IN THE SUPREME COURT OF FLORIDA

JOSEPH NAHUME GREEN, JR.,

Appellant,

v. CASE NO. 83,003

STATE OF FLORIDA

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR BRADFORD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The State will cite to the record as (R), to the supplemental record as (SR) and to the transcript as (TR).

STATEMENT OF THE CASE

Green's statement of the case contains at least one error. Contrary to Green's assertion, the trial court did find one statutory mitigating circumstance, which the court gave "significant weight" (R 646). The State has no fundamental disagreement with the remainder of Green's statement of the case.

STATEMENT OF THE FACTS

Green's statement of facts is for the most part based on the trial record. As he contends, the State's case depends in large part on the eyewitness testimony of Lonnie Thompson, as corroborated by the contemporaneous statements of the victim describing the crime, and by other facts and circumstances of the case. The sufficiency of the evidence to support the conviction is a matter that will be discussed with more particularity in the arguments which follow. The State would, however, offer the following disagreements with and clarifications of Green's statement of the facts:

First of all, the crime occurred on the evening of December 8, 1992, not 1991 as Green states at p. 6 of his brief (e.g., R3-4, TR 788, 810, 864, 906).

Green states as "fact" that the crime scene area was "poorly lit," citing testimony by defense witness Billie Gene Dean, who had formerly worked at the Mapco store where the instant crime occurred. The State would point out that she had not worked at the store since July of 1992 (TR 1395), and was not present on December 8, 1992 when the crime occurred (TR 1406). Furthermore, although to her knowledge the fluorescent lights under the eaves on the north side of the building adjacent to the dumpster did not work (TR 1414), she conceded that the interior of the store was fully lit (TR 1407), that the front of the store was covered with windows (TR 1408), that there were fluorescent lights under the gas pump canopy in front of the store (TR 1408-10), that there was a street light on highway 301 across the street from the store (TR 1412-13), and, significantly, that there are fluorescent lights across the entire front of the Mapco store, including the area immediately above the phone booth Mrs. Miscally was using when she was accosted (TR 1414).

John Goolsby was sitting in his vehicle at a traffic light when he heard what sounded like a gunshot coming from the Mapco

store at 10:12 p.m. (TR 813-15). Because without his glasses he could not make out details at a distance (TR 818), Goolsby could not identify by race or sex the two people he saw in front of a reddish-maroon pickup truck parked in front of the telephone booth at the Mapco (TR 816-17), but he could see a shorter person backed up to the truck bumper and a taller person in front of the shorter person (TR 818). He looked off to check traffic. When he looked back, the taller person had disappeared (TR 819). The shorter person started around toward the driver's door of the truck, bent over, stood up again, walked a couple of steps and fell down (TR 820). Goolsby drove over to the store, got out of his vehicle and walked to the victim (TR 820).

Robert Matroni was working inside the store when he heard two screams. He looked out the front of the store and saw the victim fall in front of the telephone booth (TR 866). Matroni ran to his home directly behind Mapco to tell his mother's boyfriend, David Futch, what had happened (TR 866). Futch was at home watching television when he heard "something that sounded like a firecracker" (TR 884). Matroni burst in and told Futch that someone had been shot. Futch went to the scene (TR 885).

Futch and Goolsby got to the victim at about the same time (TR 822, 888). At this point, the victim was still alive, although in

shock (TR 821-823, 842, 892). She had been shot in the center of her abdomen, just below her rib cage (TR 822-23, 1300). Police and paramedics arrived between 10:11 and 10:15 p.m. (TR 907, 968-69, 1008). Dwayne Hardee, one of the paramedics, knew the victim, and she recognized him. She called, "Dwayne, Dwayne. ... He shot me." (TR 910). The she told Hardee what had happened. According to her, she had driven to Mapco to use the telephone. When she exited her vehicle, a "thin or slim" black male in his twenties had approached her from behind a dumpster near where she had parked. He produced a weapon and demanded money. She screamed and he became angry. When she screamed again, he "grabbed her at that point and shot her." Then he exited in the same direction from which he had come. (TR 911-912). She described the weapon as a "shiny semiauto[matic]." (TR 912).

At the time of the crime, Joseph Nahume Green, Jr., lived with his girlfriend in room number 2 of the Starke Motor Court next door to the Mapco store (TR 1093). He was three days behind on his rent and had been told that if that if he did not pay it, he would have to move out by 11 a.m. the next morning (TR 1093-94). Early in the evening of December 8, Green went to the residence of Janet Alston and tried unsuccessfully to borrow money to pay his rent to avoid being evicted (TR 1169-70).

Green's fiancé testified for the defense about Green's whereabouts the remainder of the evening of December 8. According to her, Green returned to the motel room some time after 7 p.m. (TR 1518). She reminded him that the rent needed to be paid (TR 1519). Sometime "going on" eight o'clock Green left to visit a brother who lived in another motel, returning between 8:30 and 9 p.m. (TR 1519-20). Shortly after 9, Green left to get a cigarette, returning 10 minutes or so later (not 30 minutes later as stated in Green's brief)(TR 1521). Then, according to Green's fiancé, Green talked on the telephone with his brother for 45 minutes. When this call was over, the landlady called and talked for ten minutes (TR 1522). At 10:05, Green's fiancé testified, she and Green went for a walk (TR 1523). At 10:15 or 10:20, they arrived at Ronnie Ferrell's residence, where they stayed 5 or 6 minutes. Then they went to Jessie's Lounge, where Green tried to obtain a cigarette from "three" men (TR 1528). From there, they went to the Pizza Hut, arriving sometime before 11 p.m. (TR 1529). A customer there was having trouble with the muffler on his car, and Green volunteered to get a saw. His fiancé testified that she returned to the motel and Green left to get the saw (TR 1530). Green, according to her, returned to their room at 11:05 (TR 1531).

Green fails to note in his brief the testimony of other witnesses in conflict with his fiancé's testimony concerning Green's whereabouts the evening of December 8. For example, Green's landlady testified in rebuttal that she had telephoned Green about the overdue rent shortly before 9 p.m., not at 10 p.m. as Green's fiancé had testified (TR 1615-16). Two members of the band playing at Jessie's Lounge that evening testified that they were outside the lounge taking a break between 9:45 and 10 p.m. (and not at 10:30) when Green (whom they described as a "skinny" black man), accompanied by a woman, walked up and asked for a cigarette (TR 957-959, 990-92). Moreover, by all accounts, Green did not arrive at the Pizza Hut until shortly before 11 p.m. (TR 1553-1556). In fact, two of his own witnesses testified specifically that Green did not appear at the Pizza Hut until several minutes after they had driven by Mapco and seen the police and rescue vehicles at Mapco (TR 1562-63, 1575). (Mapco is two blocks from the Pizza Hut; both face highway 301 (TR 907, 1540, 1569)).

Lonnie Thompson had known both the victim and the defendant a "pretty good while" before he ever saw the victim being murdered (TR 1172-1174). He was also familiar with the kind of vehicle the victim drove (TR 1174). As Green points out in his brief, Thompson

was not sure just how much beer he had drunk the evening Judith Miscally was murdered; however, Green fails to note the testimony of police officers Jeff Johnson and Raymond Shuford, both of whom knew Lonnie Thompson (TR 1343-44, 1354). These officers had talked to Thompson two to five hours after the crime. Although Thompson had been drinking, he was sober and not intoxicated, and was speaking coherently and clearly (TR 1344, 1348-49, 1355).

Thompson testified that he had stopped to get a drink of water from a spigot by the side of the Lil Champ food store across the street from Mapco (TR 1179). From there, he had a "clear" view of the parking lot of the Mapco (TR 1180). (Photographs of this view are contained in the box of exhibits on file in this Court). He first saw the victim in front of her truck by the telephone (TR 1181). Joseph Green was standing in front of her, facing her. Thompson could see Green's face clearly (TR 1181-82). He saw Green "scuffling" with the victim over her purse (TR 1182, 1240). She refused to give up her purse (TR 1241). Thompson heard a gunshot, and saw the victim walk around the front of the truck and fall down "right there by her door" (TR 1182-83, 1243). Thompson ran and hid behind the Lil Champ store (TR 1183). When he looked back a few minutes later, the victim was lying on the ground, being attended to by two white men. Soon, the police and rescue units arrived (TR

1184). Feeling safe now, Thompson went over to the Mapco and bought another beer TR 1185). He left, but "a little later" officer Johnson picked him up to talk to him (TR 1186). At this time, neither officer Johnson nor Thompson knew that Judith Miscally had been mortally wounded. Thompson did not like officer Johnson as a result of some unspecified past experience which had scared him (TR 1255, 1356), and, just to get rid of him, told Johnson that the crime had been committed by a tall, blond-haired white man (TR 1188, 1258). However, when Thompson talked to officer Shuford a couple of hours later, Shuford told him that the victim had died (TR 1356, 1190). Thompson testified that this information made him feel "real bad" (TR 1190). Shuford testified that Thompson "became very upset" (TR 1356); the knowledge that this case was a murder and not merely a shooting "changed his attitude toward the entirety of the case" TR 1362). Discovering that the victim (whom he knew) had died made "a significant impact on his willingness" to tell all that he knew about the crime (TR 1366). From that point on, Shuford testified, "Mr. Thompson then very voluntarily began wanting to talk about the case and wanting to tell what he had seen and that he had been a witness to the entire incident" (TR 1357). Thompson described the crime to the police and identified Joseph Green as the shooter (TR 2319-20).

