IN THE SUPREME COURT OF FLORIDA

KENNETH 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

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING THE STATEMENT OF A POLICE OFFICER THAT HE KNEW HARTLEY HAD ROBBED THE VICTIM TWO DAYS BEFORE THE MURDER AND THAT THE DEFENDANT HAD DENIED KNOWING GINO MAYHEW, IN VIOLATION OF HARTLEY'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The State has made five points, none of which are particularly compelling: 1) Baxter's statement was admissible hearsay. 2) Baxter's references to the prior robbery were "integral and inseparable components" of statements Brooks and Bronner made. 3) The strict similarity requirement this court has required to admit Williams rule evidence

need not be met in this case. 4) The earlier robbery was, in any event, relevant to the murder without regard to any lack of similarities. 5) Whatever error occurred was harmless.

1. Baxter's statement was admissible hearsay.

The state heavily stresses that Detective Baxter's statement was admissible hearsay under Section 90.803(18) Fla. Stats (1991). That is, statements made by a defendant or "party opponent" showing his consciousness of guilt are admissible. (Appellee's Brief at pp. 17-18). First, this is a non-issue, since Hartley has cast this argument in relevancy terms. He has no idea why the state raised the hearsay problem when no one on appeal or at trial raised that issue. Cannady v. State, 620 So. 2d 165 (Fla. 1993) (Waiver rules apply to state, and issues not raised at the trial level cannot be presented on appeal.) Moreover, as this court held in Smith v. State, 424 So. 2d 726, 730-31 (Fla. 1982) the statements were offered "not to prove the truth of the matters stated, but rather to show the context of appellant's confession, so they were not even hearsay at all.

Actually, the reason counsel for the state raised this superfluous issue becomes evident with a little thought. It wanted to link Baxter's objectionable testimony to Brooks' and Bronners' equally problematic statements, thereby creating an "inconsistency" which would justify admitting everyone's testimony of what Hartley had told them. It is a clever tactic designed to obfuscate the real issue: the relevancy of Baxter's testimony that he knew the defendant had robbed Mayhew two days before the murder. This issue has

nothing to do with the alleged inconsistency of whether Hartley lied to Baxter when he said he did not know Mayhew.

The state's approach has several problems, not the least of which, is that it never presented its hearsay justification to the court or jury. Nevertheless, in the spirit of the state's brief, Hartley will consider his statement to Detective Baxter as hearsay.

For Baxter's statement to have been admitted as a hearsay exception the state had to show the falsity of the statement. Moore v. State, 530 So. 2d 61, 66 (Fla. 1st DCA 1988) ("Absent proof of their falsity, the self-serving nature of a defendant's exculpatory statements are not admissions from which guilt can be inferred.") Here, the proof supposedly came from the alleged inconsistency with the claim Bronner and Brooks made that Hartley admitted robbing Mayhew. "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 [not] know [] Mayhew." (Appellee's Brief at p. 17) Inconsistency, however, cannot establish the required lie because the state never proved which statement, the one to Baxter claiming he did not know Mayhew, or the one allegedly to Bronner and Brooks, was the lie. Logically, he could have told the truth in each instance because although he may not have known Mayhew, he was aware of who he was. There is, in short, enough ambiguity about what Hartley meant in either situation, that his words lack any probative value.

Moreover, when Hartley told Detective Baxter he did not know Mayhew, he may

have been correct. As indicated by the state in its opening statement, several people had street names. Sylvester Johnson was known as Duck, Ronnie Ferrell as Fish, and Hartley as Kip (R 1917-18). Perhaps Hartley knew Mayhew only by his street name rather than as Gino Mayhew, so he could have truthfully denied knowing Mayhew when confronted by Baxter.

The state further confuses its argument by noting on page 17 of its Brief that "The references to the prior robbery in Hartley's initial statement 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." Hartley's alleged explanation was not for that reason. It was, according to Bronner, "the only reason they saying that because I (i.e. Hartley) robbed him two days before he was killed." (T 2224) That is, according to Hartley people on the street claimed he had killed Mayhew because he had supposedly robbed him two days before his death.

Finally, the state relies on this court's opinion in Smith v. State, 424 So. 2d 726, 730 (Fla. 1983) to support its argument that inconsistencies can show a consciousness of guilt. In that case, Smith and two other men kidnapped a clerk from a convenience store, raped her for several hours, then marched her into a wooded area and shot her. When questioned by the police, the defendant initially told them he had not even been in Wakulla County, the county where the murder had occurred, on the night of the homicide. Although released, he was arrested a short time later. He then admitted he had gone to

the store with his co-defendant, Johnny Copeland, but had fallen asleep in his car. When he awoke, he saw a white girl huddled in the front seat. At Smith's insistence, Copeland took the girl out of the car, and put her in his automobile. He later told the defendant he had done something to the girl and described the area where he had left her.

Some time after his arrest, Smith made another confession. He admitted robbing and kidnapping the victim, and he said he was present when the two other men had raped her and when Copeland had shot her. This story was at odds with that of the second co-defendant who said Smith had joined in the rape and had left the woods with a gun in his hand.

On appeal this court ruled the trial judge had correctly admitted all the statements. Although Smith never took the stand, the credibility of his exculpatory stories was an issue.

> His earlier exculpatory statements, and the sequence of events showing how his story changed through the course of several interviews were certainly relevant to this issue. Furthermore, the earlier statements and the context in which they were given were also relevant to show that appellant had attempted to avoid detection by lying to the police.

Id. at 730.

In this case, Hartley, unlike Smith never made said anything exculpatory to the police. He said nothing, unlike Smith whose veracity was important because he had given several statements to the police. That is, whether Hartley knew Mayhew or not had

no connection with the question of whether he had murdered him. Here, we have no series of increasingly inculpatory statements. Instead, we have only a single allegation from the police that they "knew" (and how they knew this is unknown) that Hartley had robbed Mayhew two days before the murder and therefore knew the victim (R 2172). Hartley never placed his credibility at issue, and the court erred in letting the state attack it through some alleged inconsistency.

2. Baxter's references to the prior robbery were "integral and inseparable components" of statements Brooks and Bronner made.

Assuming Hartley's statements to Bronner and Brooks were "integral and inseparable components of those statements" still does not mean what the defendant told Baxter was admissible. What Baxter said about Hartley robbing Mayhew two days before the murder could easily have been excised without the state losing anything relevant. Other than making the assertion the state on appeal has shown nothing establishing the inextricable quality of Baxter's testimony regarding the earlier robbery.

3. The strict similarity requirement this court has required to admit Williams rule evidence need not be met in this case.

