IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 81,358

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee generally accepts Appellant's statement of the case and facts, except for the following supplementation and clarification:

Guilt Phase

The victim, Betty Jean Woods, a fifty-one year old female, was killed by a single gunshot wound to the head. (T 639). The bullet entered her "left temple area right above her left ear, " (T 654), traveled "down and slightly from front to back," (T 643), and lodged in her right temple (T 658). This wound rendered her immediately unconscious (T 648). Powder burns no more than one quarter to one half inch around the center of the wound indicate that this was a near-contact type wound (T 656, 649).

Testing showed that firing Appellant's pistol required a six-pound pull on the trigger (T 885).

The store supervisor testified that the cash register having money in it was turned on and locked down, and could not be opened except by someone knowing the correct procedure for doing so (T 698, 704). An "E" indicator showing on this register indicated that someone had tried to open it without knowing how to do so (T 704). Aside from the register, money from completed transactions would normally be kept either in a cash box under the counter beneath the register, or in a hidden safe (T 705). The cash box under the counter was empty. (T 705). An audit of "that day's work" showed that "since that morning when the clerk came in," cash in the amount of $59.05 had become missing from the store. (T 693-94).

The Jacksonville crimes and the "Williams rule" crimes were all committed within a three-day period in 1990 and are tied together as follows:

On September 13, 1990, a 1983 maroon Ford Escort was stolen from a motel one mile from Appellant's residence in Kingsland, Georgia (T 821, 836). The next morning, Appellant drove this car to a country store in Monticello (T 719). Appellant asked the cashier for some cigarettes, and shot him in the back when he turned to get them (T 719). Before he passed out, the victim saw Appellant remove money from a cash box under the counter beneath the cash register (T 722).

Later that afternoon, Appellant shot an employee at a store in Tallahassee (T 756). He fled the scene in the same Ford Escort (T 738-39). The victim was shot in the head, but survived (T 757).

Appellant's fingerprints were recovered from the cash box in the Monticello crime, and from a cash register receipt in the Tallahassee crime (T 781, 785).

Sometime before 1:00 p.m. on September 16, 1990, a Dodge Monaco was stolen in Jacksonville less than two miles from where the Ford Escort was abandoned (T 663). Betty Jean Woods was killed shortly after 1:00 p.m. on September 16, in Jacksonville (T 663). The Dodge Monaco was recovered two days later about 75 yards from Appellant's residence in Kingsland, Georgia (T 827).

Two expended shells found in the Dodge Monaco, plus expended shells left at the scene of each of the three robbery/shootings, plus bullets recovered from the Tallahassee and Jacksonville victims were all identified by ballistics examination as having

been fired from the Raven .25 caliber semi-automatic pistol recovered from the bedroom of Appellant's residence in Kingsland, Georgia (T 837-38, 885-87). In addition, the Monticello victim identified Appellant as the person who shot him and stole money from the store's cash box, and a witness in Jacksonville identified Appellant as the person leaving the scene of that crime seconds after the shooting, carrying a brown bag (T 718-19, 671).

Penalty Phase

Appellant's grandmother confirmed that he had been on his own since he was eighteen (18) T 1144). None of the witnesses presented by Appellant in mitigation could testify about Appellant's activities or conduct or behavior since the mid-1980's (T 1151, 1159, 1162-63, 1164-66, 1173). The mother of Appellant's daughter admitted on cross-examination that Appellant had not supported his daughter for the past six years (T 1154).

SUMMARY OF ARGUMENT

There are nine issues on appeal: (1) Although four blacks served on the jury, appellant complains about the State's peremptory challenge of one black prospective juror. Assuming this issue was preserved, the juror was properly struck because she had "mixed emotions about the death penalty". (2) The evidence, although circumstantial, supports a finding that appellant is guilty of both premeditated murder and felony murder, with robbery being the underlying felony. Appellant shot an unarmed female convenience store clerk in the head at close range. After he left the store, $59.05 was missing from the store. This crime was the third in a series of similar crimes in which appellant robbed a store after shooting the clerk. (3) Even assuming the claim of error was properly preserved, it was not error, or at most harmless error, to allow one of the Williams Rule shooting victims to testify he was shot in the spine: Evidence of the crime as a whole was relevant and admissible to prove identity; the victim had already testified without objection that he had been shot; and the location of the bullet explained why the Williams Rule victim was incapacitated and why the bullet was not removed from his body and placed into evidence. (4) Any evidence about the effect of appellant's prior life sentence was introduced by the appellant, and he ought not be heard to complain about it. Moreover, no inaccurate testimony was elicited. (5) The evidence supports the trial court's instructions on the robbery and pecuniary gain aggravating factors. (6) The trial court did not err by failing to instruct

the jury on the age mitigating factor because appellant was 24 years old and had been on his own for years. (7) The trial court's sentencing order properly dealt with the mitigating evidence. (8) Appellant's death sentence is appropriate. (9) Appellant's constitutional issues are either not preserved or are clearly without merit.

ARGUMENT

ISSUE I

NO REVERSIBLE ERROR ARISES FROM THE STATE'S PEREMPTORY CHALLENGE OF PROSPECTIVE JUROR GALLOWAY.

This case was tried in January of 1993, prior to this Court's decision in State v. Johans, 613 So.2d 1319 (Fla. 1993), prospectively requiring a Neil inquiry whenever an objection is raised that a peremptory challenge is being used in a racially-discriminatory manner. Thus, it was Appellant's threshold burden under the standard of State v. Neil, 457 So.2d 481 (Fla. 1984), to demonstrate a strong likelihood that a prospective juror had been challenged solely because of his or her race. State v. Johans, supra, at 1321.

