make them for him. State v. Price, 491 So. 2d 536 (Fla. 1986). Thus, the immediate problem here is the absence of any evidence Lindsey made any threats. That is, Jenkins said that the gossip was that Lindsey would

"get even with everyone who says something about him." He did not say that others had heard Lindsey say that. This idle chatter could have been based on nothing more than the defendant's reputation for violence or bad character, It is much like one child saying to his brother or sister after witnessing the latter do something "bad," "Oh you're going to get it when dad gets home." "Dad," of course, never said he would mete out some parental justice at the end of the day for this particular infraction of the family code. The child merely assumed he would do so based, probably, on earlier examples. The threat of impending punishment, therefore, comes from child and not the father.

Similarly, in this case, Jenkins never heard Lindsey make the threats, and as far as we know, the gossipers made them for him. They may very well have believed he would "get even" with others because of his general reputation for violence or his bad character. The court, therefore, should have excluded the evidence because Lindsey never made the threats, what Jenkins said was inadmissible hearsay, and it was a comment on the defendant's reputation.

The relevancy of the statements becomes even weaker because they had no effect on the witness (R 994). He was not intimidated by them. Thus, the quoted portion of Jenkins' testimony only paraded Lindsey's presumably bad character before the jury, and that, of course, is impermissible. Section 90.404(2)(a) Fla. Stat. (1991). The court erred in

admitting this evidence, and the damage it did rendered the mistake harmful.

The state presented only circumstantial evidence about the reason the defendant killed Row and her brother. Its case became stronger, however, with Jenkins' testimony portraying the defendant as a vindictive old man whom one did not cross with impunity. The jury could have reasoned that the defendant was "getting even" with Lizzette Row because she was leaving him, and it could have used Jenkins' testimony to support that conclusion. Thus, as the state claimed in closing, if jealousy was the motive for the murders, its argument became significantly stronger with evidence that he would "get even" with anyone who got in his way. Without it, the jury may have reasoned he had committed a murder or other homicide less than first degree. The state, in any event, has the burden to show that possibility could not have affected the jury's guilt phase verdict. It will also have to prove it had no impact on their death recommendation. See, State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). Because it will not be able to do either, this court should reverse the trial court's judgment and sentence and remand for a new trial or at least a new sentencing hearing.

ISSUE III

THE COURT ERRED IN ADMITTING HEARSAY EVIDENCE THAT LIZZETTE ROW INTENDED TO LEAVE CARLIS LINDSEY.

As part of the state's case in chief, Shirley Johnson, Row's sister, testified that Lizzette planned to leave Lindsey:

> **Q.** Was Lizzette planning to stay living with Carlis Lindsey?
>
> A. She was leaving with him.
>
> **Q.** And do you know when she was planning on leaving him?
>
> MR. HUNT [defense counsel]: Judge, I object, that's obviously calling for hearsay.
>
> MRS. JOHNSON [the prosecutor]: Your Honor, it's not hearsay under section 90.803 subsection (3), that would be a statement of intent on the part of the declarant, and as such, an exception to the hearsay rule.
>
> THE COURT: I will allow it.
>
> BY MRS. JOHNSON:
>
> **Q.** Was she planning on staying with him?
>
> A. She was leaving him.
>
> **Q.** And do you know when she was leaving him?
>
> A. She told me she was going home to get her clothes.

(R 864-65).

The state correctly identified the applicable section of the evidence code that controls this issue. It erred, however, in applying it to this case. That section provides:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

> (a) A statement of the declarant's then existing state of mind, emotion, **or** physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at the time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.

As to the first purpose, the declarant's state of mind, the hearsay that Lizzette intended to get her clothes from Lindsey's home was not an issue primarily because there was no evidence Lindsey knew Row planned to leave. Cannady v. State, Case No. 76,262 (Fla. January 14, 1993).

Additionally, the victim's intentions or state of mind cannot establish the defendant's state of mind. Downs v. State, 574 so. 2d 1095, 1098 (Fla. 1991) (Evidence from victim's mother that the victim said she was afraid of Downs was inadmissible.) The principle danger in admitting evidence of the victim's state of mind is "that the jury will consider the victim's statement of fear as somehow reflecting on the defendant's state of mind rather than the victim's-i.e., as a true indication of the defendant's intentions, actions, or culpability." United States v. Brown, 490 F.2d 758, 766 (D.C. Cir. 1974) (emphasis in opinion. Footnote omitted.) Accord, Correll v. State, 523 So. 2d 562, 565 (Fla. 1988). Here, Row's intent to leave Lindsey cannot prove his intent to kill her,

yet that is precisely the use the state made of Johnson's and other testimony during its closing argument:

> I think the first question as to motive is pretty obvious that the person who had the motive in this case was Carlis Lindsey. His motive was that she was leaving, and he was jealous.