The State, on page 19 of its Brief, claims that the cases Hartley cited for the position that Williams rule evidence must show a striking similarity are "inapposite" because they all deal with establishing the defendant's identity, not his intent. It relies on a Second District case, Gould v. State, 558 So. 2d 481, 485 (Fla. 2d DCA 1990) that in

turn relied on Calloway v. State, 520 So. 2d 665, 668 (Fla. 1st DCA 1988). This latter case involved the defendant sexually battering his step daughter. In that situation, as this court said in Heuring v. State, 513 So. 2d 122 (Fla. 1987), "we enlarged the list of instance where similar fact evidence is admissible. . . to also include admission of similar fact evidence to corroborate familial sexual battery victim's testimony. Saffor v. State, 20 Fla. L. Weekly S335 (Fla. July 13, 1995). This court never relaxed the strict similarity requirement in contexts other than the sexual crimes committed in a familial situation. To the contrary, it reiterated that general Williams rule demand in Saffor.

> We explained in Heuring that under the general rule regarding the admission of collateral crimes evidence, the collateral offense and the charged offense must be strikingly similar and must share some unique characteristic or combination of characteristics which sets them apart from other offenses in order to be admissible.

Id. at 20 Fla. L. Weekly S336.

Thus, cases such as Calloway and Gould that arguably relaxed the strict similarity requirements have doubtful validity. Saffor clearly recognized that even if identity is not the issue, the strict similarity requirement applies with full force to prove other elements of a charge crime, such as intent.

4. The earlier robbery was, in any event relevant to the murder without regard to any lack of similarities.

The state on page 20 then argues that well, Baxter's testimony really was not

offered as similar fact evidence (even though it filed the required notice that it was (R 41, 3130) and argued it as such (T 2161) at the trial level.) The unproven robbery was integrally connected to the murder committed two days later. 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.

In cases such as Griffin v. State, 639 So. 2d 966, 968-69 (Fla. 1994) and Smith v. State, 365 So. 2d 704, 707 (Fla. 1978) the complained of other criminal acts occurred during a prolonged criminal episode. In Griffin, the defendant and some buddies wanted to burglarize an apartment complex, but went instead to a motel where they ransacked a room and murdered a police officer as they left. In Smith, the defendant and others killed a homosexual they had picked up one night. Later, during that evening, Smith killed one of his associates. In both cases, the court correctly admitted the other crimes or bad act evidence because it tended to put the charged offenses in context, to explain the murders. Significantly, in both of these cases, the other crimes occurred the same day, within minutes or hours of the charged offenses. Such was not the situation here.

In this case, the alleged robbery of Gino Mayhew happened two days before his death. It explained nothing and contributed nothing to painting an accurate picture of Mayhew's death. Indeed, the state produced evidence showing three men wanting to rob some "dreads," but when they failed to appear, they settled on Gino Mayhew as the nearest target of opportunity. There is nothing to show that because Hartley had allegedly

robbed him two days earlier, they were going to do so again. The Mayhew robbery and murder became the unfortunate result of one plan failing to materialize.

On page 20 of its Brief, the state says the statements were relevant because they "linked him to the victim." Not so. Detective Baxter's statements may have linked Mayhew to Hartley (and that is questioned), but nothing Hartley said to the police officer did so.

On page 21 the state says that Hartley "does not complain about the testimony of Brooks and Bronner that Hartley admitted committing the prior robbery." At trial, before Bronner gave his objectionable testimony, Hartley certainly did so. "The other thing I wanted to do is make sure that the record reflected that I do in fact have a standing and continuing objection to any reference to this second robbery which is alleged to have occurred on or about April 20th regarding. . . " (T 2225)

Hartley did not mention what Brooks and Bronner said in his Initial Brief because if the court erred in admitting Baxter's comments about the April 20 robbery then it would have also mistakenly admitted Brooks' and Bronner's testimony. The errors were the same, particularly when trial counsel objected to admitting the similar fact testimony for each witness. If there was anything cumulative, it was the repetitive mistake the court made in admitting the irrelevant testimony of the April 20 robbery.

5. Whatever error occurred was harmless.

Finally, the state makes its predictable harmless error argument. Hartley relies on

what he said in his Initial Brief regarding that point. He notes only that the state has incorrectly postulated the standard of review this court should use in measuring harmlessness. "given the substantial evidence of guilt. . . " (Appellee's Brief at p. 21). At this court noted in State v. DiGuilio, 491, So. 2d 1129 (Fla. 1986)

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.. . . The question is whether there is a reasonable possibility that the error affect the verdict.

Id. at 1139. (Emphasis supplied.)

As argued in the Initial Brief, the state relied almost exclusively on witnesses to implicate Hartley to the murder of Mayhew. Only Detective Baxter lacked the credibility problems of its other witnesses. Thus, the jury likely believed what he said, and even though it was brief, it provided the essential anchor for them to have believed the other witnesses. The reasonable possibility exists that his testimony influenced the jury's verdict.

Finally, Hartley points out that the state on appeal has abandoned the reasons it presented at trial for admitting Baxter's testimony of the earlier robbery (i.e. knowledge and motive), in favor of one never articulated below. Instead it has raised the bogus issue of hearsay and allegedly inconsistent statements to justify admitting evidence the court should have excluded. The state presented no striking similarities shared by the robbery and the murder. Baxter's testimony improperly attacked the defendant's character and

bolstered the credibility of the prosecution's case.

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

ISSUE II

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF A RONALD WRIGHT THAT ONE HANK EVANS WROTE HIM A LETTER CONFESSING TO THE MURDER OF GINO MAYHEW, IN VIOLATION OF HARTLEY'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The state chides Hartley for omitting "most of the relevant testimony, including Evans' alleged statement. . . . " (Appellee's Brief at p. 23). If the Defendant failed to include all the facts the state mentioned it is because 1) they are largely irrelevant to this discussion, 2) the trial court similarly made little use of them, and 3) the additional facts attack the weight the Jury would have given to Wright's statements, not their admissibility. This last point needs further emphasis because it recognizes the underlying philosophy of cases like Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973). Just how much do we trust the jury to use their common sense and separate lies from the truth? Historically, the law had little confidence in the average citizen's ability to do what people do as a matter of course in their daily lives: make judgments and weigh facts. Thus, three hundred years ago defendants could not present sworn testimony in their behalf. A hundred years ago a Defendant could not testify because the law presumed he would lie. See, Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). It similarly excluded the testimony of a co-defendant for the same reason. Id.