Later, Green was brought to the police station, and Thompson again identified Green as the person who had shot Judith Miscally (TR 2315).

Green states in his brief that Lonnie Thompson had an "IQ of 67 which would put him in the retarded range." Appellant's Brief at p. 8. He fails to note that the only evidence of this IQ is contained in the very defense document which also states that Lonnie Thompson's IQ score "may be an underestimation of Mr. Thompson's actual intellectual functioning" (Defendant's Exhibit 1, p. 1), that his adaptive functioning was at the "lower end of normal adaptive functioning" (Id. at 3) (emphasis supplied), and that Thompson's "practical day to day living skills suggest that he in not truly an individual with mental retardation." (Id. At 5).

Green cites pages 1193-94 of the record for the factual assertion that Thompson has had "recurring dizzy spells and memory problems" since falling off a moving car "several years earlier." Appellant's brief at p. 8. Actually, the fall occurred when Thompson was a teenager, and Thompson only experienced dizziness "Maybe one or two times" following this fall (TR 1193). Thompson denied having any significant memory problems following the fall, and testified that at the present time he suffers no ill effects from the fall (TR 1194). As for Green's footnote 3, Green implies

that Thompson first claimed to have met the prosecutor only once to talk about the case, while subsequently admitting to four or five meetings. The record shows that on cross-examination, Thompson was specifically asked whether he had met with the prosecutor the previous day to discuss the facts of the case. He answered this question, "Yes, sir." (TR 1218). Then he was asked how many times he had met with the prosecutor, and he answered "About four or five times" (TR 1219). Thompson never claimed to have met with the prosecutor only once.

Green refers to charges pending against Thompson which were filed "a month before the Miscally shooting." Appellant's brief at 10. Actually, the charges were filed in November of 1991 (TR 1333), which would have been a year and a month before the December 8, 1992, Judith Miscally shooting. Thompson's defense attorney testified that Thompson's status as a witness in this case was not a factor in the entry of Thompson's plea on March 8, 1993 (TR 1326).

Green's statement of facts includes no reference to the evidence introduced at the penalty phase. The record shows that the state proved that Green had two prior violent felony convictions -- a 1983 conviction for second degree murder and a 1986 conviction for battery on a corrections officer (TR 1837).

Green presented the testimony of several witnesses at the penalty phase. First, his supervisor at Darcon testified that Green had been a laborer for Darcon for six weeks prior to his arrest and was a hard worker (TR 1851 et. seq.).

Next, Dr. Ernest Bordini, Ph.D., testified about the results of his mental evaluation of Green (TR 1879 et. seq.). According to Dr. Bordini, Green's IQ is in the low average range, his attention is good, and his general intellectual ability is superior to his ability to perform specific academic tasks, such as spelling (TR 1895-97). Further, although some of Green's "motor planning and sequences" were deficient (TR 1902), his impulse control was "pretty good" (TR 1903). Green does have some mild neurological impairments relative to his ability "adapt to demands that his environment, school, family, et cetera, would place on him" (TR 1910). Nevertheless, Bordini testified, Green was neither insane nor mentally ill (TR 1914). Bordini's impression was "adjustment disorder with depressed mood" (TR 1912), coupled with "possibly" an "undifferentiated attention deficit disorder" (TR 1913), and, based on his recurrent criminal history, an "antisocial personality disorder" (TR 1913). Asked if Green would abide by the rules in prison and develop an acceptable relationship with prison

supervisory staff, Dr. Bordini answered, "I wouldn't predict that based on his previous history, no." (TR 1917).

On cross-examination, Dr. Bordini testified that aggression and fighting and problems with obeying the law have been constants in Green's behavior (TR 1918-20, 1924-25). He testified that "some of the best predictors of what's going to happen in the future is [sic] what's happened in the past unless something significant changes, so normally that's what I would predict" (TR 1921). Green, he testified, was antisocial and likely to remain so (TR 1922). The State concluded its cross-examination with questions specifically addressing possible statutory mitigators. First, the State asked Dr. Bordini if he saw "anything that tells you that this man is under the influence of extreme mental or emotional disturbance?" Dr. Bordini answered, "No." (TR 1930). The State asked Dr. Bordini if he saw "anything that indicated [Green] was acting under extreme duress, extreme duress [sic], or under the substantial domination of someone else when this crime occurred?" Dr. Bordini answered, "No, I do not." (TR 1930). The State asked him if he saw "anything that tells you that [Green's] capacity to appreciate the criminality of his conduct is substantially impaired?" Dr. Bordini's answer was "No." (TR 1930). Finally, the State asked him if he saw "anything to show that [Green] lacks the

capacity to conform his conduct to the requirements of law?" The answer to this question also was "No." (TR 1930).

Green's sister testified that Green was "abused some" by his stepfather; the stepfather "was old-fashioned and during those days they thought that you just beat the children when they did something, you know" (TR 1934). She lived with Green for a year and a half when she was 15, and live nearby for several more years (TR 1940). Although unaware of Green's prior record (TR 1941-42) (or of Dr. Bordini's testimony), she was of the opinion that Green has "never been like a fighter, never has" (TR 1936). When Green became an adult, "he lived his own life" (TR 1941). She was not sure where he might have been living at any given time (TR 1943). At the time Judith Miscally was murdered, it might have been a year since Green's sister had seen him (TR 1944).

Finally, Green testified on his own behalf. He was released from prison in May of 1992 (TR 1952). Following his release, he lived in Palatka until his brother was arrested and he moved to Bradford County "to assist him in anything he needed" (TR 1945-46). It had been close to six years since Green had used any illegal drugs because he had been "in prison and in prison you don't mess with things like that" (TR 1948). He admitted that he had been convicted five times of "a felony or of a crime involving

dishonesty or moral turpitude" (TR 1950), including burglarizing his own mother's house (TR 1952).

SUMMARY OF THE ARGUMENT

Green raises 12 issues in this appeal (not 10 as he states at the outset of his summary of the argument). (1 and 2) The first two issues will be argued together, as both involve a claim that this Court, by one means or another, should review the weight of the evidence. It is well settled that this Court reviews only the legal sufficiency, not the weight, of the evidence, and Green offers no good reason to overturn years of precedent. (3) Green's intent to kill, although formed quickly, was sufficiently demonstrated by the circumstances, and the jury was authorized to convict him of premeditated murder. Moreover, the first-degree murder conviction may be affirmed on a felony murder theory. (4) There was no improper cross-examination of a defense witness concerning her prior alcohol use, since the defendant had opened the door to such cross-examination on direct. In addition, the cross-examination at issue had no affect on the trial. (5) Even if the one-man showup was an overly suggestive identification procedure, it did not taint an identification which had already occurred. Moreover, the defense conceded that the witness knew

Green. The identification presented at trial was based upon the witness' independent recall, not on any suggestive identification procedure. (6) There was no error in the denial of the motion for change of venue where all the jurors stated that they could decide the case base upon the evidence, and where defense counsel not only failed to use all of its allotted peremptories, but also stated that he was satisfied with the jury as selected. (7) Green failed to preserve for appellate review any objection to the excited utterances made by the victim after she was mortally wounded. Even if preserved, there was no error. (8) Probable cause to search came from an eyewitness, from the defendant's fiancé, and from the officer's own observation of Green's clothing. Reliability was sufficiently established. The clothing was sufficiently described, but even if it was not, the clothing was admissible under the Leon good-faith exception. (9) Lonnie Thompson was not mentally retarded nor otherwise incompetent to testify. (10) Lingering doubt is not a proper nonstatutory mitigator, and Green offers no good reason to re-examine this Court's precedents in this area. (11) Polygraph evidence is not admissible either. Even if it were, the polygraph evidence at issue here would not have been relevant at the penalty phase because lingering doubt is not a relevant

consideration. (12) The evidence supports the robbery aggravator.

ARGUMENT

ISSUES I AND II

THIS COURT DOES NOT REVIEW THE WEIGHT OF THE EVIDENCE TO SUPPORT A CONVICTION, EITHER DIRECTLY OR UNDER THE GUISE OF FUNDAMENTAL UNFAIRNESS OR REVIEW OF THE TRIAL COURT'S DENIAL OF A MOTION FOR NEW TRIAL; IN THIS CASE THE JURY WAS FULLY AUTHORIZED TO FIND GREEN GUILTY BASED ON EYEWITNESS TESTIMONY AND OTHER EVIDENCE

Green acknowledges that in Tibbs v. State, 397 So.2d 1120 (Fla. 1981) (aff'd, Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)), this Court held that evidentiary weight is not a ground for appellate reversal. Having acknowledged Tibbs, Green proceeds to argue that this Court nevertheless should weigh the evidence under either one of two theories: (a) this Court could review the weight of the evidence under the guise of correcting an alleged "fundamental" injustice, or (b) this Court could review the weight of the evidence in connection with its review of the trial court's denial of Green's motion for new trial. In effect, Green wants to reinstate the "third" category of appellate reversals identified in Tibbs--"where the evidence is technically sufficient but its weight is so tenuous or insubstantial as to require a new

trial in the interests of justice"--which Tibbs eliminated. Id. At 1125. What he really is asking for is that Tibbs be overruled.