(R 1367).

As to the second part, Row's subsequent conduct achieved relevancy only as it went to prove Lindsey's intent. That is, Lizzette said she was going to get her clothes from Lindsey's house, meaning that she intended to leave him. On the morning of the murder, which was some unknown time after she said she was leaving Lindsey[4], she went to her mother's home and returned to Lindsey's house with her brother. Why she did so remained vague, but if it was to get her clothes as she had earlier said, then what she said was relevant to show that in fact on the day of the murder she did so. What she did becomes relevant to the murder because they justify the state's theory that Lindsey killed Row and her brother in a fit of jealousy.

That relevancy does not make the evidence and hearsay therefore admissible. If evidence of the victim's intent cannot prove the defendant's motive then it stands to reason that neither can her acts which the hearsay supported. That is, inadmissible hearsay does not become admissible merely

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[4]The state never clarified when Lizzette made the objectionable statement or when in relation to it she acted on her intent, if at all.

because it gives meaning to an otherwise irrelevant act. In this case, that Row said she was leaving Lindsey does not become admissible hearsay because it explains why she went to her mother's house on the morning of her death, a fact which has no particular relevance to the subsequent murders.

The hearsay, therefore was inadmissible, and its harm arose from the reasonable view that the jury may have used it to contribute to their determination that the defendant committed a premeditated murder. Without it, that body may have concluded he killed his girlfriend with some lesser degree of intent. The court therefore reversibly erred in admitting this evidence, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN DENYING LINDSEY'S MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE STATE PRODUCED INSUFFICIENT EVIDENCE THAT HE PREMEDITATEDLY MURDERED LIZZETTE ROW AND HER BROTHER.

The state charged Lindsey with two counts of first degree murder, and from the evidence presented at trial and the discussion of the appropriate instructions read to the jury, the state relied solely on a theory of premeditation. It argued in closing that it had established that level of intent by presenting evidence of Lindsey's jealousy and possessiveness (R 1367), his use of a shotgun (R 1370), and his inconsistent or improbable story of what he claimed happened (R 1371). The circumstantial evidence admittedly forces the conclusion that Lindsey killed Lizzette Row and her brother. "Three people walked into an empty house. . . . Two of those people were murdered, and the only interpretation of all the evidence that makes any sense whatsoever is that the their person, Carlis Lindsey, is guilty of the murder of those other two people." (R 1359)

While that may be the only conclusion as to who committed the homicide, the evidence does not support with the same level of certainty the determination that he murdered these people with a premeditated intent. As to that element of first degree murder the state presented insufficient proof.

Regarding the level of intent a person must have to be guilty of a capital murder, this court has said, "Premeditation is a fully formed conscious purpose to kill that may be formed

in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of the act." Asay v. State, 580 so. 2d 610, 612 (Fla. 1991). Typically, defendant do not announce their intent to kill, so premeditation is usually proven by the circumstances in which the homicide was committed. As such, the evidence relied on to establish the requisite intent must be inconsistent with any other reasonable hypothesis of innocence. Wilson v. State, 493 So. 2d 1019, 1022 (Fla. 1986). In Larry v. State, 104 So. 2d 352, 354 (Fla. **1958),** this court used five factors to analyze whether the defendant had the requisite premeditation to be found guilty of first degree murder:

> Evidence from which premeditation may be inferred includes such matters as [1] the nature of the weapon used, [2] the presence or absence of adequate provocation, [3] previous difficulties between the parties, [4] the manner in which the homicide was committed, and [5] the nature and manner of the wounds inflicted.

Applying these factors to this case and then comparing it with others in which the issue of whether the defendant had the requisite intent will show that here Lindsey committed at most only two second degree murders.

1. The Nature of the weapon used.

Lindsey used a shotgun to kill Row and her brother (R 691, 697). While it was a particularly lethal weapon, that characteristic has little significance because there was no evidence Lindsey had any choice in the weapon he used. It was

not as if he had an arsenal of guns, axes, machetes, garrotes, and the like from which to choose. He only had the shotgun, which was never found (R **849).**[5] Here, a neighbor heard what may have been one shotgun blast, not two (R 982-84). Quite possibly the two shots were fired so close together that what in fact were two shots was perceived as one. Thus, no additional motion than the twitch of the finger was necessary.

