IN THE SUPREME COURT OF FLORIDA

RONNIE FERRELL,

Appellant,

v.

CASE NO: 83,076

THE 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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STATEMENT OF THE CASE

The State generally accepts Ferrell's statement of the case, except for the following supplementation and clarification:

The State would note that Fla. R. Crim. P. 3.134 requires the state to file formal charges on defendants in custody within 30 days of arrest and that second degree murder is the highest charge possible under an information. Art. I, §15, Fla. Const. Although a prior information was filed, this case was tried on an indictment for first-degree murder, armed robbery and armed kidnapping (R 20).

As to first degree murder, the trial court instructed the jury as to both premeditated murder and felony murder (T 927-929). The jury convicted Ferrell of first degree murder without further specification (R 197). Ferrell was also convicted of robbery. The jury did not find that Ferrell was in possession of a weapon during the commission of this crime (R 199). In addition, Ferrell was convicted of kidnapping, but the jury did not find that Ferrell was in possession of a weapon during the commission of this crime (R 201). Therefore, Ferrell was sentenced for first degree murder, robbery, and kidnapping (R-223-245).

The State finds no record support for the statement that trial counsel "agreed to strike all of the jurors who voiced concerns over the death penalty," Initial Brief of Appellant at p. 4, but does agree that there was no issue at trial concerning challenges for cause or peremptory challenges.

The State would note that there were no exceptions or objections to the jury instructions delivered by the trial court at the guilt phase of the trial (T 957), and also that the attorneys for both the State and the defense agreed to the jury instructions delivered by the trial court at the sentencing hearing (T 1027).

Ferrell's assertion that no evidence was presented at the sentencing hearing is incorrect. Appellant's brief at p. 5. Besides introducing evidence of Ferrell's prior violent felony convictions, the State offered the testimony of Beverly Frazier, a correctional officer (T 972-983). However, the defense offered no evidence or testimony in mitigation (T 984). The jury recommended a death sentence by a vote of 7 to 5 (R 229). Sentencing was delayed until codefendants Sylvester Johnson and Kenneth Hartley were tried (T 1070, R 229). The trial court found that five statutory aggravators had been proved beyond a reasonable doubt. Ferrell does not contest the sufficiency of the evidence to support two of these aggravators -- prior violent felony conviction and kidnapping. (He does, however, contend in Issue XI that the kidnapping and pecuniary gain aggravators were improperly doubled.) The trial court found no statutory mitigators, but noted that it might be nonstatutorily mitigating that codefendant Hartley, and not Ferrell, was the triggerman (R 240). The trial court assigned this "questionable" nonstatutory mitigator slight weight, however, because Ferrell had "put the plan in motion" so the "robbery-murder could go forward," and had betrayed a "trusted friend." In the court's view, Ferrell's culpability equalled Hartley's.

Hartley (the triggerman) was also sentenced to death, and his appeal is pending before this Court, case no. 83,201. Johnson (who drove the getaway vehicle) was sentenced to life. His conviction for first-degree murder, armed robbery and armed kidnapping was affirmed in Johnson v. State, 652 So.2d 1294 (Fla. 1st DCA 1995). (The 1st DCA did, however, order a resentencing on the armed robbery and armed kidnapping counts, to eliminate the mandatory minimums originally included in those sentences.)

STATEMENT OF THE FACTS

Ferrell's statement of facts generally is correct as far as it goes. However, the State does not agree that Jones was selling drugs "all day" on April 22, and would suggest that the term "gofer" more accurately describes Sidney Jones' role in Gino Mayhew's drug business than does "lieutenant" or "henchman." In addition, Ferrell has omitted significant facts from his recitation. Therefore, the State offers the following summary of the evidence:

At around 7:00 a.m. on April 23, 1991, a Chevrolet Blazer was discovered parked in a field behind Sherwood Forest Elementary School (T 475). The body of 17-year-old Gino Mayhew was discovered in the front seat of the Blazer, "slumped over the seat from the driver's side to the passenger side" (T 476). He had been shot five times: three times in the back of the head, once through his eye glasses into his right cheek, and once between his neck and shoulder (T 513-517). In addition, there was a "through and through" wound to his index finger (T 519). Two of the wounds to the back of the head were fatal wounds (T

513-514). One was not, apparently 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 (T 529). Based on the trajectory of the bullets, the medical examiner was of the opinion that Mayhew was in the driver's seat of the Blazer when he was shot, while the shooter was in the back seat, behind and somewhat to the right of Mayhew (T 530). The medical examiner explained the shot through Mayhew's eyeglasses as follows:

> If I'm looking back as a response to a verbal or some other stimulus, I usually would look like this and just dipping your head gives that direction, aligns everything. So then this last wound would have also come from back to front, right to left in the same direction as the others. (T 531).