Appellant objected to the prosecutor's peremptory challenges to the first two black prospective jurors on the list (T 531). After some prodding by the trial judge, Appellant requested a Neil inquiry (T 532-33).

Although the trial judge doubted that Appellant had met the "strong-likelihood" Neil threshold, he nevertheless conducted a Neil inquiry.

The prosecutor explained that, so far, he had peremptorily struck three prospective jurors, one of whom was white, because of their expressed "mixed emotions" about the death penalty (T 534, 537-38). Appellant took issue with this explanation as to prospective juror Galloway, arguing that she was, despite her mixed emotions, capable of recommending a death sentence, and that her answers were not distinguishable from those of prospective juror Venettozzi, whom the state had accepted (T

537). The trial court found that the state was justified in exercising its peremptories against those having "mixed feelings about capital punishment", (T 536), that the state's proffered reason was "racially neutral" and that the state's peremptory challenges were exercised legitimately (T 538).

The jury selection process continued. Ultimately, four African-American citizens of Duval County were selected as jurors (T 559-60). Appellant did not move to strike the panel, move to seat juror Galloway, or express any displeasure with the jury actually chosen (T 560).

Initially, Appellee would question whether Appellant has preserved this issue for appeal. Even if, as Appellant now argues, the trial judge did not specifically ask if defense counsel was "satisfied" with the jury after it was selected (Initial Brief of Appellant at p. 28), nevertheless, defense counsel "accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection." Joiner v. State, 618 So.2d 174, 176 (Fla. 1993). Here, as in Joiner, "[i]t is reasonable to conclude that events occurring to his objection caused him to be satisfied with the jury about to be sworn." Id. at 176. Under this Court's decisions in Joiner and Valle v. State, 581 So.2d 40 (Fla. 1991), Appellant's Neil claim should be regarded as waived.

However, assuming that the issue has been preserved, it is without merit. The prosecutor asked every prospective juror how he or she felt about the death penalty. Their answers fell into five categories: (1) for it; (2) opposed to it; (3) not opposed to it; (4) depends upon the circumstances; and (5)

mixed emotions (T 373-396). Appellant exercised all of his peremptories against prospective jurors who gave answer (1).[1] The state struck for cause prospective jurors who gave answer (2).[2] The state struck peremptorily those who gave answer (5).[3] Those giving answers (3) and (4) were struck, if at all, for other reasons.[4]

Clearly, the juror's feelings about the death penalty were related to the facts and issues of this death-penalty case. Both parties, in fact, exercised their challenges in major part on the basis of the jurors' answers to the death-qualification questions, which were posed in substantially the same manner to each of the jurors, including Mrs. Galloway (T 373-396, 396-424).

This Court has held that discomfort with the death penalty is a legitimate, race-neutral reason for the exercise of a peremptory challenge. Walls v. State, 641 So.2d 381 (Fla. 1994); Atwater v. State, 626 So.2d 1325, 1327 (Fla. 1993). A death-

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1 These were: Claytor (T 372-73, 527); Perritt (T 374, 527); Lyell (T 379, 530); Zerkle (T 377, 539); Simpson (T 380-81, 540); Rash (T 381-82, 541); Gedman (T 382, 542); Spaeth (T 384, 542); Elliott (T 387-88, 548); Cannington (T 390, 554) and Baird (T 389, 558). In addition, Appellant struck three "for it" jurors for cause: Campbell (T 373-74, 527); Young (T 379, 530-31); Eilers (T 384-85, 543).

2 These were: Lawson (T 385-86, 544-45) and Bradford (T 386-87, 545).

3 These were: Podekjo (T 374, 528-29); Golden (T 374-75, 529-30); and Galloway (T 378-79, 531). In addition, the state struck one "mixed emotion" juror for cause: Newkirk (T 390, 554-55).

4 These include: Dr. White (T 389-90, 558), who attended church with one of Appellant's attorneys; Mrs. Gillette (T 391, 551), whose brother is a criminal defense attorney; Mrs. Bruton (T 376-77, 550), who testified she had "a problem" with the fact that "this is someone's life I'm dealing with (T 493-94); and Mrs. Britten (T 379-80, 539) whose son is in prison (T 368).

penalty prosecutor's misgivings about a juror who has "mixed emotions" about the death penalty reasonably justify the exercise of a peremptory challenge to that juror. Happ v. State, 596 So.2d 991, 996 (Fla. 1972).

Appellant, however, argues that the prosecutor challenged Mrs. Galloway for a reason equally applicable to two jurors whom the prosecutor did not strike, and that, under State v. Slappy, 522 So.2d 18 (Fla. 1988), the State's proffered explanation for striking Mrs. Galloway is pretextual.