Pulling a trigger requires so little effort or thought that premeditation is significantly more difficult to prove when that is the only evidence offered to establish that element of first degree murder. When someone uses an axe to repeatedly bludgeon his or her victim, see, Larry, supra, or a knife to repeatedly stab a person, Penn v. State, 574 So. 2d 1079 (Fla. **1991),** intent becomes easier to prove since so much more effort, determination and time is required to kill the victim. Not so in cases such as this where the killing can occur almost before the defendant realizes what has happened.

2. The presence or absence of adequate provocation.

This is a curious factor because if there had been adequate provocation, the defendant would not be guilty of premeditated murder. What is probably meant is the cold blooded, unnecessary killing of the victim. Typically, this factor focuses on the events immediately surrounding the homicide that might have warranted the homicide. For example,

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[5]He also had an inoperative piece of a shotgun (R 849).

in Griffin v. State, 474 So. 2d 777 (Fla. 1980) the defendant killed a convenience store clerk during the course of a robbery. The co-defendant heard nothing unusual before the shooting. To the contrary, "the victim in fact cooperated with the robbery, taking off and giving to Stokes [the co-defendant] a gold neck chain Stokes had been unable to pull off." **Id.** at 780. Had the victim refused to give up the chain, such refusal might have provoked the shooting, but he offered no **resistance,** so the murder appeared to have been done for no reason other than to kill.

In this case, there is no evidence Lindsey and Row had had any fights or arguments immediately before the murders, nor did any witness say Row was afraid of the defendant, and he did not make any threats towards her or her family. Myers v. State, 256 So. 2d 400 (Fla. 3d DCA 1972) (Husband and wife have violent quarrel several hours before murder, and wife says she is afraid her husband will kill her.) Lee v. State, 141 So. 2d 257 (Fla. 1962) (Lee made threats to his estranged wife.)

3. Previous difficulties.

This factor is similar to the previous one but emphasizes the longer term problems that might have existed between the defendant and the victim. In the case of John Steward, Row's brother, there was no history of problems between the defendant and him. This case is similar to Purkhiser v. State, 210 So. 2d 448 (Fla. 1968) in which the victim was a 12 year old girl who was shot during a "sudden and brief encounter between her father and the defendant, who came to the door in search of

another man with whom he had quarreled earlier in the day." The girl and Purkhiser, as were Stewart and Lindsey, were strangers to each other. This court in **Purkhiser's** case found that the defendant had not killed the girl with premeditation. It should do the same here.

In Wilson v. State, 493 So. 2d 1019 (Fla. 1986) Wilson and his father were engaged in a violent fight which raged through their house. During this struggle, the defendant stabbed his 5 year old nephew with a pair of scissors that the two Wilsons were struggling over. The boy apparently happened to be in the house while the two men were fighting. This court said the homicide of the child was accidental primarily because Wilson told the police it was so, and the state presented no evidence to refute that assertion. Id. at 1023.

Similarly here from what the evidence shows, Stewart had the tragic misfortune to be at the wrong place at the wrong time. There is no evidence the two had ever had problems before or that Lindsey killed him because he had some lingering hatred towards Row's brother. See, **Asay,** supra, pp. 612-13.

A similar conclusion can be reached regarding the defendant and Row. We know very little of their relationship more than one month before the murder. Lindsey obviously was smitten with the woman because he gave her a car to drive and made the long trip to Arcadia to pick her up when she called asking him to to so (R 1253-54). She had no fear of him because she spent the night before her death with him

(R 1257-58). On the other hand, there is the incident of Lindsey driving oh the sidewalk that occurred a month before, but as argued in Issue I, that evidence is so ambiguous as to be of no relevance to illuminate this couple's problems.

This case, in short, contrasts well with those in which there was sufficient evidence of premeditation as shown in part by the victim's fear of the defendant, Clay v. State, 424 So. 2d 139 (Fla. 3rd DCA **1983),** evidence of beatings of the victim, Demurjian v. State, 557 So. 2d 642 (Fla. 4th DCA **1990),** or the general fact that the defendant and victim had a bad relationship.