Chambers represents only one case in a long line of decisions that have

fundamentally altered the nature of the criminal trial. The judiciary, led by the United States Supreme Court, has largely abandoned its paternalistic "father knows best" role for one that favors the admissibility of all relevant evidence. See, Ruffin v. State, 397 So. 2d 277 (Fla. 1981). ("The test of admissibility is relevancy.") With only minimum requirements of reliability or trustworthiness imposed, trial courts now leave matters that would have been in their province only a short time ago to the jury to determine, to accept or reject as the weight of the evidence dictates. That is what Chambers means.

While judges have withdrawn from the credibility arena in large part, they still rightfully require some proof that what a party wants admitted has some indicia of reliability. Even though Florida has a liberal standard of admissibility, gossip, rumor, and outright lies still find no welcome mat lying at the door of the courtroom.

As quoted in the Preliminary Statement to Hartley's Initial Brief "The prosecutor here said no truer words than when he told the jury 'a crime planned and carried out in hell does not have angels as witnesses.' (T 1621)" In this case that is the fundamental truth permeating the state's evidence and Hartley's defense. The prosecutor presented its devils who gave their uncorroborated tales incriminating the defendant. No one, for example, verified what Jones, the state's key witness said. Likewise, Parkin, Bronner, and Brooks all claimed the defendant, in one form or another, confessed to them while they were in the Duval County jail. No one or no other evidence vouched for the truth of those alleged statements, yet the court had no problem admitting them. This is especially

troubling because these witnesses, all thugs with multiple convictions for robberies and murders, each got some deal (although they denied it) for their testimony.

Why then did the court have so much problem admitting Wright's testimony? Admittedly Wright came from the same slime pit as the state's witnesses, but unlike them his motive to lie was much more tenuous than the state's witnesses, who had favorable sentencing recommendations hanging on their testimony. That is, the state, on page 29 of its brief, claims Wright had a motive to lie because "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." Revenge, then, explained why Wright went to the police. The facts, however, refuse to support that reason. Evans implicated Wright in the Texaco robbery in February 1992, but Wright had written his letter to the Assistant Public Defender about Evans' confession to the Mayhew murder in November 1991 (T 1390, 1396-97). Wright's motive could not have arisen until February.

The letter Evans wrote implicating himself in the Mayhew murder further corroborates Wright's claim that he killed the victim. His efforts to explain it away sound like a pregnant woman in false labor: the screams are there but nothing results. If the jury could hear the state's witnesses, with their credibility baggage strewn along the highway, Hartley should have been able to present Wright. What he would have said had enough reliability that the court should have admitted it, then the jury could have given whatever weight it believed it deserved.

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

ISSUE III

THE COURT ERRED IN DENYING HARTLEY'S MOTION FOR MISTRIAL MADE DURING THE STATE'S OPENING STATEMENT WHEN THE PROSECUTOR SAID THAT THE DEFENDANT WAS "THE AREA TOUGH GUY," A COMMENT ON HIS CHARACTER WHEN IT HAD NOT BEEN INTRODUCED AND A DENIAL OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The state has a problem staying with the issue Hartley framed. Simply put, can the state, in its opening argument, impugn the defendant's character? Obviously not, and to the court's credit, it sustained Hartley's repeated objections to the state's repeated attacks on his character. It erred only in that is should have granted a mistrial.

Now the state claims he has not preserved this error for appeal. Clearly, the issue Hartley raised is preserved. Perhaps the one the state created and argued was not, but that is another story.

In his Initial Brief, Hartley recognized that evidence he was the "area tough guy" was relevant if people were afraid to come forward because they had expressed some fear of reprisals. The problem the state had below, and which it failed to solve on appeal, concerns its recurring inability to show that hesitancy arose specifically because of Hartley, and not some anonymous "they." As Sidney Jones said at trial, the Washington Heights area was "pretty rough," and "it's very, very dangerous for new people but not for a person like me." (T 2106) Fear apparently permeated the air, yet that fact does not

justify unverified accusations that Hartley was the area tough guy. One of the witnesses had to say he was afraid of the defendant. It had to link his or her fear to Hartley. The state never did that, relying instead on smearing Hartley with unsubstantiated attacks that he was the "area tough guy."

Understandably, the state tries to implicate Hartley as the area bully through Juan Brown's and Sylvester Jones testimony. It makes the attempt by saying the "They" Brown referred to, and "these three guys" Jones mentioned "included Hartley." (Appellee's Brief at p. 36.) No evidence supports those claims, a troubling conclusion because if Hartley really was the town thug, a question or two directed to Brown or Jones could have quickly established that fact. That the state could have easily established the crucial deficiency but chose not to do so indicates that it either could not or that to make the effort would have amounted to an attack on the defendant's character when he had never opened it up to such an assault.

The state relies on Ronald Bronner's and Eric Brooks' testimony in which they claimed Hartley had told them "he was going to get off" because "everybody was scared to testify." (R 2230). Of course, as discussed in Issue I, these two witnesses had significant credibility problems, so that the jury could very well have discounted their testimony on this point as puffing.

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

ISSUE IV

THE COURT ERRED IN EXCLUDING AS IRRELEVANT THE NAME OF THE POLICE OFFICER SIDNEY JONES REPORTED TO AS A CONFIDENTIAL INFORMANT, IN VIOLATION OF HARTLEY'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The problem with the state's wonderful argument on this point is that if Hartley knew who Jones reported to, as the state argued on page 38 of its brief, he could never have tried to impeach him with that information because the court precluded him from asking him the name of the policeman he claimed he gave his information to. That is, if the court had allowed the defendant's inquiry, the questioning would likely have gone something like this.

Q. Now, Mr. Jones, what was the name of the police officer you reported to?

A. Officer Bozo the clown.

Q. Mr. Jones, do you recall giving a deposition in this case?

A. Yes, I do.

Q. Do you recall my question asking you who you reported to as a confidential informant?

A. Yes.

Q. And did not you say that it was Detective David Van Down you reported to?

A. Yes, I did.

(SR 363).

Jones thus would have had his credibility further destroyed, particularly if the police officer could have testified that Jones was not a confidential agent for the police.

Also on page 38 of its brief, the state claims Hartley wants to raise on appeal an issue never presented to the court below. Not at all. First, the state initially tried to silence Jones by asserting "the privilege and on the grounds of relevancy." (T 2120). It never explained what privilege it was claiming, and it never said why this witness' testimony had no tendency to prove or disprove a material fact.

