IN THE SUPREME COURT OF FLORIDA

KENNETH WAYNE HARTLEY,

Appellant,

v. CASE NO. 83,021

STATE OF FLORIDA,

Appellee.

_____/

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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PRELIMINARY STATEMENT

Citations to the original record and trial transcript, consisting of pages 1 to 2688, will be denoted by (R ---), while citations to the two supplemental records, consisting of pages 1 to 377, will be denoted by (SR ---).

STATEMENT OF THE CASE

The State generally accepts Hartley's Statement of the Case. The State would note, however, that the trial court's phraseology in its ruling on Hartley's Second Motion in Limine was not "granted in part." Rather, the motion was "granted as modified in court." (R 317). Hartley's attorney conceded that the State had a right to elicit testimony to explain why some of its witnesses did not come forward immediately, even if that reason was their fear of the defendant; his motion, as modified, was directed merely to general bad character evidence (R 1331-1333).

In addition, Hartley filed a motion to declare the cold, calculated and premeditated aggravator unconstitutional (R 217-244), and also filed a motion to prohibit instruction on both the cold, calculated and premeditated aggravator and the heinous, atrocious or cruel aggravator on the ground that both aggravators are unconstitutional and inapplicable in this case as a matter of law (R 274-75). The State would note, however, that Hartley lodged no objections to the standard jury instructions on these aggravators, and did not request expanded instructions for either aggravator.

Finally, the State would note that both of Hartley's codefendants have been convicted and sentenced. Ronnie Ferrell was sentenced to death. His appeal is pending in this Court, case no. 83,076. Sylvester Johnson was sentenced to life. The First District Court of Appeals affirmed Johnson's conviction and sentence for first degree murder, and also his convictions for armed robbery and armed kidnapping. Johnson v. State, 652 So.2d 1294 (Fla. 1st DCA 1995). However, the three-year mandatory minimum terms for "vicarious (as opposed to actual) possession of a firearm" were vacated, and Johnson's case was remanded for resentencing on the armed robbery and armed kidnapping counts. Ibid.

STATEMENT OF THE FACTS

Hartley's statement of facts generally is correct as far as it goes. However, Hartley has omitted significant facts from his recitation. Therefore, the State offers the following summary of the evidence:

Gino Mayhew's Chevrolet Blazer was discovered in a field behind Sherwood Forest Elementary School early in the morning of April 23, 1991. Mayhew's body was in the driver's seat slumped over with his head in the passenger seat (R 1978-79). He had been shot with a .25 caliber automatic (R 1998-2000, 2019, 2053). The medical examiner testified that there were six gunshot entry wounds; however, Hartley is incorrect when he states in his brief that Mayhew was shot six times in the head. He actually had been shot five times: three times in the back of the head (R 2045-48), once through his eyeglasses into his right cheek (R 2049), and once in the shoulder (R 2053). In addition, there was a bullet wound in Mayhew's right index finger that, in all likelihood, corresponded to one of the wounds to the back of the head (R 2048). Two of the wounds to the back of the head were fatal wounds, that, once inflicted, would immediately have "immobilized" the victim (R 2047). One of the wounds to the back of the head was not fatal, because Mayhew had placed his hand in the path of the bullet and partially deflected it with his index finger, so that the bullet did not penetrate his skull (R 2048-49). The medical examiner explained the shot through Mayhew's eyeglasses as follows:

> I experimented with a variety of positions of the head and the only way there was a clear track without exiting at this point would be with the head completely rotated toward the right side which sort of bunches up the neck skin immediately underneath the right side of the jaw and then the same bullet would just proceed down into the neck without exiting.... [Demonstrating], what you have to do now is try to turn your head to observe something here in the back and from this position if I fire down along my pointer I would hit the right lens, your cheek and bullet would wind up in your neck without actually exiting. So that's the only really consistent way because if you had your head up this way then I would have to fire from the area of the roof of the car in order to achieve that same thing and the bullet would exit before reentering the neck again.

(R 2051-52). The location of the wounds and the paths the bullets took through Mayhew's head were consistent "to a high degree of probability" with the shooter having been in the back seat of the Blazer (R 2054, 2057, 2058-59). They were inconsistent with a theory that Mayhew was shot by someone standing outside the driver's door of the Blazer (R 2058).

The lead homicide detective for this particular case did not release any details of the crime to the media; i.e., he did not tell the media that the victim had been abducted from the Washington Heights apartments, that he had been robbed, that drugs were involved, that he had been shot in the head, or that the murder weapon was a .25 caliber automatic (R 2001-2002). The detective followed the news reports that were published relative to this case, and did not "once" see any of these details mentioned (R 2024). Because "what the media got was only through" this detective, he "knew what was released" (R 2031).

As noted in Hartley's Statement of the Facts, Mayhew had been a seventeen-year-old drug dealer. On April 22, 1991, he was selling crack cocaine at the Washington Heights apartments, assisted by Sidney Jones, who acted as a kind of barker, directing potential customers to Mayhew.

Jones saw Sylvester Johnson in the area between 10 and 11 p.m. (R 2070). At 11 p.m., as Mayhew sat in the driver's seat of his Blazer, Ronnie Ferrell walked up to him and asked him if he had any "juggle," which according to Jones is street slang for crack cocaine (R 2071). In response, Mayhew displayed an estimated $2,000 worth of crack cocaine to Ferrell (R 2072). Jones testified that Mayhew also had a large amount of money that evening (R 2072).

Soon afterwards, Kenneth Hartley arrived, and he, Ferrell and Johnson huddled together a few feet away and talked (R 2072-73). Meanwhile, Jones obtained a "ten dollar rock" of crack cocaine from Mayhew. As he walked away, however, he examined his purchase and decided it was "really too small because that wasn't the deal we made the early part of that day." So he returned to the Blazer (R 2073). When he got to the Blazer, he realized that Hartley, who was now standing at the driver's door, had a pistol pointed at Mayhew's head as Mayhew sat in the driver's seat (R 2075). Meanwhile, Ferrell "was on the driver's side fender just standing there, just looking around just like this, he was just looking around" (R 2077). Mayhew was "very very scared and frightened" (R 2076). Although Jones was not familiar with guns, he did notice that the pistol did not have a "cylinder" and was a

"small handgun" (R 2076). Hartley ordered Jones to get his "busy mother fucking ass away from the truck" (R 2075).

Jones moved away, but stopped at the corner of a building and looked back. He saw Hartley force Mayhew to "scoot up in the seat" and enter the Blazer to sit in the back seat immediately behind Mayhew, while Ronnie Ferrell got into the front passenger seat (R 2077). The Blazer began to back up. However, before Mayhew could drive off, Johnson shouted "hold up, hold up," and ran to the Blazer to talk to Hartley (R 2077-78).

At this point, Jones went to the front part of the apartment complex, intending to report what had happened. By the time he arrived, however, he had changed his mind, because he "was very very scared that they would find out that I told what happened to Gino and these guys -- these three guys would come back and kill me the same way they did my friend Gino" (R 2079). Shortly thereafter, he saw Mayhew's Blazer leaving the complex at a "very high speed." Jones shouted for Gino. Ferrell responded that "Gino would be back" (R 2080). The Blazer ran over two speed bumps and ran a red light as it left the apartments and proceeded up Moncrief (R 2080-82). Jones testified that Gino Mayhew was driving, Ronnie Ferrell was in the front passenger seat, and Kenneth Hartley was in the back seat "squatting directly behind" Mayhew (R 2080-81). One or two minutes later, Sylvester Johnson exited the apartment complex, driving a purple pickup truck, and drove off in the same direction Mayhew's Blazer had gone (R 2082-84). The time was between 11:15 and 11:20 (R 2083).

At 11:30, Mayhew's friend Juan Brown was driving south on Moncrief toward Washington Heights apartments, when he saw Mayhew's Blazer proceeding north on Moncrief (R 2133-34). Mayhew was driving. Brown also recognized Ronnie Ferrell in the front passenger seat. There was another person in the Blazer, "crouched behind" Mayhew, "leaning forward as like if you were speaking to him or talking to him or something like that" (R 2135-36). "Because of the lighting and the way he was positioned behind Gino [Mayhew]," Brown could not identify the person seated behind Mayhew, but he could see that he was a "light skinned male" of similar build and complexion to Hartley (R 2136-2139).

Brown waved and persuaded the driver of his car to blow his horn at Mayhew, but even though they were "looking dead at each other," Mayhew just kept going (R 2139-40). Brown "knew something was wrong," so he told his friend to make a U-turn. They tried to follow Mayhew, blowing the horn to get his attention, but "the closer we got the more speed they picked up to try to stay away from us" (R 2140). Brown stopped the chase when Mayhew turned right on Soutel toward the direction of Sherwood Park Elementary School (R 2140-42). Brown testified that the route that Mayhew took is the most direct route from Washington Heights Apartments to Sherwood Forest Elementary School (R 2142).

After his arrest, Hartley was interrogated by Detective Baxter. Hartley denied even knowing Mayhew. Baxter told Hartley that he knew Hartley had robbed Mayhew two days before the murder; therefore, Hartley had to know Mayhew (R 2172). Hartley

denied being involved in the earlier robbery, and again denied knowing Gino Mayhew (R 2174). However, Hartley made statements to friends and acquaintances which were directly contradictory to those he had made to the police.

Ronald Bronner testified he has known Hartley all his life (R 2220). A couple of weeks after Mayhew was murdered, Bronner told Hartley "the word on the street" was that Hartley had killed Mayhew. Hartley said no, "the only reason they saying that because I robbed him two days before he was killed" (R 2224). Hartley was arrested on May 16, 1991 (R 2003). Bronner was arrested himself a few months later, on drug charges, and placed in a jail cell with Hartley (R 2226). Sometime in October, Bronner again talked to Hartley about the murder of Gino Mayhew (R 2226-27). Bronner asked Hartley how he had become involved in the murder of Mayhew. Hartley told him the plan was Sylvester Johnson's. Originally, they planned to rob some "dreads" (Jamaican drug dealers), but then decided to "get Gino," i.e., to rob and kill him (R 2227-28, 2246). First, Ferrell checked to see if Mayhew had anything in his possession. Then Hartley forced Mayhew into his Blazer at gunpoint. Ferrell entered on the passenger side, while Hartley got in behind Mayhew, and forced him to drive to Sherwood school (R 2228). Sylvester Johnson drove the getaway vehicle. Once at the school, Hartley told Ferrell to get out of the truck. Hartley told Bronner, "you know me, I left my trade mark, left no witnesses" (R 2229). Hartley explained to Bronner that his "trademark" was to "shoot the person in the head leaving no witnesses" (R 2229). Then,

Hartley claimed, he got "three bombs of cocaine off Gino Mayhew," and went back to the getaway vehicle (R 2229-30). Ferrell and Johnson were acting so nervous that Hartley considered shooting them. Hartley claimed "he was going to get off" because "everybody was scared to testify" (R 2230).