As noted above, the state did strike jurors other than Mrs. Galloway who had "mixed emotions" about the death penalty. The two additional jurors referred to by Appellant which the state did not strike are Mr. Venettozzi and Mrs. Goodman. However, Mr. Venettozzi did not testify that he had mixed emotions about the death penalty. Instead, he testified: "I think it's mixed. It depends on how serious. . . I believe it depends on the circumstances. I don't think I could say yes or no without knowing." (T 374). Clearly, his answer falls into category (4) (depends on the circumstances), rather than category (5) (mixed emotions). Thus, the prosecutor's reason for challenging Mrs. Galloway is not equally applicable (or even applicable at all) to Mr. Venettozzi.[5]

Mrs. Goodman was the final juror in the selection process and the last of three potential alternate jurors (T 558). The state exercised a peremptory against the first of these three,

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[5] It should also be noted that, on examination by the defense, Mr. Venetozzi testified that if "the person is guilty" and "it was violent, malicious, I believe in the death penalty." (T 483) (Emphasis supplied.)

who testified she attends church with one of Appellant's attorneys (T 339, 558). After the defense exercised a peremptory against the second potential alternate (T 558), the state challenged Mrs. Goodman for cause (T 558-59). This final challenge was denied, even though Mrs. Goodman had testified that her feelings about a death sentence would not allow her to make a recommendation of death if the aggravating factors outweighed the mitigating factors (T 416). Since the State was out of peremptories and its challenge for cause was denied, the State had no choice but to accept Mrs. Goodman as an alternate juror.

The prosecutor could reasonably have expected that its challenge for cause to Mrs. Goodman would be granted. In any event, although the State was unable to strike Mrs. Goodman, the state did challenge her, and thus factor (5) of the factors enumerated in Slappy is not present in this case. 522 So.2d at 22.

The state did not engage "in a pattern of excluding a minority without apparent reason." State v. Slappy, supra at 23. The prosecutor's exercise of peremptories was presumptively valid. State v. Johans, supra at 1322. Any possible doubt about the State's peremptory strike of Mrs. Goodman is answered by the State's explanation for its strike. Moreover, while numbers alone are not dispositive of the issue, the fact that four blacks served on Appellant's jury corroborates the State's asserted lack of racial animus. Taylor v. State, 583 So.2d 323 (Fla. 1991). The trial judge did not err by concluding that the State's peremptories were validly exercised in this case. Reed v. State, 560 So.2d 203 (Fla. 1990).

ISSUE II

EVIDENCE SUPPORTS THE JURY'S VERDICT OF GUILTY OF FIRST-DEGREE MURDER

A. The Evidence Was Sufficient To Prove Premeditation

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 that act." Asay v. State, 580 So.2d 610 (Fla. 1991). Premeditation may be - and usually is - proven by circumstantial evidence, ibid., and may be inferred from the nature of the weapon, the presence or absence of provocation or previous difficulties between the victim and the accused, the manner in which the homicide was committed and the nature and manner of wounds. Sireci v. State, 399 So.2d 964 (Fla. 1981). Circumstantial evidence is sufficient proof if it is consistent with guilt and inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972 (Fla. 1977).

In this case, a 51-year-old female convenience-store cashier was shot in the head at close range while she was taking two aspirins. Other than the single gunshot wound to the head, there were no other injuries or bruises on the body and no evidence of any struggle. The evidence showed that Appellant had procured the murder weapon in advance and had, in fact, used it before. The evidence readily supports an inference that the murder was premeditated. Eutzy v. State, 458 So.2d 755, 757 (Fla. 1986).

When reviewing a motion for judgment of acquittal:

> It is the trial judge's proper task to review the evidence to determine the presence or

> absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. [Cit.] The state is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. [Cit.] Once that threshold is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.
>
> State v. Law, 559 So.2d 187, 189 (Fla. 1989).

Appellant did not present any evidence at the guilt-phase of the trial, and offered no "theory of events" in support of his motion for judgment of acquittal. He argued then, as he does on appeal, only that the evidence is insufficient to prove premeditation (T 904). In his closing argument at trial, Appellant's attorney did speculate that the gun just "went off. . . suddenly and without premeditation," (T 1022), but that hypothesis is not consistent with evidence that Appellant's gun required a six-pound pull on the trigger to fire, Peterka v. State, 640 So.2d 59, 68 (Fla. 1994), nor does it explain why Appellant's gun was out of his pocket and just a few inches from the victim's head when it suddenly "went off." See Pietri v. State, 19 Fla.L.Weekly S486 (Fla. 1994); Lindsey v. State, 636 So.2d 1327 (Fla. 1994).

The cases relied upon Appellant are factually dissimilar. In both Jackson v. State, 575 So.2d 181 (Fla. 1991) and Hall v. State, 403 So.2d 1321 (Fla. 1981), there was evidence that the victims (both male) had resisted and that the gun had gone off unintentionally during a struggle. Neither victim had been killed by a well-placed shot to the head at very close range like the victim in the instant case.

In Hoefert v. State, 617 So.2d 1046 (Fla. 1993), the victim's body was too decomposed to establish the manner of death. Similar fact evidence established that the defendant enjoyed choking (but not killing) women while having sex with them, but this evidence was consistent with a reasonable hypothesis that the defendant unintentionally killed the victim while having sex in his usual manner. Smith v. State, 568 So.2d 965 (Fla. 1st DCA 1990), involved a domestic killing. There was no evidence to indicate the manner of the homicide, the nature of the weapon, or what had occurred immediately before the victim died. A reasonable hypothesis from the State's evidence was that the defendant-husband had killed his wife in the heat of passion during a domestic dispute.

In this case the State introduced competent evidence from which the jury could reasonably have rejected Appellant's lone theory of innocence. Helton v. State, 641 So.2d 146, 153 (3rd DCA 1994).