Although there was some "confusing and ambiguous language" in the appellate cases prior to Tibbs, id. at 1125, it is questionable whether appellate review of the weight of the evidence was ever authorized under Florida law. In Smith v. State, 249 So.2d 17 (Fla. 1971), this Court unanimously reversed the district court, which had reversed a conviction on grounds of weight, not sufficiency. Citing McKee v. State, 159 Fla. 794, 797, 33 So.2d 50, 52 (1948), for the proposition that "[u]nder our scheme of administering justice, the jury resolves factual conflicts," this Court held in Smith that once the district court "determined that the evidence supported the conviction and the trial was free of error ... the duty of the District Court was to affirm the conviction." Smith, supra at 18. Ten years later, this Court unanimously agreed in Tibbs that whatever the former validity of the concept of appellate review of the weight of the evidence, "[h]enceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the evidence is tenuous or insubstantial." Id. at 1125 (emphasis supplied). "Legal sufficiency alone, as opposed to evidentiary weight, is the

appropriate concern of an appellate tribunal. Id. at 1123 (emphasis supplied).

Green, however, argues that Tibbs contains what he describes as a "limited exception" to its own rule, i.e., that the "in the interest of justice" ground for appellate reversal allows for the review of evidentiary weight. Green's argument, however, is defeated by the very portion of Tibbs that he cites. Tibbs explains that the "in the interest of justice" ground is used to correct "fundamental injustices, unrelated to evidentiary shortcomings." Id. at 1126. Green cites no case in which a Florida appellate court has identified and relied on any interest-of-justice exception to the Tibbs rule to review the weight of the evidence. Notably, the "interest of justice" was the very justification invoked pre- Tibbs to review the weight of the evidence. E.g., Smith v. State, 239 So.2d 284 (Fla. 2d DCA 1970). It would be very surprising if the same justification supported an appellate review of the weight of the evidence after Tibbs abolished that very ground of review. Obviously, such any such exception to the Tibbs rule would not be "limited" as Green contends. It would be an exception which swallowed the rule.

Unless this Court wants to overrule Tibbs, the weight of the evidence cannot be reviewed under the interest-of-justice ground of

appellate review. "Where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal." Spencer v. State, 645 So.2d 377, 381 (Fla. 1994).

Green argues a second back-door exception to Tibbs. The Rules of Criminal Procedure authorize the trial court to grant a new trial on the ground that the verdict is contrary to the weight of the evidence. Fla. R. Crim. P. 3.600 (a) (2). Green's motion for new trial contained a contrary-to-the-weight-of-the-evidence ground. Green argues that this Court should reweigh the evidence when it reviews the trial court's denial of his motion for new trial.

The State does not dispute that a trial court has the power to grant a new trial on the ground that the verdict is contrary to the manifest weight of the evidence. Smith v. Brown, 525 So.2d 868, 869-70 (Fla. 1988). However, it remains the jury function to evaluate the credibility of any given witness. The trial judge should not act as an additional juror when reviewing the weight of the evidence. Id. at 870. The judge should intervene only when the manifest weight of the evidence compels such intervention. Ibid.

This Court has not addressed the specific nature of its review of the grant or denial of a motion for new trial in a criminal case

based on the ground that the verdict is contrary to the weight of the evidence. See, e.g., Tibbs, supra at 1123, fn. 12. If this Court were to conduct its review of such an issue merely by itself reweighing the evidence, then Tibbs would be deprived of any meaning. Under the guise of reviewing the trial court's denial of the motion for new trial, this Court would perform precisely the same kind of review of evidentiary weight ostensibly precluded by Tibbs. Furthermore, should this Court acknowledge such a review, it is likely that it would soon be called upon to conduct such a review in every case, either in lieu of, or in addition to, a review for sufficiency of the evidence. The same policy considerations which support the original Tibbs holding compel against such an expansive review of the denial of a motion for new trial on grounds of weight:

> Elimination of the third category of reversal [weight] accords Florida appellate courts their proper role in examining the sufficiency of the evidence, while leaving questions of weight for resolution only before the trier of fact. Eliminating reversals for evidentiary weight will avoid disparate appellate results, or alternately our having to review appellate reversals based on evidentiary shortcomings to determine whether they were based on sufficiency or on weight. Finally, it will eliminate any temptation appellate tribunals mighty have to direct a retrial merely by styling reversals as based on "weight" when in fact there is a lack of competent substantial evidence to support the verdict or judgment and the double jeopardy clause should operate to bar retrial.

Id. at 1125-26.

The State would argue that in a criminal case, when the defendant has had the weight of the evidence reviewed by both the jury and the trial court, he has received all the weight review to which he is entitled. When both jury and trial court have resolved the weight of the evidence against the defendant, he is limited to an appellate review only of the legal sufficiency of the evidence. Should this Court disagree, however, the State would note that, even in a civil case, the trial court's ruling on a motion for new trial is reviewed only for an abuse of discretion. The "reasonableness" test is applied to the judge's ruling; if reasonable men can differ as to the propriety of the trial judge's ruling, the ruling is not unreasonable and cannot amount to an abuse of discretion. Smith v. Brown, supra.

Green argues that the trial court abused its discretion by "summarily" denying his motion for mistrial. Green, however, offered no evidence in support of this ground of his motion for new trial, and was not restricted in his argument in support of the motion (TR 1791-92). The State is not sure what significance Green means to attach to the "summariness" of the trial court's denial, but would contend that the denial, if reviewable at all, was not an abuse of discretion.

Underlying both of Green's first two issues are two premises: (a) the evidence is legally sufficient to convict Green at least of felony murder, but (b) if this Court could reweigh the evidence in this case, this Court, unlike the jury and the trial court, would conclude that verdict is contrary to the weight of the evidence. The State agrees with the first premise, but disagrees that the verdict is contrary to the weight of the evidence.

The State in fact presented eyewitness testimony identifying Green as the killer. Moreover, this is not a case in which the eyewitness identified someone he did not know and had never met except briefly during a highly stressful criminal encounter. It is uncontradicted that Lonnie Thompson, who identified Green as the killer, knew Green (and also his brothers and his girlfriend) (TR 1172-74, 1176-77, 1265, 2364). He also knew the victim and knew what kind of vehicle she drove (TR 1173-74). His trial testimony was clear and unwavering in his identification of Green as the person who shot the victim in the parking lot of Mapco.

Green, however, attacks Thompson's very competence to testify. This issue will be argued more fully later, but the State would note here that the very evidence Green relies upon to argue that Thompson is mentally retarded refutes that assertion. Thompson did score 67 on an IQ test during an evaluation in another case. And

it is true that significantly subaverage intellectual functioning (one of the criteria for a diagnosis of mental retardation) is generally defined as an IQ below 70. However, as noted in the DSM-IV, IQ scores are at best accurate withing a range of 5 points either way, and there are a number of social and economic factors that may further reduce the accuracy of the test results. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition 1994, at 39-40. Partly for this reason, "impairments in adaptive functioning, rather than low IQ, are usually the presenting symptoms in individuals with Mental Retardation." Id. at 40. Thompson's practical living skills, according to defense exhibit 1, "are not significantly below average." Defendant's exhibit 1 at p. 2. At page 3, it is reported that in a test administered to "assess his adaptive functioning," Thompson scored an "age equivalent" of 16 and a "social quotient" of 88. These scores, it is reported, "represent the lower end of normal adaptive functioning." (Emphasis supplied.) His adaptive skills "suggest that he is not truly an individual with mental retardation." Id. At 5. In any event, even if Thompson's adaptive skills are ignored, his IQ score, if accurate, places him no lower than at the very upper end of mild mental retardation. Nothing in the record

supports an argument that a mildly retarded person is incapable of testifying accurately about concrete facts, such as who shot who.

Green also makes an issue of how much Thompson had to drink on the night of the murder. Thompson may not have remembered just how much he had had to drink, but two police officers who had talked to and observed Thompson shortly after the murder testified that, while he had been drinking, he was sober and coherent. Furthermore, Thompson's testimony was corroborated in a number of important respects.

Thompson testified that he had seen Green at Jessie's Lounge shortly before the robbery/shooting at the Mapco store (TR 1176-77). The fact that Thompson was at Jessie's and that he saw Green there was corroborated by officer Spriggle, who testified that shortly before 10 p.m. he was on routine patrol and saw Thompson (whom he knew) standing behind Jessie's (TR 926), and by two band members playing at Jessie's that night who saw both Thompson and Green at Jessie's shortly before 10 p.m. (TR 956-57, 989-90). The fact that Thompson had just seen Green at close range a few minutes before the shooting is of course another circumstance supporting Thompson's ability to identify Green as the shooter.

Thompson's testimony that, from the Lil Champ store across the street, he had a clear view of the crime scene was corroborated by

the testimony of officer Reno, who testified that he went to Thompson's location at the Lil Champ and that he had an unobstructed view to the phone booth at the Mapco (TR 1337).

Thompson's testimony that he saw a struggle between the victim and a lone, slender black male assailant was corroborated by two people: Mrs. Miscally herself and John Goolsby (TR 816-18, 911-12). In addition, Thompson's testimony that Green and the victim were struggling over her purse was corroborated by the victim's statement that her assailant had demanded money (TR 911).

Thompson's testimony that, when he looked back at the crime scene a few moments after the shooting, he saw the victim lying on the ground being attended to by two white men (TR 1184), is corroborated by the testimony of Goolsby and David Futch (TR 821, 892).