Eric Brooks, who is a friend of both Hartley and Ronald Bronner (R 2243, 2257), was arrested an August 26, 1991 (for armed robbery) (R 2259). Several days later, he and Hartley talked to each other about their cases. Hartley denied being involved in the murder of Gino Mayhew. He told Brooks that "he had robbed Gino a couple days before" the murder and "if I [had] wanted to kill him I would have killed him then" (R 2260). A few weeks later, however, Hartley changed his story. He was worried that Ferrell was going to testify against him. Hartley claimed it was Sylvester Johnson's plan to rob Mayhew. Ferrell's job was to get "Gino in place," then he and Hartley forced Mayhew into the Blazer, and "they drove off with him to the Sherwood School." Hartley told Brooks they used a .25 automatic (R 2261). Johnson followed them to the school in a truck. He was to be the getaway driver. Once at the school, they robbed Mayhew of his drugs and money. Hartley then "told Ronnie Ferrell to haul ass." Hartley shot Mayhew in the back of the head "a few times," got out and walked to where Johnson was parked with the getaway vehicle (R 2262). Hartley told Brooks that Ferrell and Johnson were acting so nervous he was afraid they were going to tell on him, and he "started to shoot them but he didn't" (R 2262-63). Instead, they drove away and split up the proceeds. Hartley bragged that "he

was going to get away with the whole thing because the police didn't have a case against him because all the witnesses were afraid" (R 2263).

Anthony Parkin also testified against Hartley. Parkin has known Hartley since 1986 (R 2184). Parkin was arrested in the latter part of April, 1991, on a charge of dealing in stolen property and place in the Duval County jail (R 2185). In the latter part of May, 1991, Parkin was visiting a friend who occupied the cell next to Hartley's (R 2186). Parkin overheard Hartley exclaim in a loud voice: "I think I really fucked up this time by doing this with that mother fucker Ferrell. I think he's going to turn on me and testify against me when he's just as guilty in doing this as I am" (R 2187). In the early part of June, 1991, Hartley talked directly to Parkin about his case. Hartley told Parkin:

> He said only thing that worries me in this case is after we killed the guy, Ferrell started getting real nervous by saying, man, we really fucked up this time by doing this, we're going to spend the rest of our lives in jail. [Hartley] said he tried to calm him down by telling him you know, nobody is going to know as long as everybody keeps their mouth shut. And he say other than that I'm not really worried about anything because the police don't have shit against me in my case, no evidence at all (R 2190).

As Hartley emphasizes in his brief, the three witnesses who testified for the State about statements made by Hartley in jail had negotiated, through their attorneys, for agreements with the State regarding their sentences in exchange for their truthful testimony. Notably, these negotiated sentences were lengthy: Anthony Parkin agreed to a sentence of 15 years for dealing in

stolen property (animals stolen from a pet store) (R 2182-83); Ronald Bronner agreed to a 25 year sentence for cocaine trafficking (two ounces of cocaine) (R 2219); and Eric Brooks agreed to a possible 30 year sentence for armed robbery (R 2255). As for the two eyewitnesses, Sidney Jones had only a misdemeanor trespass charge pending against him when he told the police what he knew about Hartley's crime (R 2090-92). And although Juan Brown apparently was jailed for contempt shortly before this trial for failing to honor a subpoena (R 2149, 2151), Brown has had no criminal charges pending against him at any time during the investigation or litigation of this case.

The defense presented no evidence at the guilt phase of the trial (R 2282). Hartley was convicted of first degree murder, robbery with a firearm and kidnapping with a firearm (R 2240). At the penalty phase, the State offered judgments of conviction for three prior violent felonies (R 2464). Hartley had been previously convicted of manslaughter (in 1986, he killed a 15-year-old girl with a shotgun) and two counts of armed robbery (he robbed one taxi driver on April 19, 1991, and robbed another taxi driver on April 27, 1991; the weapon in each case was a sawed-off shotgun) (R2464-2494).

The defense presented two witnesses at the penalty phase. Attorney Alan Chipperfield testified about 15 and 25 year mandatory minimum sentences (R 2500). Pastor Coley Williams testified that he has known Hartley since 1980 (R 2526). Hartley attended his church "off and on" and had a "quiet and peaceful spirit" (R 2227-28). It was a "shock" when he was arrested and

pled guilty to manslaughter in 1987 (R 2528). He acted genuinely remorseful for his crime (R 2532). On cross-examination, Williams testified that Hartley grew up in a "loving" family, was not abused or deprived as a child, and seemed to be above average in intelligence.

The jury recommended a death sentence by a 9 to 3 vote (R 458). The trial court sentenced Hartley to death, finding six aggravators (prior violent felony conviction, murder committed during the course of a kidnapping, murder committed to prevent a lawful arrest, murder committed for pecuniary gain, HAC, and CCP) and minimal mitigation (R 489-97). The trial court concluded that the aggravators "in the aggregate" or individually, "separate and apart from the other aggravating circumstances," outweighed any mitigating circumstances (R 497).

SUMMARY OF THE ARGUMENT

Hartley raises 11 issues on appeal: (1) Testimony about the armed robbery of Gino Mayhew two days before he was murdered was admitted to show Hartley's guilty knowledge and his attempt to deceive the police. Since this evidence was not offered as similar fact evidence, similarity is not an issue. Hartley misstates the evidence when he contends that only the police officer's testimony links Hartley to the robbery; two other witnesses testified that Hartley admitted committing the robbery. (2) Hartley concedes that the hearsay testimony of Ronald Wright (concerning an alleged confession to this crime by Hank Evans) was properly excluded as a matter of state law, but contends that the Constitution compels the introduction of such evidence. At the hearing on the state' motion to exclude Wright's testimony, Evans testified under oath that he had neither confessed to nor committed this crime, and the stated offered the testimony of numerous witnesses proving that Wright and Hartley had concocted Evans' alleged confession. Furthermore, the "facts" contained in the confession are inconsistent with the physical evidence and the eyewitness testimony in this case. The Constitution does not prohibit the exclusion of untrustworthy and uncorroborated hearsay evidence of a third party confession. (3) Hartley concedes that the prosecutor was entitled to explain that some of the state's witnesses delayed coming forward because they were afraid. Hartley contends only that the witnesses' fear was not linked to him. The evidence shows otherwise. Furthermore, the only objection at trial was to the prosecutor's opening

statement, not to the introduction of evidence or to closing argument on the subject of witness fear. (4) The trial court did not abuse its discretion by excluding as irrelevant the name of the police officer Sidney Jones reported to. The defense never contended at trial that Jones did not really report to anyone. Moreover, Jones had supplied the defense with the officer's name before trial, and if the defense had wanted to contact that officer, it could have done so. (5) Prospective juror Stanford's opposition to the death penalty was a legitimate, race neutral reason supporting the state's peremptory strike. (6) Hartley has not preserved for appeal any issue of the validity of the CCP instruction delivered at his trial. Moreover, any error is harmless in light of the strong aggravation and minimal mitigation. (7) The evidence supports the trial court's determination that this preplanned robbery/kidnapping/murder was cold, calculated and premeditated beyond a reasonable doubt. (8) The kidnapping and pecuniary gain aggravators were not based on the same essential feature of Hartley's crime, and it was proper to consider them separately. In any event, any error was harmless. (9) This murder was heinous, atrocious or cruel. Mayhew was abducted at gunpoint, forced to drive to an isolated location, and then killed. He was shot at least twice while still alive and conscious, before the fatal wounds were inflicted. The evidence establishes the requisite agony, foreknowledge of death, extreme anxiety and fear to support the HAC finding. (10) Hartley has not preserved for appeal any issue of the validity of the HAC instructions delivered at his trial.

Moreover, the instructions were sufficient. In any event, any error relating to the findings of any of the aggravators complained about on appeal is harmless beyond a reasonable doubt. Even if this Court accepts every argument made by Hartley on appeal relating to the trial court's findings in aggravation, there would remain three strong aggravators (prior violent felony, kidnapping, and avoid arrest) and minimal mitigation. (11) Prospective juror Goldman was properly excused for cause. He admitted, and his statements in their entirety show, that his feelings about the death penalty would substantially impair his ability to vote for a death sentence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN ADMITTING A STATEMENT BY A POLICE OFFICER CONCERNING A ROBBERY COMMITTED AGAINST MAYHEW TWO DAYS BEFORE HE WAS MURDERED

The State filed pretrial notice of its intention to present evidence that Hartley had participated in an earlier robbery of Gino Mayhew (R 41, 313). Hartley raised no opposition to the introduction of such evidence until immediately before Detective Baxter testified about his interrogation of Hartley (R 2155). Hartley's trial attorney explained that he had not objected earlier to the extrinsic-crime evidence because he had thought it was going to be introduced to prove motive; if it was offered for some other reason, he was not sure "that there is any relationship between the two" crimes (R 2156-57). The State explained that it was offering the testimony of Detective Baxter to prove that Hartley falsely represented to the police that he did not even know Gino Mayhew (R 2159-60). The State pointed out that Ronald Bronner and Eric Brooks would testify about statements made by Hartley concerning the first robbery, in which Hartley admitted robbing Gino Mayhew and, therefore, that he did in fact know Mayhew (R 2159-60). Proof that Hartley tried to "deceive the police," the State contended, would be relevant evidence of guilt (R 2166). Based on the foregoing, the trial court overruled the objection, finding "that the evidence in toto as summarized by Mr. Bateh is relevant and I think it comes within the purview of the Williams Rule 90.404 and I overrule the objection" (R 2166). Hartley's trial attorney asked for, and was

granted, a continuing objection relative to "my position" concerning the admissibility of "this first robbery" (R 2167). In addition, after the State rested, the defense moved for a mistrial, complaining primarily about the testimony of Detective Baxter (R 2279-80). The trial court denied the motion, noting that, regardless of Detective Baxter's testimony, the testimony of Bronner and Brooks about the prior robbery was "in any event" admissible, relevant evidence in this case (R 2281-82).