B. The Evidence Was Sufficient To Prove Robbery

It has been noted that, when the issue on appeal is the sufficiency of the evidence in a circumstantial evidence case, a review of similar cases it not especially helpful, "since the nature and quantity of circumstantial evidence in each case is unique." McArthur v. State, 351 So.2d 972, 977 (Fla. 1977). The allegedly similar robbery cases cited by the Appellant bear out this observation. Maples v. State, 183 So.2d 736 (Fla. 3rd DCA 1966) and Sanders v. State, 344 So.2d 876 (Fla. 4th DCA 1977), each involved a victim who had been drinking at a bar and got into an altercation with the defendant. After both altercations,

the victims' wallets were missing. In both cases, the defendants remained at the scene until the police arrived, but in neither case did the police find the missing wallets or money on the defendants.

In both McConnehead v. State, 515 So.2d 1046 (Fla. 4th DCA 1987) and Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986), the defendants killed the victim during a struggle. In McConnehead, the victim's wallet was found afterwards not in the possession of the defendant, but lying on the ground where the fight had taken place and where it could simply have fallen out of the victim's pocket. In Fowler, the State's evidence was consistent with Fowler's testimony that he killed the victim in self-defense and only afterward took the victim's wallet. In Greene v. State, 578 So.2d 852 (Fla. 1st DCA 1991), the defendant was a bank teller. The only evidence of theft was a shortage that could have been the result of missing cancelled checks rather than missing cash.

In McKennan v. State, 403 So.2d 389 (Fla. 1981), the defendant brutally murdered his employer by beating, strangling and stabbing her. There was a discrepancy between the amount shown in bookkeeping records and the amount contained in the cash register. However, there was nothing about the manner in which the victim was killed to indicate that robbery was the motive for the murder and significantly, there was money in the only place that money would have been kept. Finally, in Eutzy v. State, 458 So.2d 755 (Fla. 1984), the defendant shot a cab driver when a sizable fare became "due and owing." Id. at 758. Although this fact would support the pecuniary gain aggravating factor, it would not support a robbery finding.

None of these cases are apposite to this case, in which a convenience-store clerk was murdered, execution-style, by a single gunshot wound to the head, where the defendant was seen leaving that convenience store a few seconds later carrying a brown bag, and where, after the murder the cash box below the cash register was empty, there was a fresh cash shortage in the store of $59.05, and an indicator on the cash register showed that someone had tried to open it without knowing how to.

Aside from the police and the E.M.T.'s, only two other people were in the store after the murder - the person who saw Appellant leave the store, then found the victim's body behind the counter and began CPR, and a second man who looked at the open cash register and called 911. There is no evidence that either of these persons approached the second register or the cash box under the counter beneath the second register.

Appellant attempts to analyze each piece of the circumstantial evidence puzzle separately. But any review of the sufficiency of circumtantial evidence must encompass all of the relevant circumstances.

For example, it may be, as appellant contends, that the cash count alone does not "indicate" the source of any shortage (Appellant's Brief at p. 36), but the fact that the shortage arose the same day that appellant walked into the store, shot the clerk in the head and left carrying a brown bag most certainly does indicate a source of the discrepancy. Likewise, with the "E" indicator, the empty cash box, etc. No single item is conclusive, but taken as a whole, the evidence is inconsistent with appellant's theory either that no money was taken, or that it was taken by someone other than appellant.

It should be noted that the jury could have found appellant guilty of felony murder it if found that the death occurred during the commission of robbery or attempted robbery. (T 1035). F.S.A. Sec. 782.04(2). Appellant does not seriously argue that the evidence fails to support attempted robbery, and has offered no reasonable theory that would explain why appellant would have entered the Lil Champ Store and murdered the clerk, execution-style, by a single gunshot wound to the head, for any reason except in furtherance of his plan to rob the store.

"The state is not required to conclusively rebut every possible variation of events which can be inferred from the evidence but only to introduce competent evidence which is inconsistent with the defendant's theory of events." Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993). The State met its burden here.

C. The Williams-Rule Evidence Supports The Denial Of Appellant's Motion For Judgment Of Acquittal

Appellee concedes that the trial judge instructed the jury that the Williams-Rule evidence was offered to prove identity. See §90.404(2)(b)(2). Appellee points out that our State rule is virtually identical to Rule 404(b) of the Federal Rules of Evidence. Both the 5th and 11th Circuit Court of Appeals have held that once evidence is admitted for any Rule 404(b) purpose, it can be considered by the jury for any other relevant 404(b) purpose. United States v. Elliott, 849 F.2d 554, 558 (11th Cir. 1988); United State v. Baldarama, 566 F.2d 560, 567-68 (5th Cir. 1978). Accord Felker v. State, 252 Ga. 351, 314 S.E.2d 621, 634 (1984). See also United States v. Goche, 507 F.2d 820, 824 (n.4)

(8th Cir. 1974) (upholding the admissibility of 404(b) evidence under theory not offered by the government).

The Williams rule evidence was relevant to the issue of premeditation. Repetition affords an "opportunity for reflection and for foresight of the consequences." People v. Gerks, 243 N.Y. 166, 171, 153 N.E. 36, 38 (1926) (Cardozo, J.). The Williams rule evidence refutes Appellant's theory that his gun just "went off." Instead, Appellant shot Betty Jean Woods as part of a criminal pattern in which he shot unarmed and unresisting store clerks and then robbed the stores. The other two victims survived only by chance. Betty Jean Woods was not so lucky. See Crump v. State, 622 So.2d 963, 971 (Fla. 1993) (killing part of a pattern of picking up prostitutes and strangling them). Moreover, even if, as Appellant contends, the Williams rule evidence may be considered only on the issue of identity, the Williams rule evidence identifies Appellant as the person who took the money missing from the Lil Champ Store, and who attempted to open the locked cash register. Not only did Appellant take or attempt to take money from a cash register in both of the Williams rule crimes, but Appellant also took money in the Monticello crime from a cash box underneath the cash register. This evidence of Appellant's modus operandi shows both who committed the robbery of the Lil Champ food store and how he did it. Finally, this in any event is a non-issue, because the evidence supports premeditation and robbery with or without the Williams Rule evidence.