The murder weapon was a .25 caliber automatic (T 491, 493-498, 513, 514, 519, 524). Although drug paraphernalia was found on the front seat of the Blazer (T 493-494), no drugs (or alcohol) were detected in the victim's blood or bodily fluids (T 531).

No arrests were made immediately. Detective Bolena was the lead detective in this homicide case and was in charge of releasing information about this murder to the media (T 500). He provided no details of this crime to the media; i.e., he did not tell the media where Mayhew was shot, how many times he had been shot, that the murder weapon was a .25 caliber automatic, that Mayhew had been found in the front seat, that the shooter had been in the back seat, or that drug paraphernalia had been found on the front seat (T 500-501).

On May 7, 1991, Sidney Jones gave police information about the case (T 605-606). On May 16, 1991, Ronnie Ferrell and Kenneth Hartley were arrested for the murder of Gino Mayhew. On May 29, 1991, Sylvester Johnson also was arrested (T 502-504).

Sidney Jones testified that he "hang[s] around" at Washington Heights Apartments on Moncrief Road in Jacksonville and often helps "a lot of people" sell crack cocaine (T 575-576). Between 8 and 11:30 p.m. the evening of April 22, 1991, Jones was at the apartments helping Gino Mayhew sell drugs by "stopping other customers from going buying from other people and flagging them over to Gino" (T 575, 577, 619-620, 622-623). Jones saw Sylvester Johnson in the area between 10 and 11 p.m. (T 578). At 11 p.m., Jones observed Ronnie Ferrell talking to Mayhew at his Blazer. Ferrell asked Mayhew if he had any "juggle," which according to Jones is street slang for crack cocaine (T 579). In response, Mayhew displayed an estimated $2,000 worth of crack cocaine to Ferrell (T 580). Jones testified that Mayhew also had a large amount of money that evening (T 580).

Soon afterwards, Kenneth Hartley arrived, and he, Ferrell and Johnson huddled together behind Mayhew's Blazer and talked (T 581). Meanwhile, Jones bought a "dime" packet of crack from Mayhew and started to leave. As he walked away, however, he examined his purchase and decided that it was "just too small because it wasn't like the deal we made before I started helping him work." So he returned to the Blazer (T 581-582). When he got within two or three feet of the Blazer, he realized that Kenneth Hartley, who was now standing at the driver's door, had a

gun in his hand pointed at Mayhew's head as Mayhew sat in the driver's seat (T 582-583). According to Jones, Mayhew "looked very frightened, very very scared" (T 584). Meanwhile, Ferrell "was at the front left side of the Blazer looking around like this, back and forth looking around" (T 585). Hartley asked Jones what he wanted. When Jones told him he did not want any trouble, Hartley told him to "get your pussy ass on" (T 584). Jones left, and walked toward a barber shop and game room at the front of the apartment complex (T 585, 588). As he reached the corner, he turned and looked. Jones testified he saw Hartley force Mayhew up in the seat and climb into the back seat of the Blazer, while Ferrell got into the front passenger seat (T 586). 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 (T 587).

At this point, Jones proceeded toward the front of the apartment complex, intending to report what had happened. By the time he arrived, however, he had changed his mind, because he was afraid what might happen to him if he told anyone (T 589). While he was there, the Blazer exited the apartment complex at "high speed." Jones shouted "Gino, Gino." Ferrell "hollered" that "Gino would be back" (T 590). The Blazer ran over two speed bumps and ran a red light as it left the apartments and proceeded up Moncrief. Jones testified that Gino Mayhew was driving, Ronnie Ferrell was in the front passenger seat, and Kenneth Hartley was in the back seat directly behind Mayhew (T 590-592). A minute later, Sylvester Johnson exited the apartment complex,

driving a purple pickup truck, and drove off in the same direction Mayhew's Blazer had gone (T 593-594).

Juan Brown testified next. He had grown up with Ferrell, and had known the victim about a year (T 640-641). At 11:30 p.m. on April 22, 1991, he was riding with some friends on Moncrief Road, headed south toward Washington Heights Apartments. (T 642-643). Brown saw Mayhew's Blazer heading toward them. Brown could see that Mayhew was driving and that Ferrell was in the front passenger seat (T 644-646). There was also another person crouched behind Mayhew that Brown could not recognize, but he could tell that the person was a light-skinned black male (T 646-647). (Detective Bolena testified that Kenneth Hartley was a light-skinned black male (T 504).) Brown waved and persuaded the driver of his car to blow the horn. Mayhew looked "eye to eye" at Brown, but "just kept going" (T 648). Brown testified that this was unusual behavior for Mayhew, so he "had my friend to do a U-turn" and they tried to follow Mayhew, all the while blowing the horn and "hollering" (T 649). Instead of stopping, Mayhew sped up, and "the faster we went, the faster he went." When they reached the intersection of Moncrief and Soutel, Mayhew turned right, and Brown's friend refused to pursue him any further (T 649-650). Brown testified that the route that Mayhew took is the most direct route from Washington Heights Apartments to Sherwood Forest Elementary School (T 650-651).