The combined testimony of these three witnesses implicates both relevance and hearsay. Notably, however, no hearsay objection was interposed at trial, and no hearsay issue is raised on appeal. Moreover, the objection on appeal is limited to the testimony of Detective Baxter; the testimony of Bronner and Brooks concerning the earlier robbery is ignored.

Although no issue is raised on appeal as to the testimony of Bronner and Brooks concerning Hartley's statements, the State would note that, generally, "evidence of a defendant's out-of-court exculpatory statements ... is admissible as an admission under section 90.803 (18) if offered by the prosecution." Ehrhardt, Florida Evidence, §801.3, pp. 575-76 (1995 ed.). The references to the prior robbery in Hartley's initial statements to Bronner and Brooks were integral and inseparable components of those statements; i.e., the robbery was offered by Hartley to explain why he had not committed murder. In addition, Hartley's admission to Brooks and Bronner he had previously robbed Mayhew was inconsistent with his claim to the police that he did know even know Mayhew. The inconsistencies in his various statements

were "relevant to show that appellant had attempted to avoid detection by lying to the police," Smith v. State, 424 So.2d 726, 730 (Fla. 1983), and were properly offered "to affirmatively show consciousness of guilt and unlawful intent." State v. Frazier, 407 So.2d 1087 (Fla. 3d DCA 1982). See also Blair v. State, 406 So.2d 1103, 1106-07 (Fla. 1981) (defendant's statements were admissions or declarations which sought to provide an explanation of innocence; fact that they were inconsistent "shows not only guilty knowledge but also the very real intent to cover up the fact that ... [victim's] death was the result of his criminal agency").

From the foregoing, it may be concluded that the statements made by Hartley to Brooks and Bronner admitting he had robbed Mayhew two days before Mayhew was murdered, as well as the statement by Hartley to Detective Baxter denying that he even knew Mayhew, were all properly admitted. In any event, the only issue preserved for appeal is a Williams Rule objection to Detective Baxter's testimony about his own accusation to Hartley that "I told him that we knew that on the Saturday, two days prior of [sic] the murder of Gino Mayhew that Mr. Hartley had robbed Gino Mayhew that was on April 20th, 1991, therefore we knew that he knew Gino Mayhew" (R 2172). Although Hartley calls this testimony an "inadmissible allegation," no hearsay issue is raised or preserved for appeal. (The State would note, however, that insofar as the hearsay rule is concerned, this accusation arguably was necessary to place in context Hartley's response to this accusation--"He denied doing the robbery on that Saturday

and he again denied knowing Gino Mayhew"--and was properly admitted to show the effect on Hartley rather than for the truth of those comments. See Breedlove v. State, 413 So.2d 1, 6-7 (Fla. 1982).

Hartley's Williams Rule objections to Detective Baxter's testimony are without merit. His argument that the only evidence linking the first robbery to this case is "the officer's allegation," Appellant's Brief at pp. 21-21, completely ignores Hartley's own admissions to the crime, made to Brooks and Bronner. The trial court based its ruling on these statements, too, not just on what Detective Baxter had to say. The evidence considered by the trial court was sufficient to identify Hartley as a participant in the first robbery. Huddleston v. United States, 485 U.S. 681, 684, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) (interpreting comparable federal rule of evidence).

As to the "similarity" issue, Hartley's cited cases demanding "strikingly similar" collateral offenses are cases in which the State offered similar fact evidence to prove identity by proof of a distinctive modus operandi. E.g. Drake v. State, 400 So.2d 1217, 1219 (Fla. 1981) ("The mode of operating theory of proving identity is based on both the similarity of and the unusual nature of the factual situations being compared. A mere general similarity will not render the similar facts legally relevant to show identity."). These cases are inapposite. "Similar fact evidence relevant to prove a material fact other than identity need not meet the rigid similarity requirement applied when collateral crimes are used to prove identity."

Gould v. State, 558 So.2d 481, 485 (Fla. 2d DCA 1990). Lesser degrees of similarity might suffice in other situations. Calloway v. State, 520 So.2d 665, 668 (Fla. 1st DCA 1988). In fact, evidence of collateral crimes need not necessarily be similar at all. Factually dissimilar crimes may be admitted if relevant. Bryan v. State, 533 So.2d 744, 746 (Fla. 1988); Finney v. State, 20 Fla. L. Weekly S401, 403 (Fla. July 20, 1995).

In this case, although there are similarities between the first robbery and the robbery/murder on trial (same defendant, same victim, robbery involved in both instances), similarity really is not an issue, because the statements at issue here were not offered as "similar fact" evidence. Instead, Hartley's own statements about the prior robbery were "integrally connected" to his inconsistent exculpatory statements about the murder. Layman v. State, 652 So.2d 373, 375 (Fla. 1993) (extrinsic crimes defendant had committed against murder victim were "integrally connected" to her murder, because defendant told police that while he was in jail for extrinsic crimes, he had plotted victim's murder). The references to the prior robbery were necessary to complete the story of the crime on trial, and were properly admitted over a Williams Rule objection. Griffin v. State, 639 So.2d 966, 968-69 (Fla. 1994); Padilla v. State, 618 So.2d 165, 169 (Fla. 1993). In addition, his statements linked him to the victim. See Gorham v. State, 454 So.2d 556, 558 (Fla. 1984) ("The evidence adduced by the prosecution witnesses did not bring before the jury unrelated bad acts of the appellant, rather it served to link the appellant to the victim circumstantially.")

The State would emphasize that it is not contending it would be proper to accuse a defendant of committing a completely unrelated crime, and then when he denies it, offer evidence that the defendant did commit the crime just to prove he is a liar generally. See Appellant's Brief at p. 23 (fn. 2). The prior robbery of Gino Mayhew was not an unrelated crime--it was an essential element of his various inconsistent statements about his guilt in this case.

In any event, Hartley does not complain about the testimony of Brooks and Bronner that Hartley admitted committing the prior robbery. Even if the trial court erred for any reason in admitting the testimony of Detective Baxter in reference to the prior armed robbery, such testimony was merely cumulative to the testimony of Brooks and Bronner about the same event. Therefore any error as to the testimony of Detective Baxter is harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Furthermore, the combined testimony of Brooks, Bronner and Baxter about the prior robbery amounts to a mere three sentences in a guilt-phase evidentiary presentation that fills over 300 pages of the trial transcript. The prosecutor made minimal reference to the prior robbery in his closing argument, as Hartley's own brief demonstrates. Appellant's brief at p. 23. Given the substantial evidence of guilt, including the eyewitness testimony concerning Hartley's participation in this crime, as well as Hartley's confessions to the kidnap/robbery/murder, any inadmissible reference to the prior armed robbery was harmless. Craig v. State, 585 So.2d 278 (Fla.

1991) (evidence of defendant's drug use the night of the murder should have been excluded, but error harmless because of other substantial evidence of guilt); Burr v. State, 576 So.2d 278 (Fla. 1991) (evidence of unrelated collateral act by defendant should have been excluded, but error harmless in of other overwhelming evidence of guilt); Haliburton v. State, 561 So.2d 248 (Fla. 1990) (evidence of unrelated prior rape should have been excluded, but error harmless because of compelling nature of state's case); Castro v. State, 547 So.2d 111 (Fla. 1989) (unrelated prior crime should have been excluded, but error harmless, in light of totality of evidence, including defendant's own confession).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN EXCLUDING THE HEARSAY TESTIMONY OF RONALD WRIGHT CONCERNING AN ALLEGED CONFESSION BY HANK EVANS

Three months before trial, the State filed a motion in limine to exclude the testimony of Ronald Wright concerning a confession allegedly made to him by one Hank Evans, on the ground that Wright's testimony would be inadmissible hearsay. In particular, the State contended, Wright's testimony would not be admissible under the declaration-against-penal-interest exception to the hearsay rule. §90.804(2)(c), Fla. Stat. (1990). Hartley conceded that Wright's testimony was inadmissible under Florida law (R 1454-55). Nevertheless, he argued that Wright's testimony should be admitted as a matter of constitutional due process, citing Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35

L.Ed.2d 297 (1973). After hearing evidence and argument, the trial court granted the State's motion in limine (R 348, 363-369).

On appeal, Hartley once again concedes that Wright's testimony was properly excluded under Florida law. Appellant's Brief at p. 30. The only issue presented on appeal is whether Wright's testimony should have been admitted notwithstanding its inadmissibility under State law, under a Chambers due process rationale. The primary basis for the trial court's rejection of Hartley's Chambers due process argument was the unreliability and untrustworthiness of Wright's testimony, and the lack of any corroboration of Hank Evans' alleged confession. The evidence on which the trial court based its ruling supports the exclusion of Wright's testimony. Because most of the relevant testimony, including Evans' alleged statement, is omitted from Hartley's discussion of this issue, the State will first address the evidentiary basis for the court's ruling.

(A) THE HEARING ON THE MOTION IN LIMINE

Hartley offered the deposition of Ronald Wright. Wright has been incarcerated since June of 1991 (SR 9). In November of 1991, Wright sent a letter to Hartley's attorney concerning information he claimed to have about Hartley's case (SR 61). He refused, however, to give sworn testimony about this information until his own pending cases had been disposed of (SR 250, 259; R 1315). On April 12, 1993, he finally gave a sworn deposition, in which he claimed that in late October or early November of 1991, Hank Evans had confessed to the murder of Gino Mayhew (SR 22).

According to Wright, Evans told him he was leaving the Washington Heights area walking down Moncrief looking for someone to rob. There is a convenience store "to your right on Moncrief if you're going towards Soutel." Evans "looked to his left" and saw Mayhew's Blazer at the convenience store. Since Evans knew Mayhew was a drug dealer, Evans approached the Blazer on the driver's side and told Mayhew he wanted to buy some drugs. When Mayhew pulled out a bag, Evans shot him (SR 24-25). When he "did the shooting," Evans was standing outside the driver's door, and Mayhew was seated in the driver's seat (SR 28). Evans tried unsuccessfully to push Mayhew over, then went around to the passenger side, opened the passenger door, pulled Mayhew into the passenger seat, closed the door, went back to the driver's side, got in and left (SR 28-29). Evans then drove down Moncrief, took a right on Soutel and drove to Sherwood, where he left the Blazer with Mayhew's body in it. Before he left, he wiped the Blazer for fingerprints and "sprinkled" some of the "dope" on the seat and floor (SR 29-30).