Moreover, it is unrefuted that Green needed money that night. He was several days behind in his rent, and about to be evicted (TR 1459). He attempted unsuccessfully to obtain money before and after the murder (TR 1169, 1564). He not only had the motive, he had the opportunity. His motel was next door to Mapco. He was out and about that evening, but was never very far from the motel or from Mapco (TR 1459). And although he attempted to present alibi evidence, this "recounting ... admittedly has some holes."

Appellant's brief at 25. In fact, the times reported by Green's fiancé for his various whereabouts that evening are in conflict with the testimony of every other witness who testified. Green was at Jessie's between 9:45 and 10 p.m., not at 10:30 as his fiancé testified. He talked to his landlady just before 9 p.m., not at 10 p.m. as Green's fiancé testified. In fact, her testimony that she and Green went for a walk after 10 p.m. conflicts with Green's own statement to police that he was not only in bed, but "unconscious" by 10 p.m. (TR 1461). Moreover, it is suspicious that she claimed not to have noticed that anything out of the ordinary had occurred at the Mapco store--she saw no lights, heard no sirens, was aware of no commotion (TR 1540-41), even though, apparently, everyone else at the Pizza Hut had noticed the commotion and also that Green had not arrived at the Pizza Hut until many minutes afterwards (TR 1562-63). Nor, apparently did Green's fiancé hear officer Brown pounding on her motel room door hollering "police, police," shortly after 11 p.m. (TR 1066), even though she testified that she had left Green at the Pizza Hut, returned to the motel room, taken a shower, got in bed and watched the "tail end of the movie" before Green returned to the room at 11:05 (TR 1531).

Green also presented the testimony of Katrina Kinter. Kinter's testimony is, as the state argued at trial (TR 1665), "not

corroborated by anybody." No one else saw three assailants--not Judith Miscally, not Lonnie Thompson, and not John Goolsby. Nor did anyone else see a white Camaro at the crime scene, nor did anyone else describe the victim's truck as blue with silver striping (TR 1600). (Actually, it was red (TR 790, 816, 925, State's Exhibit 1)). Significantly, Kinter was not looking when she heard the shot, nor did she immediately look up (TR 1607). Nor did she see Goolsby drive up to assist the victim after the shooting, nor did she see Matroni running from the store to get his mother's boyfriend, nor did she see the latter run to Mrs. Miscally's assistance (TR 1608). Nor did she bother reporting her information to the police, even though her husband was a former police officer (TR 1596-98).

Lonnie Thompson's testimony, by contrast, was, as the state argued at trial, "corroborated on every significant aspect of his testimony." (TR 1671). The evidence was amply sufficient to persuade rational jurors that Green was guilty of murder beyond any reasonable doubt. Larkins v. State, 655 So.2d 95, 98 (Fla. 1995), Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986). Moreover, to the extent that the trial court's weight-of-the-evidence determination is addressable on appeal, the trial court correctly determined that the verdict was not contrary to the manifest weight

of the evidence, and its denial of Green's motion for new trial was not an abuse of discretion.

ISSUE III

THE EVIDENCE WAS SUFFICIENT TO PROVE PREMEDITATED MURDER, BUT EVEN IF IT WAS NOT, GREEN'S FIRST DEGREE MURDER CONVICTION MAY STAND UNDER A FELONY MURDER THEORY

In his first two issues, Green questions the evidence identifying him as the person who shot and killed Judith Miscally. In this issue, he addresses the issue of premeditation. The essence of this complaint is that the killing was not sufficiently pre-contemplated; he argues that "too little time passed for Green to have formed the required intent." Appellant's brief at 35.

The evidence has been discussed previously. Essentially, the State presented evidence which showed that Green accosted the victim as she was about to make a telephone call at a pay telephone located at the front of the Mapco store; Green demanded money; she refused and screamed; there was a struggle; he grabbed her and shot her. Significantly, the victim was shot in the center of her abdomen, just below her rib cage, at "contact" range (TR 821-23, 842, 1300). The bullet perforated her "liver, stomach, pancreas and inferior vena cava" (TR 1300).

The State did not contend at trial that the evidence showed that Green pre-planned the killing before he accosted the victim. The State's theory was that Green became angry because the victim refused to give him any of her money and "made a conscious decision to do something that he hadn't done before that moment, which is shoot her" (TR 1639). The State argued to the jury: "Guns do not, ladies and gentlemen, discharge accidentally in that kind of situation. Guns do not accidentally get put to the gut of somebody who is being robbed and go off by misfortune or mischance. They go off when somebody points and pulls the trigger and when the somebody who does that does it with that gun in the belly of their victim, there can be only one intention and that is to kill." (TR 1640).

It is important to note, first, that there is no issue in this case of the CCP aggravator, nor of heightened premeditation. First-degree, premeditated murder requires proof only of simple premeditation. Simple premeditation is a 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). Green acknowledges that under Florida law premeditation may be formed "a moment before the

act," but contends that, notwithstanding the apparent clarity in the definition of premeditation, this Court has on occasion "required more time to show the defendant contemplated murder." Appellant's brief at 35. He cites only Jackson v. State, 575 So.2d 181 (Fla. 1991) in support of his more-time-is-needed theory. In Jackson, there was evidence that the victim had resisted and that the gun had gone off unintentionally when the victim offered resistance. Significantly, however, the victim was not shot from close range. Jackson, supra at 186. This Court has found sufficient evidence of premeditation in case in which the defendant did shoot the victim in a vital area from very close range. See, Pietri v. State, 644 So.2d 1347, 1353 (Fla. 1994) (victim shot in the heart from close distance); Peterka v. State, 640 So.2d 59, 68 (Fla. 1994) (victim shot in the head at contact range); Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994) (victims each died from single gunshot wounds to the head, inflicted from close range); Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984) (victim shot in the head, execution style).

The State acknowledges that in a recent case, this Court decided that the evidence was not sufficient to prove premeditation even though the victim was shot in the head at close range, the victim's only injury was the single gunshot wound to the head, the

defendant had procured the gun in advance and had used it before, and the gun required a six-pound pull to fire. This Court concluded that notwithstanding all of the above, the killing could have occurred "on the spur of the moment." Mungin v. State, 20 FLW S459 (Fla. Sept. 7, 1995) (motion for rehearing pending).

With respect, the State would contend that premeditation can be formed "on the spur of the moment." This Court has consistently held that premeditation can be formed "in a moment." E.g. Asay v. State, supra. "Premeditation does not have to be contemplated for any particular period of time before the act, and may occur a moment before the act." Sireci v. State, 399 So.2d 964, 967 (Fla. 1981) (emphasis supplied). The question is not how long the defendant considered the act, it is whether or not he had a conscious purpose to kill and was aware of the nature of his act and the probable result of his act. The State would argue that when the defendant has placed a loaded gun to a vital part of another person's body and pulled the trigger, then, absent evidence to the contrary, the jury is entitled to conclude that the defendant intended to kill and understood the nature and probable consequences of his act.

A judgment of conviction comes to this Court with a presumption of correctness, and a defendant's claim of

insufficiency of the evidence will not prevail where there is substantial, competent evidence to support the verdict and judgment. Spinkellink v. State, 313 So.2d 666, 671 (Fla. 1975). Even in a circumstantial-evidence case, the State need not conclusively rebut every possible variation of events which could be inferred from the evidence; whether the evidence fails to exclude all reasonable hypotheses of innocence is a matter for the jury to decide. Barwick v. State, 660 So.2d 685, 695 (Fla. 1995). This Court has held: "If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there s room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." Taylor v. State, 583 So.2d 323, 328 (Fla. 1991).

In response to Green's contention on appeal that his act of shooting Judith Miscally was an "unthinking single shot killing[]" (Appellant's brief at 36), the State would make the same argument here that it did at trial: when someone puts a gun to "the belly" of his victim, and pulls the trigger, "there can be only one intention and that is to kill." The jury was entitled to conclude from the evidence that Green intended to kill, and that this intention to kill, while of short duration, existed long enough for

Green to be conscious of the nature of the act he was about to commit and the probable result of it insofar as the life of the victim was concerned. Larry v. State, 104 So.2d 352 (Fla. 1958).

But even if this Court disagrees with the foregoing, Green's first-degree murder conviction may be affirmed on a felony-murder theory (the underlying felony being robbery or attempted robbery), which Green concedes was presented to the jury. Mungin v. State, supra; Atwater v. State, 626 So.2d 1325, 1327-28 n. 1 (Fla. 1993); Jackson v. State, supra.

ISSUE IV

THE DEFENSE OPENED THE DOOR TO EXAMINATION CONCERNING KATRINA KINTER'S ALCOHOL USE; MOREOVER, ANY ERROR HERE IS HARMLESS

Green begins his argument on this issue by addressing the trial court's ruling as to Lonnie Thompson's prior cocaine use. What this discussion has to do with the proper scope of cross-examination of Katrina Kinter is not clear. Green was allowed to ask Thompson on cross-examination whether he had smoked cocaine or tried to buy cocaine the evening of the murder. Green denied any use or attempted use of cocaine that evening. Absent any showing that Lonnie Thompson had used cocaine the night of the crime, or during the trial, or that any prior use had affected his ability to

observe, remember and recount, Green properly was precluded from cross-examining Thompson about any prior cocaine use to impeach his credibility. Edwards v. State, 548 So.2d 656 (Fla. 1989). The State assumes that Green is hinting that the trial judge was not evenhanded in his treatment of the parties. The State does not agree, but, in any event, any ruling concerning the scope of Green's cross-examination of Thompson is not at issue here. Green could have made it an issue, but he did not, and his discussion of Thompson's cross-examination is an irrelevant digression.