Trial counsel, on the other hand, said the question was relevant to show Jones' "ability to make contact with the police department even in a discrete station." (T 2120) If Jones had revealed the detective's name, the officer could have been called to verify he had received no call. Such testimony would have tended to have strengthened Hartley's credibility attack on Jones. That is, Jones claimed Gino Mayhew was his friend, yet on the night of his death he did nothing to help him when the former saw him taken away at gunpoint. Detective Van Down could have clarified the circumstances under which Jones could have called him. Surely the officer would have agreed that seeing drug transactions going on, a kidnapping, and a possible robbery and murder would have qualified as meriting a telephone call. If not, then Hartley should have been able to probe exactly what sort of confidential informant Jones was.

On the other hand, if he admitted he reported to no one, or gave a name other than

disclosed at deposition, the impeachment value of those admissions would have been obvious.

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

ISSUE V

THE COURT ERRED IN FINDING THAT THE STATE HAD A RACE NEUTRAL REASON FOR EXCUSING PROSPECTIVE JUROR STANFORD, IN VIOLATION OF HARTLEY'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN DEROGATION OF HIS RIGHTS UNDER ARTICLE I SECTION 16 OF THE FLORIDA CONSTITUTION.

The state says, first, that Hartley failed to preserve this issue for this court's review because he accepted the jury before it was sworn without any further reservation of his earlier objections. (Appellee's Brief at p. 41.) Not so. After counsel had selected the jury and the alternates, the court asked the following:

> THE COURT: Mr. Batch, in behalf of the State, Mr. Willis in behalf of the defendant, both State and defense, subject to any objections, do you accept as the jury [names listed] and alternates [names listed]?
>
> MR. BATCH [The prosecutor]: State accepts, Your Honor.
>
> MR. WILLIS [defense counsel]: Yes, sir, we do.

(T 1898-99)(Emphasis added).

This issue is preserved for review.

As to the merits, the state claims that by merely saying Mrs. Stanford had a psychology/counseling background provided sufficient race neutral reasons for excusing her. (Appellee's brief at p. 42) It cites this court's opinion, Happ v. State, 596 So. 2d 991, 996 (Fla. 1992), as support. In that case, defense counsel raised no objection to the state's

claimed reason for excusing a challenged prospective juror: that he or she was a college level psychology teacher and a Catholic, was more liberal than people in other professions, and would tend to reject the death penalty. Here, the state peremptorily excused Mrs. Stanford because she was a psycho therapist and "too forgiving because of her line of work and understanding human frailties." (T 1887). Hartley's counsel objected, saying, "Your Honor, I don't think that's a basis for excusing." (T 1888) Happ has no application here, rather the requirement for record support established by this court's opinion in State v. Slappy, 522 So. 2d 18 (Fla. 1998) controls.

The state also cites this court's opinions in Walls v. State, 641 So. 2d 381 (Fla. 1994) and Atwater v. State, 626 So. 2d 1325 (Fla. 1993) for its claim that juror discomfort with the death penalty is a race-neutral reason for exercising a peremptory challenge. (Appellee's brief at p. 42.) While those cases say that, they provide little assistance to the state. In Walls, for example, all this court said was "Both of these jurors, however, had expressed discomfort with the death penalty." Id. at 386. In Atwater, the "court expressly noted that the prospective juror had difficulty answering the questions put to here and her demeanor indicated that she was hesitant and uncomfortable regarding the death penalty." Id. at 1327.

In this case, the trial court never made any findings regarding Mrs. Sanford, an indication he found nothing particularly objectionable about her or her demeanor that merited mentioning. The prospective juror also was never hesitant or even uncomfortable

with the death penalty. To the contrary, her responses reveal a thoughtful, articulate black woman, capable of making an objective decision whether a defendant should live or die. As she said, "I could objectively look at the facts without putting my personal judgment in it because that's what I do everyday, I objectively weigh what people tell me." (T 1662-63). She demonstrated none of the hesitancy or "discomfort" the member of the venire did in Atwater, and this court has no findings from the trial court to help it resolve this issue. To the contrary, she seemed comfortable with her responses, and they showed her capable of recommending death (T 1667).

On pages 42-43 of its brief the state acknowledges that "numbers alone are not dispositive of the issue." It cites this court's opinion in Taylor v. State, 583 So. 2d 323 (Fla. 1991) for the proposition that, Slappy to the contrary, the number of blacks who sat as jurors was a factor in deciding the reasons the state used to excuse a particular juror. In Taylor, one Farragut was the first of four black members of the venire called to sit in the defendant's case. He was peremptorily challenged, and significantly, another black person replaced him. None of the other three blacks were similarly excused. Limiting its decision to the facts presented, this court held "on this record, the mere fact that the state challenged one of four black venire members does not show a substantial likelihood that the state was exercising peremptory challenges discriminatorily, particularly since the

effect of the challenge was to place another black on the jury." Id. at 327.[1] Taylor has no relevance here because the issue raised is different and there is no showing of the race of the prospective juror who took Mrs. Sanford's place.

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

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[1]Taylor also has little value for this court because the Neil issue arose in the context of whether the defense had met its initial burden of showing a strong likelihood that the prospective juror was excused solely because of his or her race. This court dropped that requirement in State v. Johans, 613 So. 2d 1319 (Fla. 1993).

ISSUE VI

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR BECAUSE THAT GUIDANCE, AS THIS COURT HAS DECLARED, WAS UNCONSTITIONALLY VAGUE, A VIOLATION OF HARTLEY'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The state makes its standard "failure to preserve" argument for this issue. "At no point did Hartley object to the standard instruction itself, or submit a limiting instruction." (Appellee's brief at p. 43.) To preserve an issue for appeal, this court has required Appellants do two things:

> it is necessary both to make a specific objection or request an alternative instruction at trial, and to raise the issue on appeal.

Walls v. State, 641 So. 2d 381, 387 (Fla. 1994) (Emphasis in opinion.)

Hartley met this burden. He objected to the instruction on the cold, calculated, and premeditated instruction before trial with his "Motion to Prohibit instruction on Aggravating Factors 5(h) and 5(i)." (R 273) At the penalty phase charge conference, when asked if he objected to the CCP instruction, defense counsel said:

> The other two [proposed instructions], we would very much disagree. Both of these instructions, both have been criticized, both have been the subject of a motion prior to trial. The motion has been denied, and I guess I should renew them for the record.

(T 2571).

Counsel has preserved this issue for appeal by objecting. He need not have also presented a limiting instruction.

The more serious problem focusses on the harmlessness of this error. Hartley presented two arguments in his Initial brief why the court's error must result in a new sentencing hearing. The state, however, has argued its harmlessness because the jury would have inevitably returned the same verdict had it been properly instructed.