Wright testified further in his deposition that Hank Evans had sent him a letter in the spring of 1992 in which Evans had referred to his "confession (SR 43-49). Wright confirmed that he had been arrested for murder in December of 1991, along with Trevor Austin (SR 55). Wright further confirmed that he knew Hank Evans was a witness against Trevor Austin (SR 58). He also knew that Hank Evans was listed as a witness against him, although he claimed that Evans "wasn't no threat to me" (SR 64).

The letter from Evans to Wright states:

> Yeah man, it ain't sounding to good. I'm sayin, How would my homeboy know yall business? I'm not sayin you did it or you didn't cuase i don't know homeboy but, what i do know is i ain't gonna be caught in the cross fire, ya know? Right now i don't know what's goin on! Somebody tellin somethin cuase like i said, if they wasn't you wouldn't be down here and I wouldn't Either! Keep my name out them crackers face! I plan to be jumpin in "94." If who you say gone testify in court and that's who sayin somethin, then he only knows of what knowledge that he heard from 1 of yall. And that's crazy! Keep niggas up outta your business is what i learned just the short-time i been in prison. I made money wit you, you was my home boy and i never told you a thang about that Blazer/Sherwood tip until we got to Butler and shit had done cleared up. Shit like this make you think twice of what you tell, and who you tell it to. Know what i mean? [SR 99]

The State offered the live testimony of Hank Evans at the hearing on the motion in limine (R 1369 et seq.). Evans has known Robert Wright for 10 years (R 1370). They were codefendants in an armed robbery of a Texaco station in May of 1991 (R 1371). The next night, Evans robbed another gas station with someone else, and was arrested (R 1371). Evans not only confessed to his own participation in the two robberies, he implicated Wright in the Texaco robbery. As a result, Wright was arrested for the Texaco robbery (R 1372-73). Wright and Evans both pled guilty (R 1374). Wright was sent to Lake Butler first; Evans followed (R 1374-75). Before he left Duval County jail, Evans heard rumors about the Gino Mayhew killing. When he later saw Wright at Lake Butler, Evans discussed those rumors with Wright (R 1375-76). However, he never confessed to Wright (R 1376-77). In February of 1992, Evans was returned to Duval

County to talk to Detective Bolena about a robbery/murder at a pizza parlor involving Trevor Austin and Ronald Wright (R 1377-78). Evans agreed to become a witness against Wright and Austin (R 1378-79). Sometime thereafter, Evans received a letter from Wright asking Evans not to be a witness against him (R 1380). The letter quoted above was Evans' response to Wright's letter (R 1383), and was meant to reassure Wright that Evans was not the kind of person to go to authorities and would not be testifying against Wright (R 1384-87). For example, Evans had not gone to the authorities with information he knew about the Gino Mayhew murder in order to attempt to receive a lenient sentence, and had not even told Wright about it until Evans' own cases had been settled (R 1387-88). Asked about a possible grudge Wright might have had against him, Evans pointed out that Wright would not even have been arrested for the Texaco robbery if Evans had not implicated him (R 1389, 1407).

The trial court also considered the depositions of James Brown, Elijah Blackshear, and Kareem Johnson, Jijuan Hagans and Bilal Saleem.

James Brown testified in his deposition that, at a "Muslim service" conducted at the jail on August 16, 1992, he overheard Hartley admit to Ronald Wright that he had murdered Gino Mayhew. Hartley was complaining that he had no witnesses. Wright responded that he would talk to Hartley later (SR 125, 137-38, 139).

Elijah Blackshear also testified that Hartley had admitted being responsible for the death of Mayhew (SR 209-210). At the

August 16 "Muslim meeting," Blackshear heard Hartley asking Wright if he was "still making them plans" for Hartley (SR 222). Afterwards, Blackshear asked Wright what he was planning to do for Hartley. Wright said "he was going to lie on some dude in prison and say that the dude shot Gino Mayhew.... He say, I'm going to help my dog" (SR 223).

Kareem Johnson testified in his deposition that on August 9, 1992, he talked to Wright. Wright told him that he was going to create an alibi for Hartley by testifying that someone else had confessed to the murder, even though he (Wright) knew that Hartley had committed it (SR 243-246).

Long after the trial court had ruled on the State's motion in limine--in fact, after the state had presented its evidence at trial and both parties had rested--the defense offered the rebuttal depositions of Jijuan Hagans and Bilal Saleem (R 2277, 2285, 2318). Hartley's trial attorney claimed Hagans had testified that he had overheard the State's informants making up their stories, and that Saleem had testified that there was no opportunity for Hartley and Wright to have conversed at the service that Saleem conducted (R 2319). An examination of Hagans' deposition, however, shows only that he overheard some discussions about the case, including differences of opinion about whether Hartley would "beat this" (R 527). And Saleem specifically conceded that the attendees at his services "talk amongst themselves" (R 577) and that there are private conversations (R 582-83).

(B) THE APPLICABILITY OF CHAMBERS v. MISSISSIPPI

As noted above, Hartley has conceded at trial and on appeal that Wright's testimony about an alleged confession by Hank Evans is inadmissible hearsay under state law. (R 1454-55, Appellant's brief at p. 30). Nevertheless, some discussion of the Florida hearsay rule is a relevant predicate to a Chambers v. Mississippi constitutional analysis.

There are a number of exceptions to the hearsay rule. Declarations against penal interest "offered to exculpate the accused" are excepted from the hearsay rule, provided that the declarant is unavailable and that "corroborating circumstances show the trustworthiness of the statement." §90.804 (2)(c), Fla. Stat. (1990). Section 90.804 is virtually identical to Federal Rule of Evidence 804. Like the Florida rule, the federal rule requires that the declarant be unavailable and that any declaration against penal interest offered to exculpate the accused be corroborated. Declarations against penal interest were not admissible at common law. Moore explains the traditional distrust of such declarations, and the corroboration requirement that was included when the federal rule was adopted:

> The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in Donelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicion of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant.... The requirement of corroboration should be construed in such a

> manner as to effectuate its purpose of circumventing fabrication. [Moore's Federal Practice, Art. VIII, §804.01, pp. 234-35.]

The trial court in this case found, inter alia, that Evans was available and that there were no corroborating circumstances that would show the trustworthiness of Hank Evans' alleged confession (R 364-65). The record clearly supports these conclusions. Evans was available to testify, and did so, denying that he had killed Gino Mayhew and denying that he had ever confessed to killing Gino Mayhew. As for the trustworthiness of the alleged confession, first of all, Wright had a motive to lie about Evans: it was Evans who was responsible for Wright's arrest for the armed robbery of a Texaco station, for which Wright is now serving time. See Weinstein's Evidence, Vol 4, p. 804-153 (requirement of corroboration was added to federal rule concerning declarations against penal interest because of "special dangers of a trumped-up confession by ... some person with a strong motive to lie"). Second, the State's evidence showed not only that Wright had a motive to lie, but that he acted on that motive. Wright attempted to kill two birds with one stone; on the one hand, he could get even with Evans, on the other, he could help his friend Hartley. To these ends, he met several times with Hartley to plan the creation of a false confession to Hartley's crime. Finally, the "facts" contained in Evans' alleged confession, as reported by Ronald Wright, are inconsistent with the physical evidence and the eyewitness testimony in this case. According to Wright: Evans encountered Mayhew in the parking

lot of a convenience that was on either the right or the left side of Moncrief; Evans pulled out his gun and, as he stood outside the Blazer, shot Mayhew as the latter sat inside the Blazer; Evans then dragged Mayhew's body to the passenger side of the Blazer; Evans drove the Blazer to Sherwood; Evans sprinkled "dope" on the seat and floor before he left. In fact, there were no drugs in the Blazer when it was discovered (R 2001), Mayhew's body was in the driver's seat (not the passenger seat) (R 1978-79), and the physical evidence was utterly inconsistent with Mayhew "being shot by someone standing outside the driver's door of this car" (R 2058). Moreover, the alleged encounter at the convenience store was inconsistent with the eyewitness testimony concerning Mayhew's whereabouts the evening he was murdered.

Against all these inconsistencies, Hartley can only offer Evans' letter to Wright, with its reference to a "Blazer/Sherwood tip." As the trial court found, this reference was "too vague and oblique to provide corroboration for the statements in question" (R 365), especially in light of Evans' own reasonable explanation for the letter.

Although conceding that Wright's hearsay testimony was properly excluded as a matter of state law, Hartley contends that state law is in conflict with his constitutional due process rights, as explicated in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Mississippi, however, did not recognize declarations against penal interest as an exception to the hearsay rule. Florida does.

Hartley cites no cases in which a hearsay rule comparable to Florida's concerning declarations against penal interest has been found to violate a criminal defendant's right to present a defense. It is true that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,' [Cit.]," Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), but that principle has never been construed to mean that a state evidentiary rule must be invalidated whenever it prevents a criminal defendant from admitting any evidence, no matter how dubious. The United States Supreme Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see that evidence admitted." Ibid. The limitations upon hearsay declarations against penal interest under Florida law serve the interests of fairness and reliability. Moreover, these limitations are not unique to Florida; the federal rule has identical limitations, and a number of states have similar rules limiting the admission of declarations against penal interest. See, e.g., Killam v. State, 626 A.2d 401 (N.H. 1993) (refusal to admit statements by fellow inmate that third party had confessed to crime upheld where no showing that declarant unavailable and no corroborating circumstances indicating trustworthiness); State v. Brown, 493 S.E.2d 589 (N.C. 1994) (same). Thus, this is not a case like Crane v. Kentucky, supra, in which the "reasoning of the Kentucky Supreme Court ... conflicts with the

decisions of every other state court to have confronted the issue," id. at 687, or Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), in which Arkansas apparently was the only one of a number of states addressing the reliability of hypnotically enhanced testimony to have a per se rule excluding the testimony of the defendant, or Ferguson v. Georgia, 365 U.S. 70, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961), in which Georgia was the only state in the country not to allow the defendant to testify (he could only give an unsworn statement).

In Chambers, Mississippi in effect was compelled to adopt a declaration-against-penal-interest exception to the rule against hearsay; ironically, Hartley relies on Chambers to urge the suspension of the Florida declaration-against-penal-interest exception to the hearsay rule. Hartley's argument appears to be the inverse of that presented in Chambers, and Chambers is readily distinguishable. Hill v. State, 549 So.2d 179, 182 (Fla. 1989); Saavedra v. State, 576 So.2d 953, 961-62 (Fla. 1st DCA 1991); Kyser v. State, 576 So.2d 888 (Fla. 1st DCA 1991).