After his arrest, Ferrell was incarcerated in the Duval County jail, and given a cell adjacent to that occupied by Robert Williams, who was awaiting sentencing for dealing in stolen

property (T 659, 662). They struck up a friendship, and eventually discussed their pending charges with each other. Ferrell told Williams that he and Sylvester Johnson and Kenneth Hartley had robbed Mayhew of $1700 the Saturday before Mayhew was murdered (T 668-669). Ferrell stated that Mayhew had recognized Hartley and Johnson, but that Ferrell had been wearing a mask and Mayhew did not recognize him (T 669). According to Ferrell, Mayhew was angry about the robbery, and had "put out what they call a hit" on Johnson and Hartley (T 670-671). So Johnson, Hartley and Ferrell got together and "decided it would be to their best interest to get him first" (T 671). They agreed on a plan to purchase a large amount of crack cocaine from Mayhew "to get him off to himself" and then to kill him (T 672). Because Mayhew did not realize that Ferrell had been involved in the initial robbery, Ferrell would be the one to approach Mayhew about the purchase of three quarter ounces of cocaine (T 673). Ferrell would tell Mayhew that he did not have the money to pay for the cocaine, but that a partner of his had the money (T 674). The partner, Mayhew would be informed, was at Sherwood Park, by the school (T 674). That location was chosen because it was an isolated area and there would be no witnesses (T 674-675). Ferrell told Williams that at some point after he got into Mayhew's Blazer to go to Sherwood Park, Hartley entered the Blazer at gunpoint (T 674). When they arrived at Sherwood Park, Sylvester Johnson was already at the park waiting in another vehicle (T 675). Hartley told Mayhew, "you know what this is," and they robbed Mayhew of drugs and money (T 675-676). Ferrell

exited the vehicle and Hartley "shot Gino in the head four or five times" (T 676). Ferrell told Williams that Hartley shot Mayhew from the back seat of the Blazer and that Mayhew was in the front seat (T 676-677). Williams testified that Ferrell did not tell him what kind of gun had been used, but Ferrell did tell him that "the gun had a clip so I assume it was an automatic weapon" (T 677). Ferrell also told Williams that they left drug paraphernalia on the front seat of the Blazer (to mislead the police, according to Williams), and then drove off in Johnson's getaway vehicle (T 678). Ferrell bragged to Williams that the State had no evidence on him, and "he felt he was going to really walk up out of this one" (T 679). Williams reported this information to the police on May 28, 1991 (T 680).

Two other witnesses testified about the initial robbery of Mayhew. Lynwood Smith testified that between 9 and 11 p.m. on Saturday, April 20, 1991, he was in the bedroom of his apartment in Washington Heights when Gino Mayhew burst into the room, acting "upset, angry and excited" (T 537-537). Mayhew had a bleeding gash on his forehead (T 538). Mayhew told Smith that he had just been robbed of money and drugs by two men who had hit him with a pistol and had shot at him. Mayhew showed Smith a "bullet graze on his knee" (T 556-558). Mayhew told Smith that one of the two men looked like Kenneth Hartley, but the other had a hat pulled down over his face, and Mayhew could not recognize him (T 556-557).

Gene Felton testified that between 11 p.m. and midnight that same evening, he was in the pool hall at Washington Heights

apartments. Ferrell was there, talking to Sylvester Johnson. According to Felton, "they were discussing the way they had had their little fight and beat Mayhew up" and "took his drugs and money" (T 565-567).

Because Ferrell was a friend of Mayhew's (and had even attended his funeral), Ferrell was interviewed about Mayhew's murder soon after it happened "to assist us [the police] and help us find some names, a starting point, places to go, give me an idea who lives out there that might want to do this" (T 738). In his initial interview on April 26, 1991, Ferrell told police that he had last seen Mayhew at 9 p.m. on April 22 at a barbecue place on Soutel and New Kings. Then, at 9:30, Ferrell had gone to the home of his wife and mother-in-law, where he remained the rest of the night (T 710-712). He was interviewed again on May 7, 1991, and he again insisted he was with his wife and mother-in-law from 9:30 on (T 731, 741). After his arrest on May 16, he was again questioned about his whereabouts the evening of the murder, and he again claimed, at first, that he arrived at his mother-in-law's house at 9:30 p.m. and stayed there the rest of the evening (T 754). However, he subsequently changed his story, claiming now that he remembered picking up Clyde Porter at the pool hall at Washington Heights apartments between 10:30 and 11 p.m. and taking him to a liquor store. After returning Porter to the pool hall, Ferrell "went straight to his mother-in-law's house," where he stayed from 11-11:30 p.m. onward (T 761-762). He also claimed to have last seen Gino Mayhew at 9:30 p.m. when Mayhew drove him to his car at Washington Heights Apartments. He did not say

anything this time about having seen Mayhew at a barbecue place on Soutel (T 762-763). When the interrogating officer reviewed the changes in the stories Ferrell had offered and asked him what his next story was going to be, Ferrell responded, "Go ahead, mother fucker, do what you've got to do." That was the end of the interview (T 767-768).