D. The Evidence Was Sufficient To Prove Premeditated Murder And Felony Murder; But Even If Only One Of These Two Theories Of First-Degree Murder Is Supported By Sufficient Evidence, Appellant's Conviction For First-Degree Murder Is Valid

It has long been generally accepted that where a single count of an indictment alleges more than one specified means of committing an offense, a general verdict of guilty on that count is authorized if the evidence supports at least one of the specified means, even if it is not sufficient as to others. Griffin v. United States, 502 U.S. 46, 116 L.Ed.2d 371, 376-7, 112 S.Ct. 466 (1991). If, however, one of the specified means suffers from a legal flaw, then the verdict may not stand. See Stromberg v. California, 283 U.S. 359, 75 L.Ed.2d 1117, 51 S.Ct. 532 (1931), and other cases cited in Griffin, supra 116 L.E.2d at 380. Contrary to the implication in Appellant's brief, there is nothing new in the distinction between sufficiency of evidence and legal errors (which would allow the jury, for example, to convict for conduct protected by the Constitution, or time barred, or not within the statutory definition of the crime), as the U.S. Supreme Court's historical analysis in Griffin makes clear. Under the federal constitution, "When a jury returns a guilty verdict on an indictment charging several acts in the conjunctive. . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Turner v. United States, 396 U.S. 398, 420, 24 L.Ed.2d 610, 90 S.Ct. 642 (1970).

Appellant contends, however, that even if such a standard is constitutional, Florida might have a different standard. Virtually all of the cases he relies on, however, involve jury instructions that were deficient and, as a result, could have

allowed the jury to convict for conduct not within the statutory definition of the crime.[6] While there is some dicta implying the contrary in McKennan v. State, 403 So.2d 389 (Fla. 1981), this Court has followed the rule of Turner and Griffin, more recently, in Brown v. State, 19 Fla.L.Weekly S261 (Fla. 1994); Atwater v. State, 626 So.2d 1325, n.1 (Fla. 1993), and Jackson v. State, 575 So.2d 181 (Fla. 1991). Therefore, if either of the two theories of first-degree murder are supported by sufficient evidence, appellant's conviction may stand.

ISSUE III

THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S OBJECTION TO THE MONTICELLO VICTIM'S TESTIMONY THAT APPELLANT'S BULLET STRUCK HIM "IN THE SPINE"

As noted previously, Appellant was positively identified by eyewitness testimony, by his fingerprints and by ballistics evidence as the perpetrator of the Monticello crime. Appellant concedes the general relevance of the Monticello crime on the issue of identity, and concedes that trial counsel did not object to the victim's testimony that Appellant shot him. Appellant argues, however, that it was unnecessary to describe where the

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6 The trial court's instructions failed to define the underlying felony in Franklin v. State, 403 So.2d 975 (Fla. 1981); Knight v. State, 394 So.2d 997 (Fla. 1981); Adams v. State, 412 So.2d 850 (Fla. 1982); Brown v. State, 521 So.2d 110 (Fla. 1988); Parker v. Dugger, 537 So.2d 969 (Fla. 1988); Gunsby v. State, 574 So.2d 1085 (Fla. 1991) and Tubman v. State, 633 So.2d 485 (Fla. 1st DCA 1994). In Wallis v. State, 548 So.2d 808 (Fla. 5th DCA 1989), the trial court had instructed the jury on a means of committing the offense of sexual battery that was unauthorized as a matter of law. In Dillbeck v. State, 19 Fla. L. Weekly S408 (Fla. 1994), the trial judge had improperly excluded evidence relevant to one ground (premeditation) of the first-degree murder count.

victim was shot and that the victim's testimony that Appellant's bullet "hit the spine" (T 721), was a "forceful indictment" of Appellant's character (Appellant's Brief at pp. 53-54).

Although Appellant now argues that this testimony was irrelevant to the issue of identity, it should be noted that his objection at trial was that this testimony was "irrelevant for purposes of identity or any other limited purpose under Williams rule" (T 721). As Appellee has argued earlier in this Brief, the Williams rule evidence was relevant to issues other than identity. The fact that Appellant shot the victim in the spine, and not some other intrinsically less harmful place, is relevant to prove Appellant's intent. The trial court did not err by overruling the objection as made. Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987).

But, in any event, the fact that the bullet lodged in the victim's spine and was therefore left inside the victim's body explains why there was only a shell casing, and not a bullet, from the Monticello crime to match Appellant's gun. Further, the fact that the bullet hit his spine and knocked him unconscious, except for a brief moment when he woke up to observe Appellant taking money from the cash box beneath the counter under the cash register, explains the circumstances of this observation, and was relevant to prove the identity of the person who stole money from the cash box beneath the counter under the cash register in the Lil Champ food store in Jacksonville.