4. The manner in which the homicide was committed.

Both killings were by gun and quickly committed. Each victim was shot only once, and they stand in stark contrast to the ax murder in Larry, and the multiple stabbing death in Penn v. State, 574 So. 2d 1079 (Fla. 1991). They also contrast well with the multiple shooting death in Songer v. State, 322 So. 2d 481 (Fla. 1975). In that case, the defendant claimed he had shot a policeman while in a drug stupor. The facts, however, belied that claim because Songer, who asserted he was lying on the floor of a car at the time of the shooting, had to "fan" the pistol rapidly. Each of the four shots fired hit the officer, exhibiting an accuracy not expected of one who claimed he was drugged.

5. The nature and manner of the wounds inflicted.

Both victims were killed by shotgun, and though the wounds were particularly lethal, like the first factor, that fact

should not be the focus of this point. Instead, the nature and manner of the wounds inflicted should somehow exhibit the determination of the defendant to kill. Often when the weapon is a gun, pistol, or shotgun, the nature of the resulting wounds do not reflect much on the defendant's mental state. Using other weapons does. For example, in Larry, supra, the victim was "beat to a pulp like crushed ice and his head was half severed. In Wilson, supra, Wilson Sr. "was found in a seated position on the floor with his head in a chair. He had been shot in the forehead with the bullet entering in a 'backward,' 'downward' direction. Id. at 1022. He also had been brutally beaten with a hammer. The nature of those wounds refuted the defendant's claim of accident or that the murder occurred during an extreme rage. In Preston v. State, 444 So. 2d 939 (Fla. 1984), the mutilated defendant's body was discovered in an open field with the head almost cut off. It was, as this court said, a "particularly brutal" murder. Id. at 944.

Such cannot be said here. The killings were probably quickly done. There was no physical torture, nor was there any evidence that any of the victims tried to defend themselves immediately before being shot. Demurjian, supra. (Victim had defensive wounds.) From what the evidence shows, each was quickly killed without any undue suffering. The manner in which they were killed does not show Lindsey premeditated the murders.

There was other evidence which also rebuts any notion that the defendant adequately reflected on what he did. Lindsey, for example, never uttered any threats to kill Row or her brother. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986) Nor is there any evidence he wanted to kill them. See, Phippen v. State, 389 So. 2d 991 (Fla. 1980). Finally, we do not know what happened once the three people went inside Lindsey's house. Although premeditation need only exist moments before the killing, it nevertheless takes some time to develop. McCutchen v. State, 96 So. 2d 152 (Fla. 1957). Here the state presented no positive evidence of what occurred inside the house other than two people were killed. We do not know if the defendant waited until they were inside and then calmly dispatched them or if the homicides occurred during a heated domestic dispute. The circumstantial evidence, as demonstrated by examining the Larry factors and other evidence, does not exclude the reasonable hypothesis that Lindsey committed his crimes without a fully formed and conscious intent to kill. The analysis and evidence shows Lindsey at most committed only two second degree murders, and this court should reverse the trial court's judgment and sentence and remand for entry of a judgment for that degree of murder and sentences accordingly.

ISSUE v

THE COURT ERRED IN SENTENCING LINDSEY TO DEATH BECAUSE SUCH A SENTENCE IS NOT PROPORTIONALLY WARRANTED UNDER THE FACTS OF THIS CASE.

As part of its review of death sentences, this court in recent years has shown an increasing willingness to reduce such penalties to life in prison despite a jury recommendation of death. It has done so because it has the obligation to review such imposed punishment to insure that in a particular case it is deserved when compared with other cases involving similar facts.

> Our function in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974).

Menendez v. State, 419 So. 2d 312, 315 (Fla. 1982). Thus, this court will compare the facts of the case under consideration with other cases involving similar situations to decide if a death sentence is warranted. Proffitt v. State, 510 So. 2d 896 (Fla. 1987). In this case, the comparable cases involve killings that arise out of domestic disputes. When compared with those cases, Lindsey's murders do not merit a death sentences. Porter v. State, 564 So. 2d 1060 (Fla. 1990) (Barkett, concurring in part and dissenting in part, and cases cited therein).