What is at issue is whether the trial court erred in its ruling concerning the State's cross-examination of Katrina Kinter. The State agrees that had the defense not opened the door to the subject of Kinter's use of alcohol in its direct examination, then the State could not have cross-examined Kinter about her prior alcohol use for the purpose of impeachment, under Edwards. However, there are two permitted areas of inquiry on cross-examination: "the subject matter of the direct examination and matters affecting the credibility of the witness." § 90.612, Fla. Stat. 1995. Cross-examination as to the subject matter of the direct examination has traditionally been extended to the "entire subject matter" of the direct examination, including "all matters that may modify, supplement, contradict, rebut or make clearer the

facts testified to in chief by the witness on cross examination." Embrey v. Southern Gas & Electric Corp., 63 So.2d 258, 262-63 (Fla. 1953). More recently, this Court quoted with approval the following passage from 4 Jones on Evidence, Cross Examination of Witnesses § 25:3 (6th Ed. 1972):

> [T]he rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross-examination. One of these objects is to elicit the whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination.

McRae v. State, 395 So. 2d 1145, 1152 (Fla. 1980).

Notably, Green's objection at trial was not that the State's cross-examination was outside the subject matter of direct examination; it was that it was not "proper impeachment" (TR 1593). Green has not preserved any objection that the State's question was not within the subject matter of direct examination. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). However, to the extent that such an objection may be reached on appeal, the State would contend that its cross examination was within the subject matter of the direct examination, and was proper as a means of eliciting the whole truth of the matter at issue, and to "contradict, explain or

modify" an inference that might otherwise have been drawn from her testimony. Even Green admits in his brief that the purpose of his attorney's direct examination of Kinter was "obviously" to compare her "to Thompson." Appellant's brief at 38. Green further concedes that the State's cross-examination about Kinter's alcohol abuse was in response to Green's direct examination on the same subject. Ibid. As stated in McRae, supra, a "defendant cannot take advantage on appeal of a situation which he has created at trial." Having introduced the subject of Kinter's alcohol usage, Green should not be heard to complain about the State's cross-examination on the same issue.

But even if this Court should conclude that this issue has been preserved and that the State's cross-examination went beyond the proper scope of a subject raised in the first instance by the defense, any error was harmless. Unlike the drug usage at issue in Edwards, supra, alcohol consumption is not illegal. Furthermore, the witness testified on redirect that she had abstained from the use of alcohol for over three years, that she belonged to Alcoholics Anonymous, and that she had not only attended, but chaired, an Alcoholics Anonymous meeting earlier on the evening of the murder (TR 1610-11). The State did not even bother to mention Kinter's prior alcohol usage in its closing argument (probably

because it had an inconsequential affect on the credibility of her testimony). The State's cross-examination about her prior alcohol use had no detrimental effect upon her credibility and was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE V

THOMPSON IDENTIFIED GREEN AS THE KILLER BASED ON HIS EYEWITNESS OBSERVATION OF THE CRIME AND HIS PERSONAL KNOWLEDGE OF GREEN; THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS THOMPSON'S IDENTIFICATION OF GREEN

Prior to trial, Green filed a "Motion to Suppress Identification by Witness" contending that any trial identification of Green by Lonnie Thompson would be tainted by "a highly suggestive and impermissible pre-trial show-up" (R 136). The trial court conducted a pre-trial hearing on this motion, at which three witnesses testified (TR 2312-2371).

Early in the morning of December 9, 1992, Lonnie Thompson gave a statement to police about what he had seen, and identified Joseph Green as the person who shot Judith Miscally (TR 2319-20, 2324, 2326, 2334, 2343). Subsequently, Thompson left the police station (TR 2326). That afternoon, Green was picked up at work and brought voluntarily to the police station for questioning (TR 2314). He

was arrested that evening, at 7:30 p.m. (TR 2331). Thompson was brought back to the police station to see if he could identify Green by viewing him through a one-way mirror (TR 2322, 2326, 2328). He did so (TR 2324). Thompson testified that at the time of this identification he had known Green for three or four years (TR 2337). He also knew two of Green's brothers (TR 2337-38). On the evening of the murder, he saw Green twice; once when Green showed up at Jessie's and tried to bum a cigarette from two members of the band (TR 2339), and again at the Mapco when he saw Green shoot Judith Miscally, whom Green also knew (TR 2339-40). He explained why he had given incorrect information to officer Johnson about the shooting (TR 2342-43, 2347-48, 2364), but testified that he had subsequently told the truth to officers Shuford, Reno, and Wilkinson, and to everyone he had talked to since (TR 2343-44). Before Green was "ever" brought to the police station, Thompson told the police that could identify Green (TR 2349). There is no record support for Green's factual assertion that Thompson had to observe Green at the station for "15-20 minutes" before he could identify him. Appellant's brief at 42. Green also claims that Thompson was "vague" about the clothes Green was wearing at the station. Id. at 42-43. He may have been, but as Thompson stated, "You know a person by his size and everything, you know, and by his

hair and stuff." (TR 2360). Thompson testified without contradiction that he could have recognized Green wherever he was. In fact, Green's trial attorney conceded that Thompson knew Green, stating: "Mr. Thompson ... knows Joseph Green. I mean we're not denying that, and it is a fact. ... [W]ithout any doubt he knows Joseph Green when he sees him. And I don't have any challenge or any complaint to that." (TR 2364, 2366).

The trial court denied the motion "[p]rimarily because the person who originates the identification of Joseph Green is Lonnie Thompson. He does it many hours before the show-up at the police station." (TR 2369). Therefore, the court reasoned, "His initial identification of Joseph Green could not have been tainted by something that occurred afterwards, obviously. So that the show-up, itself, could not be the basis for withholding an in-court identification from Lonnie Thompson." (TR 2369).

Thompson testified at trial. Green's trial counsel did not renew his objection at trial to Thompson's identification of Green. Therefore, no issue of any suggestive identification procedure has been preserved for appeal. Buchanan v. State, 575 So.2d 704, 707 (Fla. 3d DCA 1991) (objection to identification testimony where police used unnecessarily suggestive procedures must be renewed at trial, notwithstanding prior ruling on motion to suppress).

But even if this issue is preserved, it is clear that the trial court ruled correctly. It is true that one-man showups ordinarily should be avoided, because they are unnecessarily suggestive. But the initial identification of Green by Thompson was not shown to be tainted by any sort of suggestive identification procedure. If no suggestive identification procedure was used to obtain the initial identification, there is no necessity to address whether a later, suggestive procedure gave rise to a substantial likelihood of misidentification. Coleman v. State, 610 So.2d 1283, 1286 (Fla. 1992).

Even where the pretrial identification is "obtained by unnecessarily suggestive means ..., such identification is not per se inadmissible and may be introduced into evidence if found to be reliable and based upon the witness's independent recall absent the illegal police conduct." Willacy v. State, 640 So.2d 1079, 1083 (Fla. 1994). Here, not only had Thompson identified Green prior to any suggestive procedure and independently of such procedure, but he knew Green and had known him and his family for years. Green's argument that Thompson's long acquaintance with Green "probably tainted his identification" (Appellant's brief at 45) truly turns the matter on its head. The fact that Thompson has known Green for years contributes to the reliability and independence of his

identification. Cf. Manson v. Brathwaite, 432 U.S. 98, 112, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (noting that one of the "problems" with eyewitness identification is that "[u]sually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress," and that the "recollection of the stranger can be distorted easily by the circumstances or by later actions of the police"). Given Green's concession at trial that Thompson "knows Green when he sees him," he is in no position to argue that Thompson's identification of Green is constitutionally unreliable. Furthermore, since Thompson identified Green before the one-man showup occurred, it is obvious that Thompson's identification of Green then and at trial was based upon his independent recollection of the offender at the time of the crime.

The trial court did not err by refusing to suppress Thompson's identification of Green.

ISSUE VI

THERE WAS NO ERROR IN THE DENIAL OF CHANGE OF VENUE; ALL JURORS WHO SERVED STATED THEY COULD RENDER A VERDICT BASED UPON THE EVIDENCE AND THE DEFENSE USED ONLY FIVE OF ITS ALLOTTED PEREMPTORY STRIKES

At issue here is the trial court's denial of Green's motion for change of venue. The crime occurred on December 8, 1992. The trial began on September 27, 1993 (TR 1). Prospective jurors underwent individual, sequestered voir dire examination (TR 100, et seq.). Although most of the prospective jurors had heard something about the crime, their knowledge was minimal and based on newspaper articles they had read almost nine months earlier (TR 622-23). All but one of Green's thirteen challenges for cause were granted (TR 126, 127, 157-58, 242, 247, 259, 347, 348, 353-54, 393, 533, 586-88), and he exercised a peremptory against the lone prospective juror whom he had unsuccessfully challenged for cause (TR 520, 639)[1].