Appellant does not and cannot complain about testimony that the Monticello victim was shot, or that as a result he fell to the floor unconscious, or that he woke up briefly to observe

Appellant stealing money from the cash box or that the bullet is still lodged inside the victim. Amoros v. State, 531 So.2d 1256 (Fla. 1988). All he complains about is testimony that the bullet "hit the spine." Even if this objection is properly preserved, and even if the court determines that the specific location of the bullet is irrelevant, any error is surely harmless under the facts of this case. Griffin v. State, 19 Fla.L.Weekly S365, 367 (Fla. 1994); White v. State, 446 So.2d 1031, 1034 (Fla. 1984).

ISSUE IV

THE JURY WAS NOT GIVEN INCORRECT INFORMATION ABOUT THE EFFECT OF APPELLANT'S PRIOR HABITUAL OFFENDER LIFE SENTENCE; IN ANY EVENT, APPELLANT HIMSELF PRODUCED THIS EVIDENCE AND CANNOT NOW COMPLAIN

Glenn Young, a correctional/probation officer working in the classification department of the Cross City Correctional Institution, was called as a defense mitigation witness (T 1176). The relevant portions of Young's testimony are reproduced verbatim in Appellant's brief, and need not be repeated here. Appellant argues that the jury was misled about the legal effect of his prior life sentence.

Of course, whether or not any of Young's testimony was relevant, see King v. Dugger, 555 So.2d 355, 359 (Fla. 1990), and whether or not it was accurate, it was offered at the behest of, and without objection by Appellant. Hence, not only has no issue here been preserved by Appellant, any possible error was actually induced by Appellant. McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980). Recognizing this, Appellant contends that "fundamental error" has occurred. But this is not the kind of issue that this Court has found to be "fundamental." Smith v.

State, 240 So.2d 807, 810 (Fla. 1970); Farinas v. State, 569 So.2d 425 (Fla. 1990).

In any event, Appellant's argument that the jury was misled fails for the very simple reason that the information provided to the jury was accurate. While Appellant, at the time of this trial, apparently had already been sentenced to life as an habitual offender for at least one of the Williams rule crimes,[7] and was therefore ineligible for either parole or gain time, Haas v. State, 625 So.2d 103 (Fla. 1st DCA 1993), nevertheless, life-sentenced habitual offenders may accumulate incentive gain time on paper, so that if the life sentence is commuted to a term of years, accumulated incentive gain time will be applied to the sentence. Fla. Admin. Code Rule 11.0065(5)(g); Burdick v. State, 584 So.2d 1035, 1038-39 (Fla. 1st DCA 1991). Such an offender may become eligible for conditional release. Bell v. State, 573 So.2d 10 (Fla. 5th DCA 1990). Moreover, while Appellant, as a life-sentenced habitual offender, is not now eligible for control release, §947.146(3), control release provisions may be and have been changed and applied retroactively to persons previously ineligible for control release. State v. Fla. Parole Commission, 624 So.2d 324 (Fla. 1st DCA 1993). See also Dolan v. State, 618 So.2d 271, 273 (Fla. 2nd DCA 1993) (noting that provisions concerning ineligibility for control

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[7] The only evidence about his prior sentence is Young's testimony that Appellant was "in for first-degree murder, felony, attempted, as a habitual offender doing a life sentence with a three-year minimum mandatory sentence. . ." (T 1177).

release "are, of course, subject to legislative amendment, and may be expanded or restricted in the future").

Furthermore, this Court has noted that the pardon and clemency power granted to the Governor and his Cabinet are "quite sweeping" in nature, and, except for cases of treason, are not limited by the constitution nor by the availability of court review. Advisory Opinion to Attorney General, 642 So.2d 724, 726 (Fla. 1994). Therefore, no one can "ensure" or guarantee that any prisoner will serve any minimum percentage of his or her sentence. Ibid.

The foregoing makes it clear that Young did not misstate the law when he testified that controlled release and conditional release are not available to life-sentenced inmates (T 1181), unless the Governor takes some unspecified action (T 1178), but that sentencing laws change "quite frequently" (T 1180), and that while life-sentenced inmates serve "more" of their time (T 1180), Young could not "guarantee" that Appellant would not be released in "five, ten, fifteen, or twenty years from now" (T 1182).

The trial court correctly instructed the jury that the punishment for the crime of which the jury had convicted Appellant would be either death or life imprisonment without possibility of parole for 25 years (T 1123- 1247, 1249, 1250). See former F.S.A. §775.082 (prior to 1994 amendment). No incorrect instructions were delivered to the jury, and no incorrect information was otherwise imparted to the jury.

A state may choose to allow the introduction in evidence of accurate information about the possibility that a life-sentenced inmate may be released. Since no inaccurate information was

given to this jury, there is no constitutional error in this case, even if this Court were to excuse appellant's failure to preserve any objection to Young's testimony. Simmons v. South Carolina, ___ U.S. ___, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994); California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). Appellant is therefore restricted to arguing that the introduction - at his own insistence - of accurate information about the possibility of his future release is fundamental error under state law. But even the admission of "extremely prejudicial" evidence does not render the trial itself illegal, so as to excuse a failure to object to that evidence. Watson v. State, 633 So.2d 525 (Fla. 2d DCA 1994). In this case, the evidence was not extremely prejudicial. At most, appellant's evidence was not quite as favorable as he might have liked, but appellant still was able to argue to the jury that he was ineligible for parole as a life-sentenced inmate, and that it was unlikely that the legislature would change the law to allow an early release for a multi-life sentenced offender like appellant. (T 1236-37).