Finally, Ferrell's wife and mother-in-law testified that although Ferrell had been at their home earlier that evening, he had left shortly before 11 p.m. and had not returned at all that night (T 796, 802). Detective Bolena testified that Ferrell's mother-in-law's house was less than two miles from Washington Heights apartments (T 806).

At the penalty phase, the State introduced Ferrell's prior convictions for the offenses of armed robbery in 1984 and riot in 1988 (T 967-968). A correctional officer testified about Ferrell's actions during the prison riot, including his vocal refusal to return to his cell, his threats, and his physical assault on a correctional officer (T 977-978, 980).

SUMMARY OF ARGUMENT

There are 12 issues on appeal: (1) Ferrell has procedurally defaulted any objection to the trial court's Biblical comment during the voir dire examination. Although judicial comments relating to Biblical interpretation generally should be avoided, the comment at issue here was brief and nonprejudicial, and clearly does not amount to fundamental error. (2) Although Ferrell's trial attorney interposed an objection to evidence that Ferrell had participated in an armed robbery of Gino Mayhew two days before the latter's murder, no grounds were offered in support of the objection. Ferrell has not preserved for appeal the grounds he now raises. Anyway, evidence of the initial robbery was offered to proved motive and premeditation, not identity, and was properly admitted even if not "strikingly" similar to the crime on trial. (3) Statements made by Gino Mayhew immediately after he was robbed, beaten and shot at were properly admitted under the "excited utterance" exception to the hearsay rule. (4) The evidence supports the conviction for first degree murder. Eyewitness testimony established that Ferrell was involved in the abduction of Gino Mayhew, and the circumstances of the case, coupled with Ferrell's statements about the crime, establish that the murder was premeditated. In addition, the evidence was sufficient to prove first-degree felony murder. (5) When Mayhew was abducted at gunpoint, he was in possession of money and drugs. After he was murdered, Mayhew had neither money nor drugs. This evidence, coupled with Ferrell's statements admitting that he had robbed Mayhew, sufficed to withstand

Ferrell's motion for judgment of acquittal. (6) Ferrell was properly sentenced as an habitual felony offender. However, his habitual offender sentences should have run concurrently rather than consecutively. (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 evidence supports the trial court's determination that this murder was committed for pecuniary gain. Even if pecuniary gain was not the only motive for the murder, it was an integral component of the crime. (9) The murder also 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) Any issue of the sufficiency of the CCP instruction has not been preserved for review. Ferrell's trial attorney not only did not object to the charge, he agreed to it. (11) The kidnapping and pecuniary gain aggravators were not based on the same essential feature of Ferrell's crime, and it was proper to consider them separately. 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 Ferrell on appeal relating to the trial court's findings in aggravation, there would remain two strong aggravators (prior violent felony conviction and kidnapping) and minimal mitigation. (12) Ferrell was not entitled to special verdicts.

ISSUE I

NO ISSUE HAS BEEN PRESERVED FOR APPEAL CONCERNING THE TRIAL COURT'S COMMENTS ABOUT THE PROPER INTERPRETATION OF THE TEN COMMANDMENTS

The trial judge's comments at issue here are reproduced verbatim in Appellant's brief and need not be repeated here. It is notable that the subject of "biblical sources" (Appellant's brief at p. 15) was raised in the first instance by prospective juror Mrs. Pollock. Thus, the trial court's comments were not entirely unsolicited. Moreover, scholarly support exists for the court's comments. See, e.g., THE REVISED ENGLISH BIBLE, Oxford University Press, Cambridge University Press (1989), Exodus 20, 13 (whose translation of the commandment, ostensibly from original sources, is: "Do not commit murder.")

Nevertheless, assuming, arguendo, that the court's comments about the proper translation of one of the ten commandments were unnecessary and/or inappropriate, this issue is not preserved for appeal. Ferrell's trial attorney did not object to these comments (T 375-376). In fact, there was no response by either party to the comments at any time during the trial, and Mrs. Pollock was selected as a juror even though both parties had peremptory challenges remaining (T 401, 403). Clearly, Ferrell's trial attorney did not deem the trial court's remarks to be worth making an issue about, nor to be prejudicial to the qualifications of the juror to whom the comments were directed.

It is well settled that, except in cases of fundamental error, issues cannot be raised for the first time on appeal. See, e.g., Finney v. State, 20 Fla. L. Weekly S401, 404 (Fla.