What further distinguishes Chambers, however, is that Chambers dealt with the exclusion of reliable and trustworthy evidence. Card v. State, 453 So.2d 17 (Fla. 1984). The hearsay declarant in Chambers had confessed to the murder "on four separate occasions," including a sworn confession he gave to Chambers' attorney. 410 U.S. at 289. Moreover, these statements were made "under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300. One was made under oath. The others were made spontaneously to

close acquaintances the night of the shooting or the next day. 410 U.S. at 291-93. These confessions were corroborated by an eyewitness to the shooting, who testified that Chambers had not fired any shots at the victim, and also by testimony that the hearsay declarant had been seen with a gun immediately after the shooting, that he had owned a gun of the same caliber as the murder weapon prior to the murder, and that after the shooting he had purchased a new weapon to replace the one he had discarded. 410 U.S. at 300. As the prosecutor argued in this case, the four confessions in Chambers were "literally dripping with corroboration" (R 1451). By contrast, Evans' alleged "confession" is utterly lacking in corroboration, and was reported by someone who not only had a motive to lie, but was overheard planning the lie. Nothing in Chambers compels the invalidation of a state evidentiary rule to allow a criminal defendant to offer such unreliable and untrustworthy evidence.

Hartley has conceded, both at trial and on appeal, that Wright's testimony was properly excluded as a matter of state law. His Chambers due process argument is without merit.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING HARTLEY'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR REFERRED TO POTENTIAL WITNESSES' FEAR OF HARTLEY DURING OPENING STATEMENTS

Before trial, Hartley filed a motion in limine seeking to prohibit "the introduction of any and all evidence to raise the Defendant's alleged reputation for violence or irrelevant or unresponsive testimony by witnesses in this cause relating to

their personal fear of the Defendant because of any alleged propensity towards violence" (R 97). At the hearing on the motion in limine, the prosecutor stated that he "certainly" was not going to place Hartley's character in issue, but he could "conceive in some instances" where a delay by a witness in reporting his information to the police "is an area that is right [sic] for attack by the defense on the believability of a witness" (R 1331). After further discussion by both parties, the Court opined, "Well, I think [the state] has a right, if it becomes an issue of why a witness didn't do something, then he can say I'm afraid" (R 1333). Hartley's attorney responded: "I understand all that, Judge. I'm just saying that barring that kind of inquiry," the subject of the defendant's character should be avoided (R 1332-33). The trial court granted the motion "as modified in court" (R 1333).

In his opening statement, the prosecutor predicted the evidence would show that Hartley had committed his crime thinking he would "get away" with it because "he believed no one would dare to be a witness against him;" the prosecutor stated the evidence would show "that he was the area tough guy, people in the area where this occurred were afraid of him" (R 1913). The defense objected and moved for a mistrial. The trial court sustained the objection on the ground that while these kinds of comments would be appropriate "in closing argument," the prosecutor was "going beyond" what was appropriate for an opening statement. The motion for mistrial was denied (R 1915). The prosecutor resumed his opening statement by stating that the

evidence would show "that the defendant counted on witnesses not coming forward because he believed that they were going to be afraid to testify against him" (R 1916). The defense once again objected, without stating any grounds. The trial court sustained the objection because the comment was "the same thing I sustained a moment ago" (R 1916). This second objection was not accompanied by a motion for mistrial.

Subsequently, evidence was presented without objection that witnesses were afraid to come forward, and that Hartley counted on this fear to "get away" with his crime. In his closing argument, the prosecutor returned to the subject of the witnesses' fear of the defendant. He argued that Sidney Jones was "afraid" and that fear "kept Sidney quiet" (R 2167). Juan Brown, the prosecutor argued, was also afraid to come forward (R 2369-71). There was no defense objection to this argument.

Hartley has conceded both at trial and on appeal that evidence about witnesses' fear of a criminal defendant may be validly admitted to explain their reluctance to come forward. Such evidence was admitted without objection, and argued without objection. The only objection at trial was to the mention of this subject in the prosecutor's opening statement. Having acceded to the admission of evidence on the subject and to closing argument on the subject, Hartley has failed to preserve for appeal any issue of whether "this evidence" was validly admitted, or whether the state ever "linked either Jones' or Browns' fear to Hartley." Appellant's brief at pp. 37-38. An appellant may only argue issues that have been preserved; the

appellate argument must be the same as the argument raised in the trial court. Peterka v. State, 640 So.2d 59 (Fla. 1994); Bertolotti v. State, 565 So.2d 1343 (Fla. 1990); Jackson v. State, 451 So.2d 458 (Fla. 1984); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if preserved, however, this issue is without merit. Hartley agrees that the state may explain that its witnesses delayed coming forward because of their fear of the defendant. E.g., Morgan v. State, 603 So.2d 619 (Fla. 3d DCA 1992). Hartley contends only that the state failed to "link" the witnesses' fear to Hartley. Juan Brown, however, testified that he was "scared that they might react or do some harm to my family" (R 2142). "[T]hey" included Hartley. Jones testified on direct examination that he "was very scared that they would find out that I told what happened to Gino and these guys -- these three guys would come back and kill me the same way they did my friend Gino" (R 2079). "[T]hese three guys" included Hartley. Furthermore, on cross-examination, Jones was asked: "Kenneth Hartley has been in jail for the last year and a half at least, you're saying these people are still scared to come forward, huh?" Jones responded in the affirmative (R 2115), and stated "I didn't come forward because I was scared just like I'm sitting here behind this here microphone scared still" (R 2118). This testimony certainly linked Hartley to witness fear. Moreover, Hartley bragged to Ronald Bronner that "he was going to get off" because "everybody was scared to testify" (R 2230), and bragged to Eric Brooks that "he was going to get away with

the whole thing ... because all the witnesses were afraid" (R 2263).

The state established a sufficient "link" to Hartley. This issue is procedurally barred and also is without merit.

ISSUE IV

WHETHER THE COURT ERRED REVERSIBLY IN EXCLUDING TESTIMONY BY SIDNEY JONES CONCERNING THE NAME OF THE POLICE OFFICER TO WHOM HE REPORTED.

Sidney Jones testified on cross-examination that he has served "at various times" as a narcotics informant for the Sheriff's office (R 2097), and in fact was "working as an informant for the vice squad" the evening of the murder (R 2119-20). Hartley's trial attorney asked him who his supervising officer was. The prosecutor objected, initially on the ground of privilege, but when the defense attorney suggested that only the supervising officer could invoke a privilege, the prosecutor changed his objection to relevancy (R 2120). The court sought a response from the defense attorney, who stated: "The relevancy is his ability to make contact with the police department even in a discrete station [sic] and that's why it is important that this jury understand that relationship" (R 2120). The trial court sustained the objection, stating, "I think they understand, I don't know if it's relevant" (R 2120).

Hartley now argues the trial court erred because the court applied a "necessity" test rather than a "relevancy" test to the excluded evidence. But if the jury understood the "relationship," the name of the officer was not material to that

understanding. No other grounds of relevancy were offered at trial. The "person seeking admission of testimony must demonstrate why sought-after testimony is relevant." Hitchcock v. State, 413 So.2d 741, 744 (Fla. 1982). No suggestion was offered at trial that the relationship did not really exist and that the defense was attempting to impeach Jones' testimony about the existence of the relationship. On the contrary, the point of the trial questioning was that there was a relationship, and that Jones could have contacted the police. The name of the officer adds nothing to the jury's understanding of the "relationship." Hartley is attempting on appeal to justify the relevance of this evidence on a ground never raised below. This attempt is improper. Bertolotti v. State, 565 So.2d 1343 (Fla. 1990); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Furthermore, Jones had already identified the name of his supervising officer, in a pretrial deposition attended by Hartley's then trial attorney Charlie Adams. In that deposition (during the examination by Hartley's attorney), Jones testified that at the time of Gino Mayhew's murder he was a confidential informant for the narcotics division (SR 362), reporting to "Detective David Van Down (phonetic)" (SR 363). Thus, there is no merit to Hartley's present claim that the trial court's disallowance of the question at trial prevented him from attempting to establish that Jones in fact reported to no one. Appellant's brief at p. 42. Obviously, the disallowance of the question at trial did not, as Hartley now contends, prevent

Hartley's trial attorney from calling an officer who previously had been identified to verify or contradict Jones' claim that he was a police informant.

"A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. [Cits.]" Jent v. State, 408 So.2d 1024, 1029 (Fla. 1982). There was no abuse of discretion in this case.

ISSUE V

WHETHER THE TRIAL COURT ERRED REVERSIBLY IN DETERMINING THAT THE STATE HAD A RACE NEUTRAL REASON FOR EXCUSING PROSPECTIVE JUROR STANFORD

Prospective juror Theresa Stanford is a program director for Lutheran Social Services who has a master's degree in counseling psychology. She also works in private practice and by contract with the city to provide services "in the area" of psychotherapy (R 1542). Her response to the prosecutor's initial question about her "thoughts ... regarding the death penalty" was: "Well, my thoughts are I'm against it, I think a person can be rehabilitated in some other form" (R 1543). Later in the voir dire examination, the prosecutor returned to prospective juror Stanford and her views on the death penalty. She stated that she could convict a defendant of first degree murder knowing that it would subject him to a death sentence, but could not "say yes or no at this point" whether or not she could vote to make a recommendation of death at the penalty phase (R 1662-63). She would have to hear the evidence first (R

1663, 1666). She denied that her beliefs against a death sentence were "strongly held beliefs" (R 1666). However, she did not know whether or not it would be "unlikely" that she "could" recommend a death sentence. Finally, however, she stated that if the aggravating factors outweighed the mitigating factors and if the judge told her that was the test, she would be able to recommend a death sentence (R 1667).

Following the conclusion of the voir dire examination, the selection of the jury began. The trial court called the names of the first 12 qualified jurors. The prosecutor peremptorily challenged Miss Stanford (R 1887). The trial court noted that of the first 12 prospective jurors, five were African-Americans, of which the state was challenging only Miss Stanford. The prosecutor explained his challenge on the ground that even though she testified she could lay aside her personal feelings against the death penalty, "her feelings opposed to the death penalty are adverse to the State's position in this case" (R 1887). In addition, he was concerned that she would be too forgiving because of her line of work. The defense attorney did not contest these proffered explanations, except to say that "I don't think that's a basis for excusing" (R 1888) The trial court disagreed, and concluded that the prosecutor had proffered a sufficiently race-neutral reason for striking Miss Stanford (R 1888).