Nothing about this evidence reaches down to the "very legality of the trial itself" or otherwise compels a findings of fundamental error. Smith v. State, supra; Ray v. State, 403 So.2d 956 (Fla. 1981). Appellant himself introduced this evidence. He ought not now be heard to complain about it.

ISSUE V

THE EVIDENCE SUPPORTS BOTH THE ROBBERY AND THE PECUNIARY GAIN FACTORS; THEREFORE, THE TRIAL COURT'S INSTRUCTIONS AND FINDINGS WERE PROPER

As discussed earlier, the evidence in this case supports a finding that appellant killed Betty Jean Woods while he was engaged in the commission of or an attempt to commit the crime of armed robbery. It follows that the trial court's instructions and findings relative to the robbery and pecuniary gain factors were proper. (It should be noted that the trial judge gave the jury appropriate instructions concerning a possible doubling of these two factors (T 1247), see Castro v. State, 597 So.2d 259 (Fla. 1992), and merged these two findings, treating them as one aggravating factor (R 398)).

Further discussion of the appropriateness of the death sentence is continued in appellee's response to Issue VIII.

ISSUE VI

APPELLANT'S AGE OF 24 COULD NOT BY ITSELF ESTABLISH A MITIGATING FACTOR, AND THE TRIAL JUDGE HAD NO OBLIGATION TO INSTRUCT THE JURY AS TO AN ALLEGED MITIGATOR NOT SUPPORTED BY THE EVIDENCE

As appellant concedes, an age of 24 is "iffy" as a mitigating circumstance. King v. Dugger, 555 So.2d 355, 358 (Fla. 1990). An age of 24 alone "will not establish a mitigating factor." Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988). As the trial court's sentencing order points out, there is no evidence in this case that appellant is mentally or emotionally immature, and he has been on his own for years (R 398-399). His age was not mitigating, and the court acted within its discretion

not to instruct the jury on the age mitigating factor. Cave v. State, 476 So.2d 180, 187 (Fla. 1985); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985). Nothing in Smith v. State, 492 So.2d 1063 (Fla. 1986), overrules Cave or Lara. By its own terms, Smith did "not establish a maximum age below which the [age] instruction must always be given", Id. at 1067, and certainly does not compel such an instruction for a 24-year-old defendant. (Smith was 20). In any event, the jury was authorized to consider appellant's age under the general mitigation instruction. (T 1248). Echols v. State, 484 So.2d 568 (Fla. 1985).

ISSUE VII

THE TRIAL JUDGE'S SENTENCING ORDER PROPERLY CONSIDERED AND WEIGHED THE EVIDENCE OF POSSIBLE NONSTATUTORY MITIGATING FACTORS

In his closing argument to the jury, appellant's attorney argued that appellant had been a well-mannered, non-violent and responsible child until he became involved with drugs in his late teens, that he was not mentally disordered or antisocial and therefore had good rehabilitation potential, had adjusted well in prison, and would not be eligible for parole for at least 25 years (T 1234-1245). After the jury returned its advisory recommendation of death, the court conducted a sentencing hearing. Appellant's counsel did not present a written memorandum to the court, but, in his oral argument to the court, mentioned as possible mitigation appellant's rehabilitation potential and his remorse (T 1276-1279).

The trial court's order dealt with all of these arguable mitigating circumstances. The trial court's order notes that appellant "offered testimony from numerous witnesses including family members, friends, former schoolmates, and teachers, who stated that they knew the Defendant throughout his high school years." (R 399). However, because these witnesses had not been in contact with appellant since he was 18, the trial court attached "no significance or value to this evidence." (R 399). Appellant argues that, because the order does not identify the "substance" of this testimony, the trial judge failed to consider the very evidence he refers to in his order. This argument is specious. Valle v. State, 581 So.2d 40, 49 (Fla. 1991) (where trial judge's order noted the testimony of witnesses and stated that he had considered the evidence, the "mere fact that the judge made no further reference to Valle's mental state at the time of the crime does not mean that the court gave it no consideration.").

The trial judge was authorized to conclude that it was not relevant mitigating evidence. While good character may well be mitigating, Rogers v. State, 511 So.2d 526 (Fla. 1987), when the only good character evidence presented on behalf of an adult defendant comes from his childhood, and there is no evidence that he has acted responsibly and nonviolently, or has supported his child since becoming an adult - when, in fact, the evidence shows just the opposite - it surely is within the court's discretion to determine that a defendant's good behavior as a child does nothing to ameliorate the enormity of the crime. Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). See also Zeigler v. State, 580

So.2d 127, 130 (Fla. 1991); Francis v. State, 529 So.2d 670, 673 (Fla. 1988). As this Court has held, there are "no hard and fast rules about what must be found in mitigation in any particular case . . . Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion." Lucas v. State, 568 So.2d 18 (Fla. 1990).

But even if the trial court erred by attaching "no significance or value" to appellant's good behavior as a child, any error is harmless. In view of the statutory aggravators presented in this case, and the absence of any statutory mitigators, the court's sentence would have been the same even if the court had found that appellant's good childhood has some mitigating weight. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Rogers v. State, supra, 511 So.2d at 535.

Appellant also complains about the trial court's discussion of Dr. Krop's testimony, arguing that the order does not refer to appellant's good functioning in prison and "totally ignored" Dr. Krop's testimony about appellant's drug and alcohol abuse.