At the time the parties argued the motion for change of venue, the defense had exercised none of its peremptory challenges (TR 628, 632-33). The defense had been granted 12 challenges for cause (see above); the state two (TR 263, 573). The defense noted that of 42 jurors questioned, 14 had been challenged for cause (TR 629). However, it is not accurate to say, as Green now does, that the

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[1]In addition, Green initially challenged prospective juror Jewell Landy for cause (TR 367-68), but after further examination decided not to pursue the challenge for cause (TR 369). Ms. Landy subsequently was accepted as a juror even though both parties had peremptory strikes remaining (TR 641-42).

trial court "excused a third of the panel because of what they knew." Appellant's brief at 54. The two prospective jurors challenged for cause by the State were excused for reasons other than their knowledge of the case (one had a criminal record; the other was unalterably opposed to capital punishment). Moreover, not all of the defense challenges were based on knowledge of the crime[2]. In any event, the trial court noted that a "substantial number" of prospective jurors on the last two of the three panels "were from Brooker or Melrose or Keystone Heights or other outlying areas of the county who evidenced virtually no knowledge of the case at all" TR 631-32). The trial judge stated: "I believe that we can pick a jury in this case that will be a fair jury and at this moment it appears to me that we have a sufficient pool to begin that process from. ... [T]he ... motion for change of venue will be denied." (TR 632).

The trial court proved correct. In fact, a jury was selected from the first three panels; the remainder of the prospective jurors (TR 460-61) were not needed (TR 644). Significantly, the State exercised more peremptory challenges than the defense. The

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[2]Pauline Peterson-Randolph works at a convenience store herself, and Willie Houston's girlfriend works at Mapco (TR 393, 348).

State exercised a total of eight peremptories; the defense exercised only five (TR 641-42, 643). Moreover, after exercising those five peremptories, Green's trial attorney stated, "[W]e're satisfied with the rest of the folks as being adequate in the case." (TR 642).

As Green concedes, an "application for a change of venue is addressed to the sound discretion of the trial court and that ruling will not be overturned absent a palpable abuse of discretion." Esty v. State, 642 So.2d 1074, 1077 (Fla. 1994). "Pretrial publicity alone does not warrant a change of venue." Pietri v. State, 644 So.2d 1347, 1352 (Fla. 1994)[3]. "The defendant has the burden to show prejudice." Ibid. All the jurors selected to try this case stated unequivocally that they could decide the case solely on the evidence presented at trial. Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994). "Thus, the pretrial knowledge of the jurors who served did not preclude a fair and impartial jury." Pietri v. State, supra. In addition, the fact that Green failed to use all of his allotted peremptory challenges, and, indeed, expressed through counsel his satisfaction with the jurors actually selected, strongly indicates the absence of juror prejudice.

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[3]The State would note that at page 53 of his brief, Green erroneously cites to the transcript instead of to the record.

United States v. Alvarez, 755 F.2d 830, 859 (11th Cir. 1985) (fact that appellants failed to use all of their allotted peremptory challenges indicates absence of juror prejudice; appellant's change of venue claim rejected).

The trial judge did not abuse his discretion in denying the motion for change of venue.

ISSUE VII

GREEN HAS WAIVED ANY ISSUE AS TO WHETHER STATEMENTS MADE BY JUDITH MISCALLY AFTER SHE WAS SHOT WERE PROPERLY ADMITTED AS EXCITED UTTERANCES

Before trial, Green filed a motion in limine seeking the exclusion of statements made by Judith Miscally after she was shot, describing the events surrounding her shooting, on the ground that such statements were hearsay (R 462-63). The trial court conducted a hearing on the motion (TR 663 et seq.). The State argued that Miscally's statements were admissible under three different exceptions to the hearsay rule: as a dying declaration, as information regarding a medical diagnosis, and as an excited utterance (TR 667-70). § 90.803 (2), (4) and § 90.804 (3), Fla. Stat. (1993). After hearing the State's proffer, the trial court ruled that only a portion of Mrs. Miscally's statement to Dwayne Hardee was admissible as statement made for purposes of medical

diagnosis (TR 681-82), and, apparently, that the dying-declaration exception was not applicable (TR 681, 691-95). What Green complains about here is the trial court's ruling that Judith Miscally's statement to Dwayne Hardee in the Mapco parking lot was admissible as an excited utterance (TR 682). However, Green's trial counsel did not object to Dwayne Hardee's testimony at trial. He is procedurally barred from complaining about that testimony now. Even where a prior motion in limine has been denied, the failure to object at the time the testimony is introduced at trial waives the issue for appellate review. Correll v. State, 523 So.2d 562, 566 (Fla. 1988) (even when prior motion in limine has been denied, failure to object at time collateral crime evidence is introduced waives the issue for appellate review); Feller v. State, 637 So.2d 911, 914 (Fla. 1994) (failure to renew confrontation clause objection when testimony actually offered at trial waived issue for appellate review).

Even if Green had preserved the issue, it is clear that Mrs. Miscally's statement to Dwayne Hardee was admissible as an excited utterance. The evidence presented at trial showed that she had been shot in her abdomen, just below her rib cage, and was in shock (TR 821-23, 842, 892). Less than five minutes after she was seriously wounded, Dwayne Hardee arrived at the scene. Mrs.

Miscally knew Hardee, and called his name. She stated, "He shot me." (TR 907-910). Then she told Hardee what had happened.

Hearsay statements are admissible if made "under the stress of excitement" caused by a "startling event or condition." § 90.803 (2) Fla. Stat. (1992). A statement qualified for admission as an excited utterance when: "(1) there is an event startling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event." Rogers v. State, 20 Fla. L. Weekly S233, S233-34. In Rogers, the startling event was that the declarant had observed someone else being shot. If that was sufficient to cause the requisite nervous excitement, and if the declarant was still under the requisite stress 10 minutes later even though she had only seen someone else getting shot, then the State does not see how it can be seriously questioned that Mrs. Miscally, having herself been shot (fatally as it turns out) less than five minutes before making her statement, was under nervous excitement and stress when she made the statement. Clearly, her statement was properly admitted as an excited utterance. Rogers, supra, Power v. State, 605 So.2d 856, 862 (Fla. 1992); Jano v. State, 524 So. 2d 660 (Fla. 1988).

Even if preserved, this issue is without merit.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN DENYING GREEN'S MOTION TO SUPPRESS THE CLOTHING SEIZED PURSUANT TO A VALID SEARCH WARRANT

Green filed a pre-trial motion to suppress evidence (R 101-103), along with an amendment thereto (R 122-124). A hearing was conducted on Green's motions (TR 2217-2311 and SR 42-168). After hearing, the trial court denied the motion (R 501-506).

Green contends the trial court erred by denying the motion, in two respects. First, he contends the warrant (R 385-86), along with the supporting affidavit (R 6-8), fail to show the reliability of the informant. Second, he contends that there was no sufficient description of the clothing to be seized. In connection with these two grounds, he touches upon the good-faith exception announced in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and also contends that the supporting affidavit was not attached to the warrant nor specifically incorporated into it.

As to the first complaint, the record shows that the search warrant was obtained based upon information obtained from an eyewitness to the crime (Lonnie Thompson) and from Green's fiancé. Officer Reno testified that he was looking for Green early on the morning of December 9. He and officer Wilkinson went to the motel room shared by Green and his fiancé. She allowed him to enter.

She pointed out some clothing lying on a chair near the television and told the officers that they were the clothes that Green had been wearing the evening before (TR 2237-2240). This information was included in the affidavit (R 7, TR 2260, 2262).

In addition to information obtained from Green's fiancé, Lonnie Thompson had identified Green as the "perpetrator" and had "described the clothing worn by the perpetrator" (TR 54-55). Lonnie Thompson was not named in the affidavit, but he was described in the affidavit as an "eyewitness" (R 7, TR 2253, 2255).

From the foregoing, it is clear that there was no confidential informant in this case. Since Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the United States Supreme Court has "proceeded as if veracity may be assumed when information comes from the victim of or a witness to criminal activity." LaFave, Search and Seizure, 2d Ed 1987, § 3.4 (a) (Information From a Victim or Witness), p. 713. According to LaFave, "the prevailing view" is that corroboration of eyewitnesses is not necessary. Unlike informants, who generally predict future events (the sale of drugs, etc.), victims and eyewitnesses typically report only past events. Eyewitness information is presumed to be reliable. Id. at 717-18.

As stated in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), rigorous scrutiny of the basis of eyewitness information is unnecessary. All that is necessary is "a mere showing that the informant was an ordinary citizen, an eyewitness, a disinterested bystander, or a victim of a crime." State v. Novak, 502 So.2d 990, 992 (Fla. 3d DCA), rev. denied, 511 So.2d 299 (Fla. 1987). Lonnie Thompson was an eyewitness. Moreover, his information was corroborated by information supplied by Green's fiancé, not to mention the officers' own observations of the clothing lying on the chair in Green's motel room. Reliability of this information was sufficiently demonstrated, as the trial court found (R 501-02).

As for the description of the items to be seized, Green contends the clothing is not described with sufficient particularity. In fact, the described object of the search could hardly have been more limited in scope; the warrant directs the seizure of "the clothing Joseph Nahume Green, Jr. was wearing on the evening of the 8th day of December 1992" (R 385). This description does not permit a general exploratory search; it describes specific objects to be seized. "[T]he test is the reasonableness of the description. Elaborate specificity is unnecessary." United States v. Strauss, 678 F.2d 886, 892 (11th

Cir. 1982). In Strauss, the items to be seized included "a GMC mobile home." This description was found to be sufficient. In United States v. Osborne, a warrant authorizing the seizure of a "money order machine" was found to be sufficiently precise.