This court should ignore that claim. The proper measure of harmlessness is whether the improper instruction could have reasonably affected the jury's recommendation. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In this case, we must assume that the jury improperly found the murder to have been cold, calculated, and premeditated because of the unconstitutional guidance. See, Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.")

The bulk of the evidence the jury used in deciding what sentence to recommend came from those sterling characters who had sold themselves to the state for their testimony against Hartley. Their credibility was abysmal and the weight the jury gave to this aggravator and the others could not have been very significant. Thus, the court's

error regarding this instruction, though harmless in other instances cited above, cannot be so here.

Before leaving the harmlessness problem, Hartley would like to point out that the state, as is its right and tendency, argues in conclusion that every error the Appellant has presented here is harmless. Assuming that is true, the question becomes whether those errors, in the aggregate, remain so. That is, one mistake may have had no impact on the jury's verdict, but did two, three or more errors, that individually made no difference, remain so when considered together? Obviously not. Frank Sinatra can perhaps hit the wrong note once, maybe twice, but let him do it repeatedly and his crooning becomes little more than singing in the shower.

Similarly, with harmless error, mistakes add up, and sometimes, as here, where witness credibility was the only issue the jury had to resolve, repeated mistakes have an impact greater than the sum of the individual errors.

This court cannot say, with a clear conscience, that the court's error was harmless beyond a reasonable doubt, and you should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VII

THE COURT ERRED IN FINDING HARTLEY COMMITTED THIS MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The state, on page 45 of its brief, claims "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 . . . , is inapposite here. What evidence? The state cites none. The facts show only that Mayhew was robbed when the original plan to rob some "dreads" fell through. So "Duck said let's get Gino." (T 2227-28). Assertions that "Hartley coldly and calmly joined in the careful plan and prearranged design to kill Gino Mayhew" (Appellee's brief at p. 46) cannot substitute for evidence.

The state says Hartley had a long time to contemplate his actions, and he cites Jackson v. State, 522 So. 2d 802, 810 (Fla. 1988) to support its claim. But in that case, as the state admits, Jackson kidnapped the victim in the afternoon and committed the murder later that evening. Presumably hours passed. Here, at most minutes separated the plan from the homicide, and most of Hartley's time was spent crouched in the back seat of Mayhew's car as it raced along the streets of Jacksonville.

Similarly, there is no evidence the school ground was a "secluded location," (Appellee's brief at p. 47)

The state, on pages 47-48 of its brief tries to get around this court's ruling in Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994) that this court will not notice the evidence presented in companion cases. It first notes that "the judge may consider matters not presented to the jury." True, but it cannot consider facts not presented in court. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

It next claims that as long as there is evidence somewhere to support the court's finding, that is good enough. Here, it claims a deposition provided the facts not presented in court. The state has missed the point of Wuornos.

If either the state or the defendant could refer to matters outside the record to support a death sentence, why have a sentencing hearing? That proceeding establishes the facts the trial court, the defendant, the state, and this court use when they argue for or against, impose, and review a death sentence. Often times, facts revealed in a deposition never are used at trial. That does not mean a court can use them to somehow justify a ruling. C.D.M. v. State, 553 So. 2d 734 (Fla. 1st DCA 1989). In C.D.M., as here, the state tried to support the trial court's ruling by incorporating a deposition as part of the record on appeal and then arguing it justified the trial judge's decision. The First District rejected that ploy.

> Although a transcript of Nelson's deposition is a part of the record on appeal in this case, such deposition testimony was not introduced into evidence or otherwise received by the court as part of the evidence upon which the subject motion was

> determined or the appellant's guilt decided. The issue before us must be decided based solely upon the testimony and evidence properly presented before the trial court.

Id. at 735.

The First District's holding makes good sense, and this court should likewise reject the state's efforts to bring in extra-judicial matters. It should, instead, reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE VIII

THE COURT IMPERMISSIBLY DOUBLED THE AGGRAVATING FACTORS, "FOR PECUNIARY GAIN," AND "DURING THE COURSE OF A KIDNAPPING," VIOLATING HARTLEY'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

After sifting through the essentially irrelevant arguments on this point, the only point needing some reply comes on page 51 of its brief.

> 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.

(Emphasis in Appellee's brief)

To make this argument, the state had to ignore what this court did in Green v. State, 641 So. 2d 391, 395 (Fla. 1994). In that case, this court looked to the Indictment to determine what purpose the state alleged Green had in mind when he committed his kidnapping.

The state, in this case, ignored the Indictment, and went instead to the court's order to find the reason Hartley kidnapped Mayhew. He committed that crime because it

involved "both robbery and murder, as the trial court's order plainly states." The indictment, on the other hand, charged Hartley with kidnapping Mayhew to "facilitate robbery or murder." (R 28) The charging document should control what purpose the State believed Hartley had. The prosecutor is the one, afterall who prepares it, and for the state now to rely on reasons found by the trial judge, but which he had no notice of, violates the defendant's due process right to notice.

This court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE IX

THE COURT ERRED IN FINDING THAT HARTLEY COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER, A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The state says on page 62 of its brief that "Mayhew did not die instantaneously after having been shot." Assuming the truth of this unsupported conclusion does not thereby mean the homicide was especially heinous, atrocious, or cruel. As mentioned in the Initial Brief, a person can be shot and linger in extreme agony for some time before dying without the especially heinous, atrocious, or cruel aggravator applying. Teffeteller v. State, 495 So. 2d 744 (Fla. 1986); Brown v. State, 473 So. 2d 1260 (Fla. 1985). Thus, if Mayhew lived for a few seconds or even a few minutes after the first shot and was conscious does not mean his subsequent death was especially heinous, atrocious, or cruel.

As mentioned in the Initial Brief on page 63, "If the HAC aggravator applies it does so because of the ride from Washington Heights to the school grounds, but even that 'fact' has problems." Hartley relies on the argument presented there to respond to the states claim that the ride made this crime especially heinous, atrocious, or cruel.

This court should reverse the trial court's sentence and remand for a new sentencing hearing.

CONCLUSION

Based on the arguments presented here, Kenneth Hartley respectfully asks this court for the following relief: 1) Reverse the trial court's judgment and sentence and remand for a new trial. 2) Reverse the trial court's sentence and remand for a new sentencing hearing before a new jury. Or, 3) reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis M. French, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, KENNETH WAYNE HARTLEY, #318987, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 14th day of December, 1995.