Typically, when this court has reduced death sentences of defendant's who have killed their wives, girlfriends, or

lovers, the method of killing has been irrelevant. Amoros v. State, 531 so. 2d 1256, 1261 (Fla. 1988) (Shooting); Ross v. State, 474 So. 2d 1170, 1174 (Fla. **1985),** Blakely v. State, 561 So. 2d 560 (Fla. 1990) (Bludgeoning). Likewise murders resulting from a "heated domestic confrontation" have not been death worthy. Garron v. State, 528 So. 2d **353,** 361 (Fla. 1988). Even the number of aggravating factors legitimately found by the trial court and a death recommendation by the jury has not prevented this court from reducing a death sentence. Blakely, supra. On the other hand, domestic violence cases involving defendants who have convictions for prior violent crimes do not benefit from this proportionality review. Lemon v. State, 456 So. 2d 885 (Fla. 1984) (prior conviction for assault with intent to commit murder): Hudson v. State, 538 So, 2d 829 (Fla. 1989) (on community control for sexual battery). Several cases in which this court reversed a trial court imposition of a death sentence illuminate this area of the law.

In Irizzary v. State, 496 So. 2d 824, 825 (Fla. 1986) Irizzary brooded over the recent split up with his former wife. Two weeks after he learned that she had taken a new lover, he killed her with a machete and tried to kill her boyfriend. This court, rejecting the trial court's override of the jury's life recommendation, reduced his sentence to life in prison.

Likewise, in Ross v. State, 474 So. 2d 1170, 1174 (Fla. **1985),** the court reduced Ross' sentence because he had bludgeoned his wife to death. Ross had been drinking and had a

hard time controlling his emotions. He also had not reflected long about killing his spouse.

In Blair v. State, 406 So. 2d 1103 (Fla. **1981),** Blair planned to murder his wife, and he had gone so far as to dig her grave before killing her and sending their three children away from the house while he killed her. The apparent motive for the homicide was a threat his wife had made that she **was** going to call the police because Blair may have sexually molested their daughter. Even though the jury recommended death, this court reduced that sentence to life in prison.

In Kampff v. State, 371 So. 2d 1007 (Fla. **1979),** the defendant and his wife had been divorced for three years, During that time, Kampff repeatedly harassed her, trying to convince her to remarry him or making veiled threats on her life. He also was a chronic alcoholic. On the day of the murder, he followed her to where she worked and shot her twice. This court held that Kampff did not deserve to die because there was no evidence he had planned to kill her for three years, the murder was quickly done, and it was the result of **Kampff's** obsession with his former wife.

Finally, although there are more cases that could be **cited,**[6] in Penn v. State, 574 so. 2d 1079 (Fla. 1991) Penn bludgeoned his mother to death while she slept. This court

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[6]**See,** Justice **Barkett's** concurring and dissenting opinion in Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990) for an excellent summary of the case law on this area of the law.

reduced his subsequent death sentence in part because of his heavy drug use, but also in part because his wife had told him that as long as his mother lived, they could not be reconciled.

As to the murders in this case, they were "simple" in that they apparently resulted from Lindsey's inability to accept losing the affections of a girl at least 40 years younger than himself. That he killed her brother also shows that this was an impulsive, poorly considered criminal episode. From what the record shows Steward had the misfortune to be present when Row and Lindsey confronted each other, and there was nothing indicating the defendant had any animosity towards him. The absence of bad feelings towards this victim supports the notion that Lindsey acted impulsively and without any planning or significant premeditation.

Like the evidence in Kampff, there is no indication Lindsey brooded for a long time about killing Row. True, he apparently followed her around town on the morning of the murders, but there is nothing showing he planned to kill her or her brother. Nor did he derive any pleasure from what he had done.

In short, the murders in this case are not among the most aggravated this court has considered. True, Lindsey had an earlier second degree murder conviction, but that had occurred more than forty years earlier (R 1712), which distinguishes it from other cases in which the defendants had a violent background. In Lemon, supra, the defendant also had a violent background, but Lemon killed his paramour shortly after being

released from prison after serving a sentence for assault with intent to commit first-degree murder. See also, Hudson, supra. Here, Lindsey's violence had occurred a generation earlier, and from what we know of him, he had abandon his violent youth. This court should reverse the trial court's sentences and remand for the imposition of sentences of life in prison without the possibility of parole for twenty-five years.

CONCLUSION

Based on the arguments presented above, the appellant, **Carlis** Lindsey, respectfully asks this honorable court to 1. reverse the trial court's judgments and sentences and remand for a new trial, or reverse the trial court's sentences of death and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Snurkowski, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, **CARLIS** LINDSEY, **#122838,** Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 11 7th day of February, 1993.

DAVID A. DAVIS