Jul. 20, 1995); Sochor v. State, 580 So.2d 595, 602-603 (Fla. 1991); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). The contemporaneous objection requirement has been applied to prosecutorial comment, Pangburn v. State, 20 Fla. L. Weekly S323, 324 (Fla. July 6, 1995), to judicial instructions, Kearse v. State, 20 Fla. L. Weekly S300, 301 (Fla. June 22, 1995), to the jury selection process, Larkins v. State, 655 So.2d 95, 98 (Fla. 1995) and -- most significantly here -- to allegations of improper comments by the trial court. Jackson v. State, 599 So.2d 103, 107-108 (Fla. 1992); Ross v. State, 386 So.2d 1191, 1195 (Fla. 1980).

Ferrell does not even contend that the trial court's comments in this case rise to the level of fundamental error. While it is doubtless true that trial judges generally should refrain from discussing religious philosophy during the voir examination of prospective jurors, the comment at issue here was brief, and essentially neutral on the question of whether a death sentence is Biblically appropriate. (The Court did not mention any of the ensuing passages in the Bible which mandate the death penalty for a wide variety of offenses, including reviling one's mother or father, having sexual intercourse with a beast, or being a witch.)

Mrs. Pollock favored the death penalty; she simply was not sure that she could vote to impose it herself. She stated: "I don't know if I could live with myself, even though I am in favor of the death penalty. I guess I am undecided because I will have to be truthful, and I don't know if I could or not." (T 374).

Following the comments by the trial court, Mrs. Pollock was asked by the prosecutor if she would be able to convict the defendant if proven guilty beyond a reasonable doubt of first degree murder, knowing that he could then be subjected to a death sentence. Mrs. Pollock answered: "I'll try. That is all I can say. I will try.... It is not an easy matter." (T 376).

Ferrell's trial attorney could reasonably have concluded that Mrs. Pollock might be favorable to the defense, particularly at the penalty phase. However, despite her initial misgivings about her ability to serve, the State did not challenge her for cause. Arguably, the trial court's comments were beneficial to the defense in this respect.

In any event, whether beneficial to the defense or not, nothing about the trial court's comment reaches down to the "very legality of the trial itself" or otherwise compels a finding of fundamental error. Smith v. State, 240 So.2d 807, 810 (Fla. 1970); Mungin v. State, 20 Fla. L. Weekly, S459 (Fla. Sept. 7, 1995). Cf. Bates v. Dugger, 604 So.2d 457, 458 (Fla. 1992) (any issue concerning opening of trial with prayer by victim's minister was not raised at trial or on direct appeal and therefore was procedurally barred when raised for the first time on collateral review; claim did not involve "fundamental error"). Ferrell has failed to preserve this issue for appeal, and it is procedurally barred.

ISSUE II

NO WILLIAMS RULE ISSUE HAS BEEN PRESERVED FOR REVIEW; MOREOVER, EVIDENCE THAT FERRELL WAS A PARTICIPANT IN A ROBBERY OF MAYHEW TWO DAYS PRIOR TO THE MURDER WAS NOT "SIMILAR FACT EVIDENCE" ADMITTED TO PROVE IDENTITY BY PROOF OF A DISTINCTIVE MODUS OPERANDI; IT WAS INSTEAD "RELEVANT" EVIDENCE INTEGRALLY CONNECTED TO THE MURDER AND PROPERLY ADMITTED TO PROVE FERRELL'S MOTIVE

As noted in Ferrell's brief, pursuant to §90.402 and 90.404(2) Florida Statutes (1991), the State filed a pretrial "Notice of Other Crimes, Wrongs or Acts Evidence" announcing the intention of the State to introduce evidence that Ferrell participated in a robbery of Gino Mayhew two days prior to the murder (R 43). Ferrell's trial attorney did not file any written response to the notice, but just before opening statements lodged this objection:

> The other thing I had not filed [a] written motion about it and going through things yesterday it's apparent to me that Mr. Bateh intends to call witnesses concerning a robbery that took place some days prior -- robbery of the same victim that took place some days prior to his death. My understanding is the purpose of that is to provide some motive or opportunity or something like that.
>
> And rather than doing it as each one of those witnesses come in I wanted to explain -- I wanted to object to any testimony concerning this prior criminal act and have the Court rule on it.

(T 426). The State responded:

> There was no pre-trial motion, Mr. Nichols told me now he wanted to object. I filed some months ago a notice of intention to introduce William's Rule evidence but he indicated that I could summarize the facts. I frankly think Mr. Nichols is probably raising this merely to protect the record but I think I can summarize the facts to the Court....
>
> ...Williams Rule evidence can come in to show a number of matters, one of which is motive. And in

this particular case Gino Mayhew was murdered on Monday night, April 22nd, 1991, two days before, Saturday, April 20th, he was robbed, I have evidence to show he was robbed by this defendant and his co-defendants. And it was after that -- that Saturday robbery on ... April the 20th that these defendants began to believe that Gino Mayhew were [sic] going to retaliate against them in some fashion for the earlier robbery. And it was at that time that they formulated their plan to murder Gino Mayhew and in fact carried that plan out. The State has a witness who received a statement from the defendant in which the defendant laid that all out for him and stated, yes, we participated in the robbery and we heard that Gino was going to retaliate against us and so we decided to kill him.