Furthermore, the accompanying affidavit referred to in the warrant (R 385) provides additional specificity of description. Green contends that State v. Kingston, 617 So.2d 414 (Fla. 1st DCA 1993) holds that the affidavit cannot cure a deficient description in the warrant unless the "warrant specifically incorporated the affidavit and the two were physically connected," Brief of Appellant at 65. That is not Kingston says. Instead, the district court stated: "First, although the proof of physical attachment here is equivocal, we do not believe this is fatal. ... Here, although the affidavit was not specifically incorporated by reference, it was referred to in the three 'whereas' clauses. We are inclined to conclude that this is sufficient." Id. at 415. Furthermore, here, as in Kingston, even if the warrant was invalid, the Leon good faith exception applies. Id. at 416. There was a probable cause determination made by the issuing magistrate, the affidavit provided additional specific identifying information relative to the clothing to be seized, the executing officer was the affiant and knew what was to be searched for (having personally

observed it), and the warrant could easily have incorporated the affidavit by specific reference. Under these circumstances, the officers' good faith reliance upon the warrant was objectively reasonable. U.S. v. Beaumont, 972 F.2d 553, 562 (5th Cir. 1992), applying United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (establishing good-faith exception to exclusionary rule); and Massachusetts v. Sheppard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) (applying good-faith exception to warrant violating particularity requirement where officers and issuing magistrate aware of contents of affidavit containing sufficient description and officers believed warrant valid). Accord, United States v. Luke, 859 F.2d 667 (9th Cir. 1988) (notwithstanding fact that warrant was invalid, actual reliance by agents on affidavit description means evidence admissible under Leon good-faith exception). See Johnson v. State, 660 So.2d 648, 654 (Fla. 1995) (holding that Leon is binding on this Court under article I, section 12 of the Florida Constitution).

In any event, there was no dispute about what Green wore the evening of the murder. Green himself admitted that he had worn a black pin-striped suit (TR 1462), and his fiancé concurred (TR 1534). The issue raised by the defense was not what Green wore,

but whether or not Lonnie Thompson could remember what Green had been wearing that evening, and he was Thompson was extensively cross-examined about that issue (TR 1216-18, 1231-34, 1237-38, 1247-51). Any error in the denial of Green's motion to suppress was harmless beyond a reasonable doubt. State v. DiGuilo, 491 So.2d 1129 (Fla. 1986).

ISSUE IX

THE TRIAL COURT DID NOT ERR IN FINDING THAT LONNIE THOMPSON WAS COMPETENT TO TESTIFY

Green filed a pre-trial motion challenging the competency of Lonnie Thompson to testify (R 113-14). The trial court conducted a hearing on the matter during the trial (TR 1137-58). After hearing evidence, the trial court found Thompson competent to testify (TR 1158). Green contends this ruling was error because the State's inquiry was inadequate and "the hearing never established Thompson's competency." Appellant's brief at 70.

As Green concedes, however, every person is presumptively competent to testify. § 90.601, Fla. Stat. (1995). Since witnesses are presumed to be competent, the burden is on the objecting party to demonstrate the lack of competency. Zabrini v. Riveron, 495 So.2d 1195, 1198 (Fla. 3d DCA 1986). The burden was not on the

State to demonstrate that Thompson was competent; it was Green's burden to establish, if he could, that Thompson was not competent. He had the opportunity to present whatever he wanted in this regard.

Thompson testified that he understood the importance of telling the truth and that it would be wrong not to tell the truth (TR 1139). He was not under the influence of alcohol or drugs, except that he was taking antibiotics (TR 1138-39. He admitted having occasional dizzy spells and headaches (TR 1141, 1144), but he could remember what he saw at Mapco on December 8, and could tell the jury what he saw (TR 1154-55). In addition to Thompson's testimony, the trial court considered a written competency evaluation of Thompson prepared for another case (TR 1157, Defendant's Exhibit 1). Green argues that this evaluation proves that Thompson is mentally retarded. As noted earlier, in the State's argument as to Issue I, the evaluation refutes, rather than establishes, that Thompson is mentally retarded. Thompson was reported to have scored an IQ of 67. And it is true that significantly subaverage intellectual functioning (one of the criteria for a diagnosis of mental retardation) is generally defined as an IQ below 70. However, as noted in the DSM IV, supra, IQ scores are at best accurate within a range of 5 points either

way, and there are a number of social and economic factors that may further reduce the accuracy of the test results. Partly for this reason, "impairments in adaptive functioning, rather than low IQ, are usually the presenting symptoms in individuals with Mental Retardation." Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition 1994, at p. 40. Thompson's practical living skills, according to defense exhibit 1, "are not significantly below average." (It should be noted that, by definition, one-half the population would be at least slightly below average with respect to any measure of any kind of ability.) At page 3 of the report, it is stated that in a test administered to "assess his adaptive functioning," Thompson scored an "age equivalent" of 16 and a "social quotient" of 88. These scores, it is reported, "represent the lower end of normal adaptive functioning." (Emphasis supplied.) His adaptive skills "suggest that he is not truly an individual with mental retardation." Report at p. 5. In any event, even if Thompson's adaptive skills are ignored, and his IQ score considered to be an absolutely accurate measure of his intellectual functioning, he is operating intellectually at no lower than at the very upper end of mild mental retardation. In Kaelin v. State, 410 So.2d 1355 (Fla. 4th DCA 1982), the court upheld a finding of competency where the

witness was a 32-year-old mentally retarded woman afflicted with cerebral palsy and a sever hearing deficiency. The witness had an IQ of 54 (much lower than Thompson's) and the sign language ability of a six to eight year old child. The district court found no abuse of discretion in allowing the witness to testify, because as "limited" as the witness was, she "was nevertheless able to relate the circumstances of the assaults upon her with sufficient clarity and decisiveness." Id. at 1357.

Resolving the issue of witness competency is the responsibility of the trial court. The trial court based its decision upon the evidence presented to it, including Thompson's testimony and, as well, the report presented by the defense (TR 1158). The trial court's decision was not an abuse of discretion. Swain v. State, 172 So.2d 3,4 (Fla. 3d DCA 1965); Lloyd v. State, 524 So.2d 396, 400 (Fla. 1988).

ISSUE X

RESIDUAL OR LINGERING DOUBT IS NOT RELEVANT EVIDENCE IN MITIGATION AND THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW GREEN TO ARGUE SUCH ISSUE

This Court has consistently held that "residual or lingering doubt is not an appropriate nonstatutory mitigating circumstance." Bogle v. State, 655 So.2d 1103 (Fla. 1995). Accord, Preston v.

State, 607 So.2d 404, 411 (Fla. 1992); Tafero v. Dugger, 520 So. 2d 287, 289 (Fla. 1988); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); White v. Dugger, 523 So. 2d 140 (Fla. 1988); Burr v. State, 466 So.2d 1051 (Fla. 1985). Green acknowledges these rulings, and acknowledges that no less authority than the United States Supreme Court has held that a state does not have to recognize residual doubt as a mitigator. Franklin v. Lynaugh, 487 U.S. 164, 101 L.Ed.2d 155, 108 S.Ct. 2320 (1988). Nevertheless, Green contends these rulings are wrong and should be overruled.[4] And once again, he contends that the case against Green was "extraordinarily weak." Appellant's brief at 80.

The State strongly disagrees with the characterization of the evidence in this case as "extraordinarily weak," and disagrees with the various factual assertions he renews here (i.e., the crime scene was "poorly lit"). The State has already argued both the sufficiency and (as a precaution) the weight of the evidence earlier in its brief and will not repeat its argument here except to say that the jury's verdict was eminently reasonable. In addition, the State would disagree that this Court's prior rulings

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[4]Green makes no argument that any of the excluded evidence at issue here was relevant to any other statutory or nonstatutory mitigator or to rebut any aggravator.

are wrong. In fact, the State would agree with the United States Supreme Court that Green's residual doubt argument is "scarcely logical." Green's claim is "not that some error was made in imposing a capital sentence upon him, but that a fundamental error was made in finding him guilty of the underlying murder in the first place. It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison." Herrara v. Collins, 506 U.S. ___, 113 S.Ct. 858, 122 L.Ed.2d 203, 220 (1993).

Green has not offered any persuasive reason to overrule a long line of case law excluding residual or lingering doubt as a mitigator.

ISSUE XI

POLYGRAPH EVIDENCE IS NOT ADMISSIBLE; AND ITS EXCLUSION IN THIS CASE WAS NOT ERROR

Once again Green seeks the overturn of well-established case law, this time as to the admissibility of polygraph examination results.

Prior to the presentation of the evidence at the penalty phase, the State filed a motion in limine to exclude any evidence of a polygraph examination administered to Green on two grounds:

first, that the results of a polygraph examination are not admissible unless stipulated to, and the State would not agree to such stipulation, and second, that the results of any polygraph examination of Green would not be relevant to any issue in the penalty phase of the trial, since residual or lingering doubt is not an appropriate issue at the penalty phase (R 593-94, (TR 1751-53). Green's attorney conceded that its polygraph evidence was relevant only to the issue of whether or not Green was the person who shot Judith Miscally (TR 1754). The trial court granted the State's motion in limine on both of the grounds argued by the State, i.e., because polygraph test results are not admissible, and because even if they were, they would not be admissible at the penalty phase to relitigate the issue of guilt or innocence (TR 1760).