Appellee would note that there is no evidence that appellant was under the influence of drugs or alcohol when he committed the murder of Betty Jean Woods, or when he committed either of the two prior violent felonies. Appellee would further note that appellant had the burden at trial to "identify for the court the specific nonstatutory mitigating circumstances" he was trying to establish. Lucas v. State, supra, at 24. It is questionable whether he identified within the requisite specificity either of the two omissions he alleges here.

In any event, while the trial court's order is only a summary of Dr. Krop's testimony, and not a verbatim recount of it, the order's reference to Dr. Krop's testimony about appellant's mental condition and rehabilitation potential implicitly encompasses appellant's drug and alcohol abuse and his prison functioning. The trial court properly considered and weighed this evidence. Thompson v. State, 19 Fla.L.Weekly S632, 634 (Fla. 1994); Armstrong v. State, 19 Fla.L.Weekly S397, 400 (Fla. 1994); Atwater v. State, 626 So.2d 1325 (Fla. 1993). The order is sufficient to show that the sentence was imposed in the exercise of "reasoned judgment". Holmes v. State, 374 So.2d 944, 950 (Fla. 1979).

ISSUE VIII

THE DEATH PENALTY IS APPROPRIATE PUNISHMENT FOR APPELLANT

Appellant's argument on this issue is premised upon his hope that this Court will find the evidence insufficient to support the robbery/pecuniary gain aggravator. Since the trial court's findings are supported by the record, appellant's argument fails.

Appellant has shot one man in the back and two women in the head, and has committed (or at least attempted) three armed robberies. There is no substantial mitigating evidence in this record. Appellee cannot agree with appellant's argument that the record fails to show a propensity to violence.

Moreover, appellee would take issue with appellant's further argument that he is a person "whose character is basically good." (Appellant's brief at p. 93). Appellee would point out that appellant filed a pretrial motion in which he gave notice that he

was waiving the mitigating circumstance of "no significant history of prior criminal activity," and moved the trial court in limine to prohibit the state from producing at the penalty phase any evidence of his prior criminal activity unless it was relevant to prove a statutory factor (R 193). After hearing (T 49-50), the motion was granted (R 241).

Having successfully excluded any evidence of criminal activity other than the two prior violent felonies that were committed shortly before the crime on trial, appellant ought not now be able to argue to this Court that his character is "basically good".

Insofar as appellant's adulthood is concerned, there is no evidence that would justify an inference that anything about his character should "reduce the weight" (Appellant's brief at p. 93), of the aggravators found in this case.

There are two statutory aggravating factors in this case: (1) the merged robbery/pecuniary gain factor, and (2) appellant has been convicted of two prior violent felonies. There were no statutory mitigating factors and the nonstatutory mitigators are not compelling. Appellant's death sentence is not disproportionate to similar cases. Melton v. State, 638 So.2d 927 (Fla. 1994) (death penalty proportionality warranted where murder committed for pecuniary gain; defendant had one prior violent felony conviction; no statutory mitigators and no compelling nonstatutory mitigators); Freeman v. State, 563 So.2d 73 (Fla. 1990) (same); White v. State, 446 So.2d 1031 (Fla. 1984) (death penalty appropriate where murder committed during a robbery; defendant had prior violent felony conviction; defendant had been drinking when he committed crime).

ISSUE IX

APPELLANT'S CONSTITUTIONAL CLAIMS HAVE NOT BEEN PRESERVED FOR REVIEW OR ARE MERITLESS

Appellee will respond to appellant's alphabetically-listed claims seriatim:

A. Here, appellant recasts his Issue I Neil/Slappy claim as a constitutional claim under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). No constitutional issue was raised below, so this claim is not preserved for appellate review.

In any event, since there was not Neil/Slappy error, there was no constitutional error.

B. Appellant's Jackson v. Virginia claim (443 U.S. 307, 99 S.Ct. 278, 61 L.Ed.2d 560 (1979)), is without merit for reasons stated in appellee's argument in Issue II, post.

C. This Court is without power to grant appellant's request to overrule Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). For reasons discussed previously, appellant's claim here is without merit.

D, E, F, H, and I. These constitutional claims were not raised below and are not preserved for appeal. Clark v. State, 363 So.2d 331 (Fla. 1978).

G. Appellant's automatic-aggravator argument is without merit. Jones v. State, 19 Fla.L.Weekly S577, 581 (Fla. 1994); White v. State, 403 So.2d 331 (Fla. 1981); Lowenfeld v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

J. Appellant's death-qualification argument is without merit. Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 59, 90 L.Ed.2d 137 (1985).

K. Appellant does not contend that the trial court abused its discretion under state law by denying his requests for expert assistance to examine and present evidence of racial discrimination in death penalty cases and to prove that electrocution causes physical pain. See Quince v. State, 477 So.2d 535, 537 (Fla. 1985); Martin v. State, 455 So.2d 370, 372 (Fla. 1984).

Assuming arguendo that the due process clause of the federal constitution could require a state to provide non-psychiatric expert assistance to an indigent defendant upon a sufficient showing of need, Moore v. Kemp, 809 F.2d 702, 711-712 (11th Cir. 1987), there is no due process violation here because appellant cannot demonstrate that any denial of expert assistance resulted in a fundamentally unfair trial. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Foster v. State, 614 So.2d 455 (Fla. 1992).

CONCLUSION

For all of the above reasons, appellant's conviction and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven A. Been, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 3rd day of February, 1995.

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