The jury selection process continued. The state did not strike any of the other four African Americans in the first twelve, and two served on the jury (the defense struck the other

two) (R 1889, 1894, 1896). The record does not show the racial composition of the remaining 16 prospective jurors from the group of 28 from which the jury was selected. However, both the state and the defense accepted the jury as selected (R 1898-99). Hartley did not move to strike the panel, move to seat juror Stanford, or express any displeasure with the jury actually chosen (R 1899). Nevertheless, Hartley now argues that this Court's decisions in State v. Neil, 457 So.2d 481 (Fla. 1984), State v. Slappy, 522 So.2d 18 (Fla. 1988), and State v. Johans, 613 So.2d 1319 (Fla. 1993), compel the conclusion that the prosecutor's peremptorily challenges were not exercised in a racially-neutral manner.

The State would argue, first, that Hartley has not preserved this issue for appeal. Defense counsel "accepted the jury immediately prior to its being sworn without reservation of his earlier-made [Neil/Slappy] objection." Joiner v. State, 618 So.2d 174, 176 (Fla. 1993). "[C]ounsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn." Ibid. Therefore, whether the trial court erred in overruling the defense objection to the State's peremptorily challenge to prospective juror Stanford has not been preserved for this Court's review. Mungin v. State, 20 Fla. L. Weekly S459, S460 (fn. 5) (Fla. Sept. 7, 1995).

However, even if the issue has been preserved, it is without merit. A proffered explanation for a peremptorily challenge need not rise to the level justifying a challenge for cause. Happ v. State, 596 So.2d 991, 996 (Fla. 1992). Juror Stanford may not have been excusable for cause, but she certainly was "against" the death penalty, and she expressed some uncertainty about her ability to recommend it. This Court has consistently 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 prosecutor's misgivings about a prospective juror who is "against" the death penalty reasonably justify the exercise of a peremptory challenge to that juror. The prospective juror's psychology/counseling background provided further support for the prosecutor's peremptory strike of the juror. Happ v. State, supra, at 996 (prosecutor had race-neutral reason for striking psychology teacher at community college as possibly too liberal, especially where defendant did not contest this reason).

The prosecutor's exercise of peremptories was presumptively valid. State v. Johans, supra at 1322. Any possible doubt about the prosecutor's peremptory strike of prospective juror Stanford is answered by his explanation for his strike. Moreover, the prosecutor did not engage in "a pattern of excluding a minority without apparent reason." State v. Slappy, supra at 23. Although numbers alone are not dispositive of the issue, the fact that the prosecutor peremptorily challenged only

one of five African-Americans included in the first 12 qualified jurors corroborates the prosecutor'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 VI

WHETHER REVERSIBLE ERROR EXISTS CONCERNING THE TRIAL COURT'S INSTRUCTIONS AS TO THE CCP AGGRAVATOR

The State cannot agree that Hartley's trial counsel ever objected to the standard instruction on the cold, calculated and premeditated factor. Before trial, he filed a motion to declare the CCP aggravator to be unconstitutional on its face and as applied by this Court (R 217). In addition, he filed a motion to prohibit instruction on this aggravator on the ground that the CCP aggravator is unconstitutional and also on the ground that the evidence in this case does not support CCP (R 273). Before trial, the court denied the motion to declare the CCP aggravator unconstitutional (R 338), and denied the motion to prohibit instruction on the CCP aggravator (R 335). At the penalty phase charge conference, Hartley's trial counsel renewed his pretrial motions as to the CCP aggravator (R 2571), and also argued that no instruction was warranted because the evidence did not establish the aggravator (R 2572-73).

At no point did Hartley object to the standard instruction itself, or submit a limiting instruction. Therefore this issue is procedurally barred. Beltran-Lopez v. State, 626 So.2d 163,

164 (Fla. 1993) (Although defendant filed a motion to exclude HAC factor from consideration, "it is clear that he never attacked the instruction itself, either by submitting a limiting instruction or making an objection to the instruction as worded. Therefore he is procedurally barred from complaining of the erroneous instruction."). Accord, Gamble v. State, 20 Fla. L. Weekly S242 (Fla. May 25, 1995) ("Since Gamble failed to raise the objection he now asserts, we find that this issue is procedurally barred."); Dailey v. State, 20 Fla. L. Weekly S241 (Fla. May 25, 1995) (since Dailey "never objected to the jury instructions themselves on vagueness grounds or offered alternative instructions," claim that CCP and HAC instructions unconstitutionally vague was procedurally barred); Windom v. State, 20 Fla. L. Weekly S200, S202 (Fla. April 27, 1995) (claim that CCP instruction is unconstitutionally vague "is procedurally barred unless a specific objection on that ground was made at trial"); Crump v. State, 654 So.2d 545, 548 (Fla. 1995) (same); Wuornos v. State, 644 So.2d 1012, 1020 (Fla. 1994) (same).

In any event, even if any issue had been preserved concerning the wording of the CCP instruction itself, any error would have been harmless not only because under the facts of this case the murder "could only have been cold, calculated, and premeditated" (for reasons set forth as to the next issue), but also because in light of the remaining strong aggravators and lack of significant mitigation, the jury's recommendation would have been the same" regardless of the CCP instruction. Foster v. State, 654 So.2d 112, 115 (Fla. 1995); Fennie v. State, 648 So.2d

95, 99 (Fla. 1994); Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993).

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THIS MURDER WAS COLD, CALCULATED AND PREMEDITATED

Hartley obtained a gun and a getaway vehicle in advance, took Mayhew to a remote area where there would be no witnesses, and shot him five times, including three execution-style shots to the back of Mayhew's head. According to Hartley, shooting the victim in the head and "leaving no witnesses" was his "trademark." The evidence supports the trial court's determination that Hartley and the others planned "[f]rom the inception" not just to rob Mayhew but also to "execute" him (R 494). As the trial court found in its sentencing order, "This was a classic cold-blooded execution" (R 494).

Because the evidence in this case establishes that Ferrell and the others planned a murder, not just a robbery, Hardwick v. State, 461 So.2d 69 (Fla. 1984), which Hartley cites for the proposition that the CCP aggravator is not established by proof of premeditation merely to commit a felony other than murder (Appellant's Brief at pp. 51-52), is inapposite here.

In addition, there is no evidence in the record, including Hartley's own statements about how the crime occurred, to indicate that there was any resistance or struggle by Mayhew. Therefore, the record supports the trial court's observation that "[t]here was no sign of resistance or struggle by Mayhew" (R 239). See Thompson v. State, 648 So.2d 695 (Fla. 1994);

Swafford v. State, 533 So.2d 270, 277 (Fla. 1988) (lack of resistance or provocation is a factor indicating CCP).

The four elements of CCP were established here. Wuornos v. State, 644 So.2d 1000, 1008 (Fla. 1994). Hartley did not act out of emotional frenzy, panic, or a fit of rage. There was not even a claim, much less any evidence, of any loss of emotional control. Compare, Walls v. State, 641 So.2d 381 (Fla. 1994) (Walls' self-serving testimony claiming loss of emotional control properly rejected based on record). Hartley coldly and calmly joined in the careful plan and prearranged design to kill Gino Mayhew -- a plan which entailed the advance procurement of a weapon and a getaway vehicle, required Hartley's codefendant Ferrell to approach Mayhew in advance to make sure that he had money and drugs, and involved forcing Mayhew at gunpoint to take the killers to a secluded area where there would be no witnesses. This was "a protracted execution style slaying which is by its very nature cold." Fennie v. State, 648 So.2d 95, 99 (Fla. 1994).

"The lengthy nature of the crime also goes to the heightened premeditation necessary to establish this aggravating factor." Ibid. The murder of Gino Mayhew clearly was planned sufficiently in advance to afford Hartley "ample time ... to reflect on his actions and their attendant consequences." Jackson v. State, 522 So.2d 802, 810 (Fla. 1988) (victim kidnapped in the afternoon, murdered that evening). See, also, Foster v. State, 654 So.2d 112, 115 (Fla. 1995) (the several minutes that elapsed between concealing victim's body and

inflicting mortal wound gave defendant "ample time to reflect on his actions and their attendant consequences" and was "compelling evidence" of heightened premeditation).

The fact that the victim was transported to a secluded location where there would be no witnesses and no one to assist the victim supports heightened premeditation. Fennie v. State, supra (defendant's actions in transporting victim to secluded area where gunshot would not be heard "exude the deliberate ruthlessness necessary to raise his premeditation above that generally required for premeditated first-degree murder"). See also, Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987); Huff v. State, 495 So.2d 145, 153 (Fla. 1986); Stano v. State, 460 So.2d 890, 892-893 (Fla. 1984).

As for the last CCP factor, Hartley himself argues on appeal that there is no evidence that would support a pretense of moral or legal justification. See Banda v. State, 536 So.2d 221 (Fla. 1988) (pretense of moral or legal justification existed where uncontroverted evidence that victim was violent man who had threatened accused and defendant killed to prevent victim from killing him). According to Hartley, the "fact" that arguably shows a pretense of moral or legal justification is the very "fact" that, according to Hartley, is not supported by the record in this case, i.e., that Hartley "planned to kidnap, rob and murder the 17 year old Mayhew so he could not retaliate for defendants [sic] earlier robbery of him" (R 494).

In deciding sentence, the judge may consider matters not presented to the jury. E.g., Cochran v. State, 547 So.2d 928,

931 (Fla. 1989); Spaziano v. State, 433 So.2d 508, 511 (Fla. 1983); White v. State, 403 So.2d 331, 339-40 (Fla. 1981). However, it is questionable whether the trial court may consider evidence presented in another case, involving a different defendant and different counsel, even if the case involves the same crime and is tried in the same county before the same judge. See Wuornos v. State, 644 So.2d 1012, 1019 Fla. 1994) (improper to look at another case involving the same defendant, but different crime and different court, to establish mitigator); White v. State, supra at 340 (fn. 9) (noting that while trial court had not considered information not presented to jury, court had not considered any information unknown to defendant or his counsel).