DAVID A. DAVIS

IN THE SUPREME COURT OF FLORIDA

KENNETH HARTLEY,

Appellant,

v. CASE NO. 83,021

STATE OF FLORIDA,

Appellee.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW Appellee, State of Florida, by and through undersigned counsel, pursuant to Fla.R.App.P. 9.210(g), and hereby gives notice of its intent to rely upon the following additional authority as to Issue VII:

Lockhart v. State, 655 So.2d 69 (Fla. 1995).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

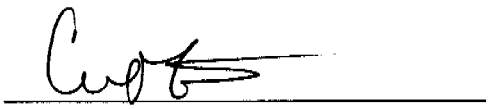
CURTIS M. FRENCH
Assistant Attorney General
Florida Bar No. 291692

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of February, 1996.



CURTIS M. FRENCH
Assistant Attorney General

tive assistance of appellate counsel, we must determine whether (1) the assistance of counsel was so erroneous or deficient that it fell measurably outside the range of professionally acceptable performance, and (2) the error or deficiency in the appellate process was so egregious that it undermined confidence in the correctness of the result. *Suarez v. Dugger*, 527 So.2d 190, 192–93 (Fla.1988); *Pope v. Wainwright*, 496 So.2d 798 (Fla.1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1617, 94 L.Ed.2d 801 (1987). The substance of issues (d), (e), (f), (g), and (i), were raised in Byrd's rule 3.850 motion and were rejected because his trial counsel either failed to preserve the issues for review or because the issues were otherwise without merit. Likewise, trial counsel failed to properly preserve issues (a), (b), (c), (j), and (k) for review. *See, e.g., Jackson v. State*, 648 So.2d 85 (Fla.1994) (although the jury instruction on cold, calculated, and premeditated was unconstitutionally vague, the issue is viable only for those defendants who properly preserve it at trial through a specific objection); *Hodges v. State*, 619 So.2d 272 (Fla.) (unconstitutionality of jury instruction was procedurally barred on appeal where no objection was raised at trial), *cert. denied*, — U.S. —, 114 S.Ct. 560, 126 L.Ed.2d 460 (1993); *James v. State*, 615 So.2d 668 (Fla.1993) (objection required to preserve shifting of burden issue for appeal). Consequently, appellate counsel cannot be deemed deficient for failing to raise these issues on appeal. *Medina v. Dugger*, 586 So.2d 317 (Fla.1991) (appellate counsel will not be considered ineffective for failing to raise issues that were not preserved for appeal). Moreover, even if these claims were not procedurally barred, we would still find that appellate counsel was not ineffective in failing to raise them on appeal because we find each of the claims to be without merit. For example, the record fully supports the aggravating circumstances found by the trial judge, and the requirement of contemporaneous written and oral sentencing pronouncements in death cases was not rendered until well after Byrd was sentenced.

[5] As to claim (h), Byrd contends that his counsel was ineffective for failing to assert that he was convicted and sentenced on the basis of unconstitutionally obtained statements. Notably, the admissibility of his confessions was debated extensively before both this Court and the trial court. This present claim regarding Byrd's confession deals with the admissibility of statements made by Byrd on October 30, 1981, two days after he gave his initial confession. We need not reach the issue of whether anything Byrd said on October 30 was unconstitutionally obtained because nothing said by Byrd on that date contributed to his conviction—on that date he simply denied any involvement in the crime at issue. Clearly, counsel was not ineffective for failing to raise this meritless claim.

Accordingly, the petition for a writ of habeas corpus is denied.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

Michael Lee LOCKHART, Appellant,

v.

STATE of Florida, Appellee.

No. 82096.

Supreme Court of Florida.

March 16, 1995.

Rehearing Denied June 1, 1995.

Defendant who pleaded guilty to murder was sentenced to death by the Circuit Court for Pasco County, Maynard Swanson, J., and he appealed sentence. The Supreme Court held that: (1) there was no error in failing to conduct *Faretta* inquiry when defendant initially asked to represent himself during pretrial hearing; (2) there was no error in allowing detective to testify about two out-of-state murders of which defendant had been con-

victed and to show photographs of victim of one of the crimes, at penalty phase; (3) evidence supported aggravating factor that crime was committed in cold, calculated and premeditated manner; (4) there was error in relying on information from newspaper articles to support finding of no mitigation, but given overwhelming evidence supporting three aggravating factors, this did not injuriously affect defendant's substantial rights; and (5) there was no error in not appointing independent counsel to present mitigating evidence when defendant requested death sentence.

Affirmed.

1. **Criminal Law** ⇐641.10(2)

There was no error in failing to conduct a *Faretta* inquiry when murder defendant initially asked to represent himself during pretrial hearing, where at that time the trial judge did not grant the request, but allowed defendant to direct his defense while ordering defense counsel to remain in advisory capacity, and defendant in fact consulted counsel during pretrial period, and where *Faretta* inquiry was conducted when defense counsel moved to withdraw at the start of penalty phase. U.S.C.A. Const.Amend. 6.

2. **Homicide** ⇐358(1)

At penalty phase of capital murder prosecution, hearsay testimony of detective about homicides of which defendant had previously been convicted in other states was admissible where the detective had attended parts of both of the out-of-state trials and had reviewed case files from those crimes, and defendant had opportunity to cross-examine the detective. West's F.S.A. § 921.141(1).

3. **Homicide** ⇐358(1)

At penalty phase of murder prosecution, testimony of detective about similar out-of-state crime and photographs of victim of that crime were admissible to show the similarity of the crimes and to establish the aggravating factor that murder was cold, calculated and premeditated and, though the photographs were gruesome, the prejudicial effect of the testimony did not outweigh its probative value.

4. **Homicide** ⇐358(1)

Details of prior violent felony convictions involving use or threat of violence to victim are admissible in penalty phase of capital trial, but evidence of other violent crimes should not be admitted when it is not relevant, gives rise to violation of defendant's confrontation rights, or prejudicial value outweighs probative value. U.S.C.A. Const. Amend. 6.

5. **Criminal Law** ⇐438(1)

Admissibility of photographs is within trial court's discretion and will not be disturbed on appeal absent showing of clear error.

6. **Homicide** ⇐357(3)

Finding in capital murder prosecution of aggravating factor for death penalty purposes that crime was committed in cold, calculated and premeditated manner without pretense of moral or legal justification was supported by evidence that victim was bound and tortured by small pricking knife incisions, was strangled, and while still alive was stabbed with several incisions, and was anally assaulted.

7. **Homicide** ⇐343, 358(1)

In imposing death penalty for murder, trial court erroneously relied on information from newspaper articles to support finding of no mitigation, but given overwhelming evidence supporting three aggravating factors, error did not injuriously affect defendant's substantial rights, where trial judge was concerned that defendant chose not to present mitigating evidence and apparently read the articles in an attempt to find something in mitigation, and though the articles were not in the record, they were based on interviews that defendant himself gave, so that he could not claim that the information was confidential.