And with that evidentiary predicate it's the State's intention to introduce evidence of the robbery that happened two days before the murder to establish the motive for the killing and to establish the context that the killing occurred in.

(T 427-428) (emphasis supplied). Ferrell's response to this evidentiary predicate and the court's ruling were as follows:

MR. NICHOLS: Judge, here's my purpose, Mr. Bateh already filed some time ago notice of intent to use William's Rule evidence. I realized in final preparations for trial that I never did have a hearing on that and I never filed an objection to it.

It certainly is arguable that Florida case law on Williams Rule would allow this testimony to come in. I don't want it to come in without my having voiced an objection to it, I had not filed a written objection to it, I can do that in a few minutes.

THE COURT: All right. Let me ask you this, you stipulate that the facts -- you agree that the facts that Mr. Bateh has just outlined are sufficient for the Court to make a decision upon?

MR. NICHOLS: Yes.

And I bring it up now rather than just letting -- waiting until the evidence during the trial and allow it to go forward.

THE COURT: Based on the facts I just heard to which you agree, I think it's admissible, Williams Rule evidence.

MR. NICHOLS: Well, I think arguably [it] is but I just need to voice my objection.

(T 428-429) (emphasis supplied).

The State would first contend that Ferrell has not preserved for appeal any issue that the collateral crime was not sufficiently similar to the crime on trial, or that the collateral offense became a feature of the trial, or that its probative value was outweighed by undue prejudice. None of these grounds for objecting to the collateral-crime evidence was raised at trial. In fact, no grounds at all were raised at trial -- only a bare objection unsupported by any grounds of objection, coupled with what is very nearly a concession that the evidence was properly admitted under Florida case law.

"The specific legal ground upon which a claim is based must be presented to the trial court, in order to preserve an issue for appeal." Bertolotti v. State, 565 So.2d 1343, 1345 (Fla. 1990). Because the legal grounds upon which Ferrell's present Williams Rule claim is based were not raised below, they were not preserved for appeal. Kearse v. State, 20 Fla. L. Weekly S300, 301 (Fla. June 22, 1995) ("Kearse did not object to the special instruction on this ground and thus did not preserve this issue for appeal."); Peterka v. State, 640 So.2d 59, 70 (Fla. 1994) (grounds of objection raised on appeal "not preserved as defense counsel did not specifically object on those grounds below"); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."); cf.

Kujawa v. State, 405 So.2d 251, 252 (3rd DCA 1981) (objection that "we feel it violates our client's constitutional rights" is not a statement of grounds for objection).

Moreover, even if preserved, the evidence was properly admitted. The cases cited by Ferrell for the proposition that the collateral crime must be "strikingly similar" or that the "points of similarity have some special character" or "unique characteristics" are cases in which the State offered similar fact evidence to prove identity by proving a distinctive modus operandi. "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). In this case, the collateral crime was offered to prove motive. This Court recently explained:

> Although the similarity between the facts of the charged offense and the other crime may serve to enhance the probative value of other crime evidence, similarity is not always a prerequisite to consideration of such evidence. See Williams v. State, 621 So.2d 413, 414 (Fla. 1993); Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), cert. denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989). Overall similarity between the facts of the two offenses generally is necessary before the other crime evidence is considered relevant to the issue of identity. [Cits.] However, such is not the case when other crime evidence is used to prove motive.

Finney v. State, 20 Fla. L. Weekly S401, 403 (Fla. July 20, 1995). In this case, although there were similarities between the extrinsic offense and the crime on trial (same victim, same defendants, robbery at gunpoint in both case, drugs taken in both cases), the extrinsic crime here was not offered as "similar fact evidence but rather was integrally connected to the murder.... [and] was relevant to show motive and premeditation." Layman v. State, 652 So.2d 373, 375 (Fla. 1995). As in Padilla v. State, 618 So.2d 165, 169 (Fla. 1993), the collateral crime was "inseparable crime evidence" that was necessary to complete the story of the crime on trial, and was properly admitted. See also Craig v. State, 510 So.2d 857, 863 (Fla. 1987) (evidence that defendant had been stealing cattle from his employer admissible to show defendant's motive in killing ranch owner and another who had discovered theft); State v. Richardson, 621 So.2d 752, 757 (Fla. 5th DCA 1993) (evidence of prior factually dissimilar murder admissible to prove defendant's motive to commit subsequent murder).