Hartley's trial counsel was aware that in the previous trials of the codefendants the state had presented evidence that this murder was motivated in part by the defendants' desire to prevent Mayhew from retaliating against them for their earlier robbery (R 2156-57). Moreover, testimony was presented by way of deposition at the hearing on the state's motion in limine in this case, to the effect that Hartley had killed Mayhew because Mayhew had threatened "to get him back," so Hartley "got Gino first" (SR 210). Since this retaliation theory was not "unknown" to defense counsel in this case, arguably the trial court did not err by considering it, even if such evidence was not directly offered in support of sentence, either to the jury or to the court. But whether or not this theory was properly considered, there was no error in the trial court's finding.

There was no pretense of moral or legal justification for the kidnap/robbery/murder of Gino Mayhew even if Hartley planned to kill him to prevent his retaliation for a crime Hartley had committed against him. Such a motive does not rebut the cold, calculating nature of the homicide. Banda v. State, supra. Moreover, the trial court found that Hartley planned to kidnap, rob and murder Gino Mayhew "so there would be no witness to the present robbery" (R 494). Any reference to an additional retaliatory motive for the murder was at most a gratuitous statement not affecting the trial court's finding that this murder was CCP. Rutherford v. State, 545 So.2d 853, 855 (Fla. 1989).

The trial court's finding that the CCP statutory aggravator had been proved beyond a reasonable doubt is amply supported by the evidence. There was no error here. However, even if this factor were found not to apply, any error would be harmless in light of the presence of other strong aggravating factors supporting the death penalty (three of which Hartley does not even contest), and the weak case for mitigation. Castro v. State, 644 So.2d 987 (Fla. 1994); Fennie v. State, supra; Armstrong v. State, 642 So.2d 730 (Fla. 1994).

ISSUE VIII

WHETHER THE TRIAL COURT IMPERMISSIBLY DOUBLED THE KIDNAPPING AND PECUNIARY GAIN STATUTORY AGGRAVATORS

Hartley argues here that the kidnapping and pecuniary gain aggravators should not have been found separately, or "doubled." However, although it is improper to double count aggravators

which relate to the "same aspect" of the crime, Provence v. State, 337 So.2d 783, 786 (Fla. 1976), when the two aggravators "are not based on the same essential feature of the crime or of the offender's character, they can be given separate consideration." Agan v. State, 445 So.2d 326, 328 (Fla. 1983). As this Court has noted:

> There is no reason why the facts in a given case may not support multiple aggravating factors provided the aggravating factors are themselves separate and distinct and not merely restatements of each other as in a murder committed during a robbery and murder for pecuniary gain, or murder committed to eliminate a witness and murder committed to hinder law enforcement.

Echols v. State, 484 So.2d 568, 575 (Fla. 1985). It would seem obvious that the pecuniary gain and kidnapping factors "rest on separate factual predicates." Hardwick v. State, 521 So.2d 1071, 1077 (Fla. 1988) (CCP and HAC rest on "separate factual predicates" even if some of same facts support both findings). And, in fact, this Court has rejected arguments "that the aggravating factors for pecuniary gain and during the course of a robbery and kidnapping should be considered as a single factor." Preston v. State, 607 So.2d 404, 409 (Fla. 1992). Accord, Routly v. State, 440 So.2d 1257, 1264 (Fla. 1983); Bryan v. State, 533 So.2d 744 (Fla. 1988); Bolender v. State, 422 So.2d 833 (Fla. 1982).

However, citing Green v. State, 641 So.2d 391, 395 (Fla. 1994), for the proposition that it is improper to double kidnapping and pecuniary gain where the "sole purpose" of the kidnapping is to facilitate a robbery, Hartley argues that

because the trial court found that the kidnapping was "an integral part of the defendant's plan to rob and murder Gino Mayhew" (R 490), and the "gain of drugs and money was an integral part of defendant's plan ... [to] kidnap, rob and murder" (R 491), it was improper to consider pecuniary gain and kidnapping as two separate aggravators.

Hartley concedes that the language he relies upon from Green is dicta. But assuming that this Court will follow its Green dicta in a case in which it is established that the "sole purpose" of the kidnapping is to rob the victim, and even assuming further (as Hartley apparently does) that "integral part" and "sole purpose" mean the same thing, it is nevertheless clear that the trial court did not find that the "sole purpose" of the kidnapping was to rob Gino Mayhew. Instead, the kidnapping had a "broader purpose," Green v. State, supra, involving both robbery and murder, as the trial court's order plainly states. Therefore, the trial court properly considered kidnapping and pecuniary gain as separate aggravating factors.

Even if the court had erred, however, the error would have been harmless. Hartley does not even contend that there was any other error in the kidnapping finding, and the kidnapping factor would remain to support the death sentence even if the pecuniary gain aggravator were merged into it, along with the uncontested finding of prior violent felony conviction, murder committed to prevent lawful arrest, and, as well (assuming this Court agrees with the State's arguments as to Issues VI, VII, IX and X), the HAC and CCP findings. In light of the presence of strong

aggravation findings and minimal mitigation findings, any error in the trial court's consideration of the kidnapping and pecuniary gain factors was harmless beyond a reasonable doubt.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE MURDER OF GINO MAYHEW WAS HEINOUS, ATROCIOUS OR CRUEL

This Court has held that where "death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply." Cochran v. State, 547 So.2d 928 (Fla. 1989). This Court has also held that multiple gunshots alone do not establish HAC. E.g., Street v. State, 636 So.2d 1297 (Fla. 1994). However, this Court has upheld the application of the HAC aggravating factor in a number of cases in which "victims have been murdered by gunshot" even when they "have died instantaneously" where, as here, "the victims were subjected to agony over the prospect that death was soon to occur." Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983).

It should be noted that Mayhew did not die instantaneously after having been shot. Hartley implies that nothing can be concluded about the order of the shots. However, while all five shots cannot be precisely ordered, some conclusions about the order of the shots may be drawn. There were two fatal gunshot wounds to the back of the head, both of which went "basically through the entire width of the brain" (R 2045-47). Once either of these wounds was inflicted, Mayhew would have been

immediately "immobilized" (R 2047). Therefore, they had to have been inflicted after any wounds that were inflicted while Mayhew was alive, conscious and able to respond to stimuli. Gillam v. State, 582 So.2d 610, 612 (Fla. 1991) (the trial judge may apply common-sense inferences from the circumstances). The evidence demonstrates that there were at least two such wounds. Mayhew was shot once in the face, through his eyeglasses. The bullet travelled through the right lens of his glasses, into his right cheek, and ended up in the muscle of the right side of his neck (R 2049-51). The most reasonable explanation for this wound was that it was inflicted after Mayhew turned his head "to observe something here in the back" (R 2052). Obviously, Mayhew could only have looked back in response to some stimulus if he was alive and conscious, and therefore was alive and conscious when this wound was inflicted.

Mayhew was also shot in his finger. This wound in all likelihood was inflicted by the same bullet that failed to penetrate Mayhew's skull (R 2048). The most reasonable inference is that Mayhew had brought his hand up to protect himself, and the bullet penetrated the finger, lost its velocity, hit the skull, failed to penetrate it, and fell onto the seat, where it was found (R 2048-50). If this was the case, Mayhew obviously had to be still alive and conscious when this second wound was inflicted.

It is logical to infer that Mayhew experienced "foreknowledge of death, extreme anxiety and fear" just from the manner in which he was shot. Cf. Tompkins v. State, 502 So.2d

415, 421 (Fla. 1986) ("it is permissible to infer that strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear"); Wuornos v. State, 644 So.2d 1000, 1011 (Fla. 1994) (After being shot once, victim "still was conscious and able to walk from the car. In spite of seeing this, Wuornos then ran around to where [victim] was standing, and shot him several more times." Held: "the protracted nature of this killing together with the mental suffering it necessarily would entail" supported fact finder's determination that murder was HAC.).

Nevertheless, the five gunshot wounds are not all of the circumstances of this case. The HAC aggravator pertains to the nature of the killing, the surrounding circumstances and the victim's perception of the events leading to death. Hitchcock v. State, 578 So.2d 685 (Fla. 1991), reversed on other grounds, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992); Stano v. State, 460 So.2d 890 (Fla. 1984); Mason v. State, 438 So.2d 374 (Fla. 1983). Mayhew was forced at gunpoint to leave the relative safety of Washington Heights Apartments and to drive to an empty field behind a school located some distance away. He was forced to ignore his two friends (Sidney Jones, who shouted for Mayhew as he was leaving the apartment parking lot, and Juan Brown, who made a U-turn, shouted, and blew his horn in a vain attempt to get Mayhew to stop and talk to him). Sidney Jones testified that Mayhew looked "very, very scared and frightened" (R 2076). Mayhew had to have realized that if only a robbery was planned, Hartley and Ferrell need not have taken him out of the apartment

complex (nor to have made arrangements with Johnson for a getaway car before they left). The trial court surely did not err by concluding that, during the drive from the apartments to the isolated area behind Sherwood Forest elementary school, with Hartley's gun to the back of his head, Mayhew must have been seized by "sheer animal terror" (R 238).

This Court has affirmed HAC findings in cases in which the victim was abducted, taken to a remote location, and then killed. "Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." Preston v. State, 607 So.2d 404, 410 (Fla. 1992). Here, the victim's death was not instantaneous, and the trial court's conclusion that the murder was heinous, atrocious or cruel is supported by the evidence. Preston v. State, supra ("Preston forced the victim to drive to a remote location, made her walk at knifepoint through a dark field, forced her to disrobe, and then inflicted a wound certain to be fatal. Undoubtedly, the victim suffered great fear and terror during the events leading up to her murder."); Fennie v. State, 648 So.2d 95, 98 (Fla. 1994) (evidence that defendant forced victim into trunk at gunpoint, brought her to a location where the gunshot would not be heard, and shot her "supports a finding that the heinous, atrocious or cruel aggravating factor was established beyond a reasonable doubt under any definition of the terms"); Cave v. State, 476 So.2d 180, 183, 188 (Fla. 1985) (Cave and others robbed a convenience store, forced the cashier to get in their car, drove her to a rural area several

miles away. Cave's codefendants stabbed her once, and then fired "single lethal shot into the back of her head;" this evidence supported trial court's conclusion that murder was HAC); Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983) (citing a number of cases for proposition that where victim subjected to agony over the prospect of death, HAC appropriate even where victim killed instantaneously by gunshot; victim in Routly placed in trunk, taken to isolated area, and shot; terror felt by victim during this ride, knowing he was going to die "is beyond description by the written word").