The trial court did, however, allow the defense to proffer the testimony of Green's polygraph examiner, Clarence Kirkland (TR 1805 et seq.). Contrary to the assertion that Green makes in his brief (at p. 84), the State did not accept Kirkland as an expert in polygraphy; the State merely declined to object to evidence of the examiner's qualifications since "this is a proffer only" (TR 1812). As Kirkland himself conceded, he is not a licensed polygraph examiner (TR 1805). It should be noted that there are apparently

a variety of polygraph techniques, not all of which Kirkland considers reliable, even though used by a number of government agencies. (TR 1814-15). Kirkland was initially trained in the "Keeler technique," but now uses what he describes as a "modified Texas A&M procedure" (apparently modified by him personally). The Texas A&M procedure (at least in unmodified form) "rates very high with those of us who are trained in Texas," and is used by most midwestern examiners (TR 1826). It apparently rates less well in other parts of the country.

In any event, for whatever reason, Kirkland never asked Green the direct question "Did you shoot Judith Miscally?" (R 612, TR 1822). He did ask if Green had a pistol in his hand at any time that night, and also asked Green if he was in Miscally's immediate presence when she was shot. (TR 1818-19). Green did react to each of these questions, but Kirkland did not think Green's reaction was "sufficient to call deceptive." Instead, he "called it inconclusive" (TR 1824-25). Therefore, he "had no alternative but to say that in my opinion he was telling the truth" (TR 1816). Kirkland acknowledged that different polygraph examiners might disagree about whether Green's reaction to these two questions indicated deception (TR 1825).

In fact, Kirkland's charts and reports were reviewed by a polygraph examiner employed by the State, and his conclusions were that because the results were inconclusive, the test does not "demonstrate truthfullness [sic]." Moreover, he questioned the validity of the test on the ground that Green had been asked no direct questions about Green's involvement in the shooting (R 606).

This State has long held that polygraph evidence is not admissible in a criminal case. E.g., Delap v. State, 440 So.2d 1242 ((Fla. 1983). In fact, this Court has expressed hostility to the use of polygraph tests even for investigative purposes. Farmer v. City of Fort Lauderdale, 427 So.2d 187, 190-91 (Fla. 1983). Green, however, contends that advancements in polygraph reliability have occurred since Florida first rejected the admissibility of polygraph results in Kaminski v. State, 63 So.2d 339 (Fla. 1952). Nevertheless, the Florida case he cites for this proposition affirmed the trial court's rejection of polygraph evidence. McKenzie v. State, 653 So.2d 395, 397 (Fla. 4th DCA 1995). It appears that, absent a stipulation, few courts anywhere will allow evidence of polygraph results to be admitted in evidence for any purpose. Cassamassima v. State, 657 So.2d 906, 908 (Fla. 5th DCA 1995). In Cassamassima, the district court explained:

> It appears that factors other than reliability have influenced courts against the evidentiary use of lie detector test results, including the risk that the issue of the polygraph and its accuracy will generate disproportionate expense on both sides of a criminal trial and degenerate into a battle of experts that will unduly bog down the trial or become the focus of the case. Also, there is the danger that the jury may give disproportionate weight to this scientific means of assessing credibility.

Ibid. Virtually the lone exception to the exclusion of polygraph results is an Eleventh Circuit case cited in both Cassamassima and McKenzie: United States v. Piccinonna, 885 F.2d 1529, 1532 (11th Cir. 1989). Over a vigorous dissent which claimed that "the scientific community remains sharply divided on the reliability of the polygraph" and that the test "relies upon a highly subjective, inexact correlation of physiological factors having only a debatable relationship to dishonesty ... [and] detects lies at a rate only somewhat better than chance," id. at 1542, and notwithstanding the majority's own recognition that "polygraphy is a developing and inexact science," id. at 1535, the majority fashioned a new rule allowing for the limited admissibility of polygraph results to impeach or corroborate the testimony of a witness when the credibility of the witness has first been attacked with opinion or reputation evidence. Id. at 1536. Even under the

new rule, the admission of such evidence "is left entirely to the discretion of the trial judge." Ibid.

Even if this Court were to adopt the Piccinonna rule, Green could not prevail on this issue for at least two reasons. First, he cannot demonstrate that the exclusion of the polygraph evidence in this case was an abuse of discretion, given the lack of conclusiveness in the results and the absence of any persuasive demonstration that the modified technique used by Green's witness is generally accepted even in the polygraph community. Second, he cannot demonstrate that the polygraph testimony would have been relevant to any proper issue at the penalty phase of the trial. Finally, it is difficult to see how Green could have been harmed in any event by the exclusion of such inconclusive results.

This is not the case in which to revisit the issue of the admissibility of polygraph results.[5]

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[5]The State would suggest that the numerous authorities cited in footnote 1 of Judge Sharp's dissenting opinion in Cassamassima, supra at 914, persuasively demonstrate that polygraph evidence is not reliable and has no place in courts of law.

ISSUE XII

THE EVIDENCE SUPPORTS THE ROBBERY AGGRAVATOR

The trial court found two aggravating circumstances: (1) prior violent felony conviction (second degree murder and battery on a corrections officer) and (2) that the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit a robbery (R 643, 644). Green raises no issue concerning the prior violent felony aggravator, but contends the robbery aggravator finding is deficient for three reasons: (1) Green was not prosecuted for the robbery, (2) the finding is based solely on hearsay, and (3) it was not shown that robbery was the "dominant motive" for the murder.

Green concedes that the State is not required to prosecute the robbery at the guilt phase in order to argue the aggravating factor that the murder was committed during a robbery. E.g. Turner v. State, 530 So.2d 45 (Fla. 1987); Delap v. State, 440 So.2d 1242 (Fla. 1983). He offers no reason why this precedent should not be followed.

Green acknowledges that hearsay evidence may under certain conditions be admitted at the penalty phase of the trial, "regardless of its admissibility under the exclusionary rules of

evidence." § 921.141 (1), Fla. Stat. (1992). He contends, however, that the trial court was not authorized to base its robbery aggravator finding solely on hearsay. He fails to acknowledge, however, that this alleged "hearsay" evidence was admitted at the guilt phase of the trial pursuant to a valid exception to the hearsay rule. Although the State does not concede that it would be inappropriate to do so, this is not a case in which an aggravator was proved by otherwise inadmissible evidence admitted for the first time at the penalty phase under the relaxed rules of admissibility applicable to the penalty proceeding. See, Cannady v. State, 620 So.2d 165, 169 (Fla. 1993) (hearsay testimony to prove rape could be admitted under relaxed rules of evidence for penalty phase proceedings).

Furthermore, the victim's excited utterances were not the only evidence supporting the robbery aggravator. Lonnie Thompson's testimony that Green was trying to take the victim's purse also supports the trial court's finding of the robbery aggravator (TR 1240-41). See Echols v. State, 484 So.2d 568, 576-77 (Fla. 1985) ("the well-established rule [is] that all evidence and matters appearing in the record should be considered which support the trial court's decision").

Finally, the robbery, or attempted robbery clearly was not an afterthought; the robbery or attempted robbery preceded the shooting, and the trial court was authorized under the evidence in this case to conclude that the murder was committed while Green was engaged in the commission of a robbery or attempted robbery. Jones v. State, 652 So.2d 346, 350 (Fla. 1995).

Although Green raises no issue of the proportionality of his sentence, the State would note that his death sentence is consistent with the sentences imposed and upheld in similar cases.[6] See Mungin v. State, 20 Fla. L. Weekly S459 (Fla. Sept. 7, 1995) (two prior violent felony convictions, murder committed during robbery, some mitigation); Lowe v. State, 650 So.2d 969 (Fla. 1995) (prior violent felony and robbery aggravators, some mitigation); Brown v. State, 644 So.2d 52 (Fla. 1994) (prior violent felony and

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[6]The State would also note that the substantial impairment statutory mitigator found by the trial court is not supported by Dr. Bordini's testimony, and there is no other evidence in the record to support this mitigator. Dr. Bordini was specifically asked and specifically answered that the capacity of the defendant to appreciate to criminality of his conduct and to conform his conduct to the requirements of the law was not substantially impaired (TR 1930). Although the State did not cross-appeal this finding, and without conceding that it would make any significant difference to the Court's proportionality review, the State would contend that for the purposes of proportionality, this Court should ignore the unsupported finding of the substantial-impairment mitigator. Echols, supra. Cf. Duncan v. State, 619 So.2d 279, 283-84 (Fla. 1993).

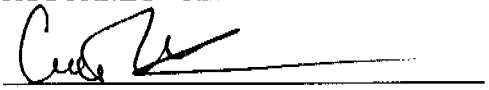
robbery aggravators, organic brain damage in mitigation); Smith v. State, 641 So.2d 1319 (Fla. 1994) (prior violent felony and robbery aggravators, mitigator of no significant prior criminal history plus some nonstatutory mitigation); Melton v. State, 638 So.2d 927 (Fla. 1994) (pecuniary gain and prior violent felony aggravators, some mitigation); Lindsey v. State, 636 So.2d 1327 (Fla. 1994) (murder during commission of another violent felony and prior conviction of second degree murder); Freeman v. State, 563 So.2d 73 (Fla. 1990) (pecuniary gain and prior murder conviction, mitigation included low intelligence and abuse as a child).

CONCLUSION

For the foregoing reasons, Green's conviction and death sentence should be affirmed.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 Mr. David A. Davis, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida, 32301, this 2ND day of February, 1996.

CURTIS M. FRENCH
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