8. **Criminal Law** ⇐641.10(1)

There was no error in failure to appoint independent counsel at penalty phase of capital murder case to present mitigating evidence when defendant requested death sentence, where trial judge thoughtfully analyzed facts and did
state's position. U

9. **Criminal Law** ⇐

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James Marion M
and Andrea Norgar
Bartow, for appella

Robert A. Butte
Candance M. Sabell
pa, for appellee.

PER CURIAM.

Michael Lee Lock
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9. Criminal Law ⇐641.4(1), 641.10(1)

Defendant has constitutional right to represent himself when competent to do so, and allowing counsel to take position contrary to defendant's wishes through vehicle of guardian ad litem would be improper as violating dictates of *Faretta*. U.S.C.A. Const.Amend. 6.

James Marion Moorman, Public Defender and Andrea Norgard, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen. and Candance M. Sabella, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Michael Lee Lockhart, who pleaded guilty to first-degree murder for killing fourteen-year-old Jennifer Colhouer, appeals the death sentence imposed. We have jurisdiction based on article V, section 3(b)(1) of the Florida Constitution.

We affirm Lockhart's conviction and death sentence.

Colhouer was killed in 1988 after Lockhart entered her Pasco County home. Using a knife from the Colhouer kitchen, Lockhart inflicted a number of wounds described as pricking, prodding, or teasing wounds. He also bound Colhouer's arms, strangled her with a towel, and stabbed her at least seven times in the abdomen. Some of the stab wounds were so deep that her internal organs protruded. The medical examiner testified that Colhouer could have been conscious for as long as three minutes after Lockhart began to strangle her. As Colhouer was dying, Lockhart turned her over and raped her anally.

Assistant Public Defender William Eble initially was appointed to represent Lockhart. A month later he moved for a continuance and to withdraw, arguing that he could not be ready when trial started because of his workload, the complexity of the case, and the travel required due to Lockhart's out-of-state convictions. The judge denied Eble's motions.

Later in that hearing, Lockhart pleaded guilty against Eble's advice. Lockhart then asked the court to dismiss Eble because he wanted to represent himself. The court refused to dismiss Eble completely. Instead, he kept Eble on as "advisory counsel." As advisory counsel, Eble would be present in the courtroom, but Lockhart would not be required to accept his advice. Because Lockhart did not want to present mitigation, the judge signed an order prohibiting Eble from spending county funds to investigate potential mitigation without Lockhart's direction.

The trial court refused Lockhart's request to sentence him without impaneling a jury for the penalty phase. When the penalty phase began, Eble again sought to withdraw. He argued that Florida statutes precluded advisory counsel and that ethical obligations required him to act against Lockhart's wishes. Lockhart again said he wanted to represent himself, and the court allowed Eble to withdraw. Eble would be available if Lockhart needed to consult him, but he was not required to remain in the courtroom.[1]

During the penalty phase, the State presented evidence of Lockhart's robbery conviction in Wyoming and of his capital convictions in Texas and Indiana.[2] Lockhart did not present any witnesses. His closing statement included a request to jurors that they "[d]o exactly what the District Attorney asks you. Do the right thing, and that is return the death penalty."

The jury voted unanimously to recommend the death penalty. In sentencing Lockhart to death, the trial judge found four aggravating factors: (1) previous conviction of another capital felony or of a felony involving the use or threat of violence to the person; (2) murder committed while engaged in the com-

1. Lockhart did, in fact, request and receive Eble's assistance at one point during the penalty phase.

2. Lockhart shot and killed a police officer in Texas. He killed a sixteen-year-old girl in Indiana in a crime that bore a striking resemblance to the instant case. He was sentenced to death for both the Texas and Indiana murders.

mission of, or an attempt to commit, a sexual battery; (3) murder was especially heinous, atrocious, or cruel; and (4) murder committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification. § 921.141(5)(b), (d), (h), (i), Fla. Stat. (1989). The trial judge did not find any statutory or nonstatutory mitigation.

Lockhart raises twelve issues on this direct appeal.[3]

Contrary to Lockhart's assertions, we find that he understood the nature of the charges against him and the consequences of pleading guilty to first-degree murder. Thus, the trial court did not err in accepting his plea.

[1] Lockhart next argues that the trial court erred in failing to conduct a *Faretta*[4] inquiry when he initially asked to represent himself during a pretrial hearing. At that time, the judge did not grant his request. Instead, the judge allowed Lockhart to direct his defense, but ordered defense counsel to remain in an advisory capacity. The State indicated during oral argument that Lockhart consulted Eble during the pretrial period about clothing for trial, medical records, and help in securing a witness. When defense counsel moved to withdraw at the start of the penalty phase and Lockhart renewed his request to proceed pro se, the judge conducted a *Faretta* inquiry. The record shows that Lockhart made a knowing and intelligent waiver of counsel after the trial judge informed him about the dangers and disadvantages of self-representation. We find no merit to this issue.

[2] Lockhart also contends that the trial court erred in allowing Detective Fay Wilber, who investigated Colhouer's murder, to testify about the homicides in Indiana and Texas because he had no opportunity to rebut the unreliable hearsay testimony. Wilber had attended parts of both out-of-state trials and had reviewed case files from those crimes.

Florida's death penalty statute allows the introduction of hearsay testimony during capital sentencing proceedings. § 921.141(1), Fla.Stat. (1989).[5] Lockhart had the opportunity to cross-examine Detective Wilber. On a few occasions, the trial judge restricted questioning because Lockhart interrupted the witness or because he tried to testify himself, but the judge did not abuse his discretion.

[3, 4] As his next issue, Lockhart argues that the trial court erred in allowing Detective Wilber to testify about the out-of-state crimes and to show eight photographs from the Indiana crime. Details of prior violent felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial. *Waterhouse v. State*, 596 So.2d 1008, 1016 (Fla.), *cert. denied*, — U.S. —, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992). Such testimony helps determine whether "the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the judge and jury." *Elledge v. State*, 346 So.2d 998, 1001 (Fla.1977).