The trial court's finding that the HAC statutory aggravator had been proved beyond a reasonable doubt is amply supported by the evidence. There was no error here. But even if this Court disagrees, any error would be harmless in light of the presence of other strong aggravating factors supporting the death penalty (three of which -- prior violent felony, kidnapping and avoid arrest -- Hartley does not even contest), and the weak case for mitigation. Castro v. State, supra, 644 So.2d at 991; Fennie v. State, supra, 648 So.2d at 99; Coney v. State, 653 So.2d 1009, 1015 (Fla. 1995) ("We find, however, that there is no reasonable possibility this error affected the death sentence where four strong aggravating factors remain and the court specifically stated in its sentencing order that 'there are more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the death penalty.'"); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987) ("Here, we have determined that the murder was committed by one previously

convicted of a violent felony, and that it occurred during flight from an attempted robbery. On the other hand, the trial court may have found that Rogers was a good father, husband and provider. Under these circumstances, we cannot say that there is any reasonable likelihood the trial court would have concluded that the aggravating circumstances were outweighed by the single mitigating factor.").

ISSUE X

WHETHER REVERSIBLE ERROR EXISTS CONCERNING THE TRIAL COURT'S INSTRUCTIONS AS TO THE HAC AGGRAVATOR

The State cannot agree that Hartley's trial counsel ever objected to the standard instruction on the heinous, atrocious or cruel aggravating factor. Before trial, he filed a motion to declare the HAC aggravator to be unconstitutional on its face and as applied by this Court (R 189). In addition, he filed a motion to prohibit instruction on this aggravator on the ground that the HAC aggravator is unconstitutional and also on the ground that the evidence in this case does not support HAC (R 273). Before trial, the court denied the motion to declare the CCP aggravator unconstitutional (R 330), and denied the motion to prohibit instruction on the CCP aggravator (R 335). At the penalty phase charge conference, Hartley's trial counsel renewed his pretrial motions as to the HAC aggravator (R 2571), and also argued that no instruction was warranted because the evidence did not establish the aggravator (R 2572-73).

At no point did Hartley object to the standard instruction itself, or submit a limiting instruction. Therefore this issue

is procedurally barred. Beltran-Lopez v. State, 626 So.2d 163, 164 (Fla. 1993) (Although defendant filed a motion to exclude HAC factor from consideration, "it is clear that he never attacked the instruction itself, either by submitting a limiting instruction or making an objection to the instruction as worded. Therefore he is procedurally barred from complaining of the erroneous instruction."). Accord, Gamble v. State, 20 Fla. L. Weekly S242 (Fla. May 25, 1995) ("Since Gamble failed to raise the objection he now asserts, we find that this issue is procedurally barred."); Dailey v. State, 20 Fla. L. Weekly S241 (Fla. May 25, 1995) (since Dailey "never objected to the jury instructions themselves on vagueness grounds or offered alternative instructions," claim that CCP and HAC instructions unconstitutionally vague was procedurally barred); Windom v. State, 20 Fla. L. Weekly S200, S202 (Fla. April 27, 1995) (claim that CCP instruction is unconstitutionally vague "is procedurally barred unless a specific objection on that ground was made at trial"); Crump v. State, 654 So.2d 545, 548 (Fla. 1995) (same); Wuornos v. State, 644 So.2d 1012, 1020 (Fla. 1994) (same).

In any event, even if any issue had been preserved concerning the wording of the HAC instruction itself, there was no error. The HAC instruction delivered by the trial court (R 2652-53) mirrors the one this Court upheld in Hall v. State, 614 So.2d 473, 478 (Fla. 1993), and in Fennie v. State, 648 So.2d 95, 98 (Fla. 1994). Furthermore, any instructional error would have been harmless not only because under the facts of this case the murder would qualify as HAC "under any definition of the terms,"

but also because in light of the remaining statutory aggravating factors and minimal mitigation there is no reasonable possibility that any defect in the HAC instruction affected the jury's recommendation of death. Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993); Thompson v. State, 619 So.2d 255, 260-61 (Fla. 1993); Krawczuk v. State, 634 So.2d 1070, 1073 (Fla. 1994).

Finally, although Hartley does not raise any issue concerning the proportionality of his death sentence, the State would note that this Court has consistently approved death sentences for defendants in cases similar to this one. Hartley was the triggerman. It is undisputed that he had previously been convicted of three violent felonies, including the shotgun slaying of a 15-year-old girl and two armed robberies of taxi drivers. It is also undisputed that Hartley committed this murder while he was engaged in the commission of the crime of kidnapping and for the purpose of avoiding lawful arrest. Moreover, the evidence supports the trial court's findings that the murder was committed for pecuniary gain, that it was cold, calculated and premeditated, and that it was heinous, atrocious or cruel. Against all this is the "slight" mitigator that Hartley is intelligent, mature and had some leadership qualities (which he used in masterminding this crime). This is the kind of crime for which the death penalty is properly imposed. E.g., Melton v. State, 638 So.2d 927 (Fla. 1994); Freeman v. State, 563 So.2d 73 (Fla. 1990); White v. State, 446 So.2d 1031 (Fla. 1984).

ISSUE XI

WHETHER THE TRIAL COURT ERRED IN GRANTING THE STATE'S CHALLENGE FOR CAUSE AS TO PROSPECTIVE JUROR GOLDMAN

Prospective juror Goldman indicated during the voir dire examination that he had personal views against the death penalty. He described these views as long-standing, deeply-held views (R 1672). While he could vote to convict in a potential death-penalty case, he doubted that he would be able to recommend a death sentence (R 1672-73). On further examination, he again insisted that he was very doubtful that he could recommend a death sentence, except possibly in a situation involving national security or a public official (R 1837). Based on these answers, the state challenged Mr. Goldman for cause (R 1847). Before ruling, the trial court asked Mr. Goldman some additional questions:

> THE COURT: [I]f and only if there is a penalty phase ... would your feelings about the death sentence substantially impair your ability to follow the law?
>
> A JUROR: I think I need -- you asked the question, probably what I'm getting is that the law says one thing, do I want to violate the law and go the other way, if that would be the question I guess it's -- if it's a question -- if I only have a reasoning [sic] phase two and I have -- say the law says this and everything -- I don't want to violate the law, if it comes down to violating the law but I don't if the choice for me to make I would -- I doubt that I would want to choose the death penalty if it comes to that.
>
> THE COURT: Do you feel as though then your strong feelings about the death penalty would substantially impair your ability to follow the law and vote for death if on the basis of the law and the evidence you felt as though death was the appropriate -- legal appropriate sentence?

A JUROR: I wish I had more after back ground [sic], again my answer basically is if at all possible I probably would not want to vote for the death penalty.

THE COURT: Well, you would have a choice.

A JUROR: If I had a choice somehow the law says I have to do certain things, whatever, and there is no if, and and [sic] buts, then I guess I will follow the law. I don't know if that answers the question, I'm sorry. I don't know exactly what the specific of that stage would be.

* * *

THE COURT: Mr. Goldman, I'm going to ask you one other time and rephrase the question somewhat so listen if you will. If and only if there is a penalty phase in this trial and if after I tell you the law and you listen to the evidence and the arguments of the attorneys and if after you heard all of that if you are convinced that death rather than life is the appropriate sentence could you vote for death or would your feelings against the death penalty substantially impair your ability to follow the Court's instructions on the law and vote for death?

THE JUROR: I hope I could explain myself very properly, I don't know if I can or can't. On a private person in private person manner, I can't see it a situation where I would feel -- I don't -- I could perceive of a situation where I would feel that the death penalty is appropriate. Now, I guess if he felt that way for some reason because of the extreme situation, fine, but I can't perceive myself feeling that way from the way I feel now. Again I don't know the specifics. I guess if there is some real -- I don't know, somebody turns a lion loose on a baby, maybe I could get emotional enough to feel, I don't know, but my reaction, my general sense is I can't imagine what it would be that I would personally feel justifies it. I hope, I don't know, I'm sorry, I can't be so -- when you say well, you're convinced the death penalty is in order, I don't know that I -- I can't imagine a situation where I would be convinced.

* * *

THE COURT: The key word I'm asking you here is would it substantially impair you ability to do that?

A JUROR: Again I wish I knew far end of the situation, if it's an absolute wherein violation of the law I could do something different, certainly I would want to follow the law, I again see people as being not good guys bad guys but shades and it's kind of hard to sense to give up on somebody even though --

THE COURT: Do you feel ill at ease in saying that it would substantially impair your ability to follow the law and vote for death?

A JUROR: If you didn't have to follow the law I would feel fine with your statement because to break the law somehow then certainly I would feel uncomfortable with that too.

THE COURT: Using those two words, do you think it would substantially impair your ability?

A JUROR: Substantially impair my ability to vote the death penalty, yes, I feel it would.

(R 1850-55, 1858).

It should be noted that prospective jurors rarely come into court with precisely defined opinions about the death penalty. Few have been called upon to formulate and express their thoughts with any degree of clarity and precision. It is therefore unsurprising that when they are called upon to formulate and coherently express those beliefs for the first time during a voir dire examination, in the unfamiliar and intimidating setting of a courtroom, their answers can be and often are ambiguous, equivocal and contradictory. Therefore, the judge must attempt a final distillation of the prospective

juror's theretofore unarticulated and amorphous -- even if deeply held -- thoughts upon the subject of capital punishment.

As Hartley states in his brief, "[t]he law in this area is simple." Appellant's brief at p. 72. The death-qualification standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

> This standard does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when face with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror. [Ibid.]

The record does not support Hartley's contention that this juror was excused merely because it would be difficult for him to recommend a death sentence, or because he would be reluctant to do so. Not only could the juror not even imagine a situation where he might be convinced to vote for death, his final answer was that his feelings would "substantially impair" his ability to vote for a death sentence. The trial court was well justified in concluding that the juror's final evaluation of his

impartiality was correct. Deference must be paid to that finding. Castro v. State, 644 So.2d 987, 990 (Fla. 1994); Reed v. State, 560 So.2d 203, 206 (Fla. 1990); Green v. State, 583 So.2d 647, 652 (Fla. 1991).

The trial court did not err in excusing prospective juror Goldman for cause.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the State respectfully requests this Honorable Court to affirm this case in every respect.

Respectfully submitted,

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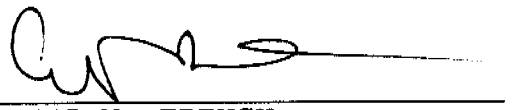
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 10th day of October, 1995.



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