Although Ferrell raised no issue at trial concerning the quantum of proof establishing the extrinsic offense, there is no merit to Ferrell's claim that the State's evidence was insufficient to demonstrate that he was a party to the Saturday robbery. The evening of the same day the robbery occurred, Gene Felton overheard Ferrell bragging about it (T 565-567), and Ferrell also later confessed to Robert Williams that he had robbed Mayhew the Saturday before Mayhew was murdered (T 668-669). The evidence clearly was sufficient to support a jury

finding that Ferrell was a participant in the extrinsic offense. 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).

Finally, although -- again -- Ferrell did not raise any issue at trial concerning whether the earlier robbery was made a "feature" of the trial, and does not, insofar as the State can tell, raise such issue on appeal, the State would note that the initial robbery clearly was secondary to the subsequent robbery/kidnapping/murder, both as to the seriousness of the offense and in the quantum of evidence offered to prove it. Moreover, there were no gruesome photographs or other highly inflammatory evidence admitted in connection with the proof of the initial robbery. Compare Henry v. State, 574 So.2d 73, 75 (Fla. 1991) (extensive inflammatory evidence presented concerning search for child victim of collateral murder, along with unnecessary and gruesome details and photographs). Furthermore, the trial court delivered cautionary instructions to the jury concerning the limited relevance of the collateral robbery (T 534-535). Bennett v. State, 593 So.2d 1069, 1071 (Fla. 1st DCA 1992) (cautionary instructions help ensure that probative value of evidence is not outweighed by unfair prejudice).

Issue II is procedurally barred and is also without merit.

ISSUE III

THE TESTIMONY OF LYNWOOD SMITH CONCERNING STATEMENTS MADE BY GINO MAYHEW IMMEDIATELY AFTER HE WAS ROBBED THE SATURDAY BEFORE HIS MURDER WAS PROPERLY ADMITTED UNDER THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE

Ferrell's trial attorney objected on hearsay grounds to the testimony of Lynwood Smith concerning statements made to him by Gino Mayhew the Saturday evening before Mayhew was murdered (T 539, 541). The State responded that it was offering this testimony under the excited-utterance exception to the hearsay rule (T 539). Following a proffer outside the presence of the jury, the trial court ruled that Mayhew's statements met "the criteria" for admission as an excited utterance (T 555).

Smith's testimony was that between 9 and 11 p.m. on April 20, 1991, Mayhew ran into Smith's apartment, looking like "he had just been beaten up" and acting "Upset, angry and excited" (T 538). There was a bleeding gash on his forehead (T 538). Mayhew picked up the telephone to call someone, but before he dialed, he told Smith that "he had just been robbed" and that the robbers had "hit him with a pistol and shot at him two or three times" (T 540, 546). Mayhew showed Smith where a bullet had grazed his knee (T 547). The robbers had taken "money and drugs" (T 547). The place where Mayhew told him the robbery had occurred was right across the street and it would have taken only 20 to 30 seconds for Mayhew to run from the scene of the robbery to Smith's downstairs apartment (T 544-545). Mayhew acted "very upset and excited" while he was telling Smith what had happened (T 558).

Hearsay statements are admissible if made "under the stress of excitement" caused by a "startling event or condition." §90.803 (2). Fla. Stat. (1989). "A person who is excited as a result of a startling event does not have the reflective capacity which is essential for conscious misrepresentation; therefore statements that are made by the person who is in a state of excitement are spontaneous and have sufficient guarantees of truthfulness." Charles W. Ehrhardt, Florida Evidence, §803.2, pp. 615-616 (1995 ed.)

Ferrell cites Rogers v. State, 20 Fla. L. Weekly S233 (Fla. May 11, 1995). Rogers supports the admission of the excited utterance in this case. This Court noted:

> A statement qualifies for admission as an excited utterance when (1) there is an event startling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event.

Id. at S323-324. Here, as in Rogers, there clearly was an event startling enough to cause nervous excitement (Mayhew was robbed, beaten and shot at). The "real" questions in Rogers were whether the declarant had time for reflection and whether she was still excited from the startling event. In contrast to this case, the declarant in Rogers took the time to call the police and to drink a soda before making her "excited utterance." As many as eight to ten minutes might have passed before she recounted the events of the evening. Id. at S324. Nevertheless, although "there conceivably was time" for reflection, this Court upheld the admission of the statements because the declarant obviously did not engage in reflection and

made her statements while still under the effects of the evening's stressful events.

Mayhew not only did not reflect, he had no time for reflection. He made his statement almost immediately upon his entry into Smith's apartment, before he called anyone, and before anyone had the time to offer him a soda. Far less than eight to ten minutes elapsed from the time the robbery occurred until he told what had happened to Smith. Moreover, the evidence shows that Mayhew was upset and excited the entire time as he recounted the startling event. Clearly, Mayhew made his statements while he was still under the effects of the excitement of having been beaten, shot and robbed. His statements were properly admitted as an excited utterance. Rogers, supra; Power v. State, 605 So.2d 856, 862 (Fla. 1992); Jano v. State, 524 So. 2d 660 (Fla. 1988).