3. Whether (1) the trial court erred in accepting Lockhart's guilty plea; (2) Lockhart's waiver of counsel was freely, intelligently, and voluntarily made; (3) the trial court erred in restricting Lockhart's voir dire and in denying challenges for cause to two prospective jurors; (4) the trial court's statements to the venire improperly denigrated the jurors' sentencing responsibilities; (5) the trial court erred in allowing the State to introduce unreliable hearsay testimony that Lockhart had no opportunity to rebut; (6) the trial court erred in overruling objections to testimony about and photographs of collateral crimes; (7) the trial court improperly restricted Lockhart in presenting mitigating evidence; (8) the trial court failed to adequately renew the offer of counsel before sentencing Lockhart; (9) the trial court failed to weigh mitigating evidence available in the record; (10) the trial court erred in finding the cold, calculated, and premeditated aggravator; (11) the trial court improperly considered information not in the record; and (12) this Court should recede from *Hamblen v. State*, 527 So.2d 800 (Fla.1988), and require the appointment of special counsel to present mitigating evidence when a defendant requests a death sentence.

4. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975).

5. This statute provides in relevant part:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

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Jackson v. State, 64
(citations omitted).

Evidence of other violent crimes should not be admitted when it is "not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." *Rhodes v. State*, 547 So.2d 1201, 1205 (Fla.1989). The testimony supported the aggravating factor of prior violent felony. *See* § 921.141(5)(b), Fla.Stat. (1989). Although Detective Wilber and the medical examiner testified in some detail about the Indiana crime, the detail helped show the similarity of the Indiana and Florida crimes. It also was a valid attempt by the State to try to establish the cold, calculated, and premeditated aggravating factor. Under the facts of this case, the prejudicial value of the testimony did not outweigh its probative value, so the trial court did not err in admitting the testimony.

[5] In addition, there was no error in admitting the eight photographs from the Indiana crime. The admissibility of photos is within the trial court's discretion and will not be disturbed on appeal absent a showing of clear error. *Wilson v. State*, 436 So.2d 908, 910 (Fla.1983). Although the Indiana photos are gruesome, they show with clarity the similarities between the injuries suffered by the victims in Florida and Indiana. The photos include separate views of the Indiana victim. They did not become an impermissible feature of Lockhart's Florida trial.

[6] Lockhart contends that the record does not support the trial court's finding that the crime was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification. We disagree. This Court recently said that to find this aggravating factor:

> [T]he jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So.2d 85, 89 (Fla.1994) (citations omitted).

The facts of this crime alone support a finding of CCP. Lockhart went to Colhouer's house in the afternoon. There was no evidence of forced entry, so apparently Lockhart convinced Colhouer to let him in. The evidence shows that she was bound at one time and tortured by small pricking knife incisions just below the skin. She was then strangled and, while still alive, stabbed with several incisions. She also was anally assaulted. When police arrived, Colhouer was found naked from the waist down.

It is evident that this killing was not something that occurred on the spur of the moment. The fact that Colhouer was bound and tortured before she was killed indicates that the incident happened over a period of time. The nature and complexity of the injuries indicate that Lockhart intended to do exactly what he did at the time he entered Colhouer's house. Thus, the trial court did not err in finding CCP.

[7] Lockhart also argues that the trial judge erred in sentencing him based, in part, on information that he had no opportunity to rebut or explain. *See Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The trial judge said in his sentencing order:

> H. Defendant presented no evidence of any kind, and an explanation of his conduct can only be gleaned from interviews he has given to newspaper reporters outside this Court. None of this information so gleaned mitigates in his favor.

The trial judge did not discuss the substance of these articles, and the articles are not in the record.

In *Gardner* the United States Supreme Court considered whether a trial judge could impose a death sentence based on confidential information in a presentence investigation that was not disclosed to the defendant or his counsel. A plurality of the Court held that Gardner was denied due process when the death sentence was imposed based, in part, on information that Gardner had no opportunity to deny or rebut. *Id.* at 362, 97 S.Ct. at 1206–07. The Florida Supreme Court subsequently held that "[s]hould a sen-

tencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it." *Porter v. State*, 400 So.2d 5, 7 (Fla.1981).

The State argues that there was no *Gardner* violation because the trial judge rejected any information he read in the newspaper and did not consider it in aggravation or mitigation. We disagree with the State because the sentencing order indicates that the judge relied on information from the newspaper articles to support his finding of no mitigation. However, given the overwhelming evidence supporting three aggravating factors, this error did not injuriously affect Lockhart's substantial rights. *Delap v. State*, 440 So.2d 1242, 1257 (Fla.1983), *cert. denied*, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984). The sentencing order reflects that the trial judge was concerned that Lockhart chose not to present mitigating evidence. He apparently read the newspaper articles in an attempt to find something in mitigation. Although the articles are not in the record, they were based on interviews that Lockhart himself gave and he cannot claim that such information is confidential. *See Spaziano v. State*, 393 So.2d 1119 (Fla.), *cert. denied*, 454 U.S. 1037, 102 S.Ct. 581, 70 L.Ed.2d 484 (1981) (reversing death sentence and remanding when trial judge relied on confidential information in a presentence investigation to impose sentence).

[8, 9] Finally, we decline Lockhart's invitation to recede from *Hamblen v. State*, 527 So.2d 800 (Fla.1988), where this Court found no error in the trial court's failure to appoint independent counsel to present mitigating evidence where the defendant demanded or requested a death sentence because the trial judge "carefully analyzed the possible statutory and nonstatutory mitigating evidence." A defendant has a constitutional right to represent himself when competent to do so. Allowing counsel to take a position contrary to the defendant's wishes through the vehicle of guardian ad litem would violate the dictates of *Faretta*. Where a judge thoughtfully analyzes facts and does not merely rubber-stamp the State's position, *see Hamblen*, 527 So.2d at 804, we do not believe that independent counsel must be appointed.

We find no merit or procedural bars to the remaining issues Lockhart raises.[6]

Accordingly, we affirm the conviction and death sentence imposed on Lockhart.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

STATE of Florida, Appellant,

v.

McArthur BREEDLOVE, Appellee.

No. 82731.

Supreme Court of Florida.

April 6, 1995.

Rehearing Denied June 1, 1995.

Following affirmance of defendant's conviction and death sentence for first-degree felony-murder, 413 So.2d 1, and remand of his second motion for postconviction relief, 595 So.2d 8, order was entered vacating the death sentence and granting defendant new sentencing hearing, and state appealed. The Supreme Court held that although the sentencing court had erroneously used jury instruction regarding the "heinous, atrocious or cruel" aggravating factor for imposition of death sentence which lacked language requiring that the crime be "apart from the norm of capital felonies," the error was harmless.

Reversed.

6. Issue 3 (no merit to first subissue; second subissue not preserved); Issue 4 (not preserved); Issue 7 (no merit); Issue 8 (no merit); Issue 9 (no merit).

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3. Criminal Law ⇐

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