Furthermore, Smith's testimony about Mayhew's injuries was not hearsay. In light of Ferrell's own statements about the Saturday night robbery and beating, and the corroborative testimony by Smith about Mayhew's injuries Saturday night, the excited utterance testimony was cumulative. Even if error, its admission was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE IV

THIS IS NOT A CASE IN WHICH THERE IS ONLY CIRCUMSTANTIAL, EVIDENCE TO PROVE FIRST DEGREE MURDER; A CONFESSION IS DIRECT EVIDENCE OF GUILT; THE TRIAL JUDGE PROPERLY DENIED FERRELL'S MOTION FOR JUDGMENT OF ACQUITTAL

At the close of the State's case, Ferrell's trial attorney made a motion for judgment of acquittal "without any further argument" (T 807). The trial court denied the motion. Ferrell now contends the evidence was insufficient to prove first-degree murder, because, Ferrell argues, the evidence fails to establish that Ferrell was involved in the homicide, and fails to establish premeditation. Without either of these elements of proof, Ferrell argues, his first degree murder conviction cannot stand. The State disagrees, for several reasons.

First, even in a purely circumstantial-evidence case (which, as will be demonstrated below, this case is not), the question of whether the evidence presented by the State is inconsistent with any hypothesis of innocence offered by the defendant is for the jury, and its verdict will not be disturbed if it is supported by substantial, competent evidence. Heiney v. State, 447 So.2d 210 (Fla. 1984). A motion for judgment of acquittal should be denied unless there is no view of the evidence favorable to the State that can be sustained under the law. DeAngelo v. State, 616 So.2d 440 (Fla. 1993). Furthermore, the State is not required to rebut every conceivable version of events, but only to introduce evidence which is inconsistent with the defendant's theory of events. State v. Law, 559 So.2d 187, 189 (Fla. 1989). It is difficult

to discern from his brief what Ferrell's theory of events is, but his pretrial statements to police indicate that he was at the home of his wife and mother-in-law when Mayhew was kidnapped. In light of the inconsistencies in his various statements, however, "the jury was free to reject [Ferrell's] version of events as unreasonable." Finney v. State, 20 Fla. L. Weekly S401, 402 (Fla. July 20, 1995). In addition to the internal inconsistencies in his statements, his statements are directly contradicted by the testimony of Sidney Jones and Juan Brown, both of whom placed Ferrell in Mayhew's Blazer as it sped toward the Sherwood Park Elementary School where Mayhew was murdered, and also by the testimony of Ferrell's wife and mother-in-law, each of whom testified that Ferrell was not with them at the time of the kidnapping and murder, as he had claimed.

Second, Ferrell fails to note that under the trial court's charge, the jury could have found Ferrell guilty of first degree felony murder if it found that the death occurred during the commission of robbery or kidnapping or attempted robbery or kidnapping, and that it was "not necessary for the state to prove that the defendant had a premeditated design or intent to kill to be guilty of felony first degree murder" (T 928-929). Although he does argue as Issue V that the trial court should have granted his motion for judgment of acquittal on the robbery count of the indictment, Ferrell does not even argue that the evidence is insufficient to prove first degree felony murder, or that the evidence is insufficient to prove the possible

underlying felonies of attempted armed robbery or kidnapping or attempted kidnapping. Therefore, the State will not dwell on this aspect of first degree murder, except to say that the evidence, including Ferrell's own statements, is sufficient to support a conviction of first degree felony murder, and that under Florida law, there is no error "in instructing the jury on both premeditated and felony murder when, as here, the jury returned a general verdict." Mungin v. State, 20 Fla. L. Weekly S459 (Fla. Sept. 7, 1995). See also Atwater v. State, 626 So.2d 1325, 1327-28 n.1 (Fla. 1993). (The sufficiency of the evidence to prove robbery will be discussed in the State's argument as to Issue V.)

Finally, Ferrell argues as if the conviction in this case rests solely on circumstantial evidence. This case is not circumstantial, however, because Ferrell confessed to Robert Williams both that he (Ferrell) was a party to the murder and that the murder was premeditated (T 669-680). "A confession of committing a crime is direct, not circumstantial, evidence of that crime." Hardwick v. State, 521 So.2d 1071, 1075 (Fla. 1988).

Ferrell suggests that the testimony of Robert Williams should be disregarded, because it is "dubious". This Court, however, does not "weigh" the evidence on appeal. Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981) ("Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.") The question of the weight and credit to be given William's testimony was one for the jury

to resolve. Demps v. State, 462 So.2d 1074 (Fla. 1984). The State would note, however, that the jury had good reason to credit Williams' testimony. The evidence shows that the details of Mayhew's murder were not released to the media. Nonetheless, Williams was able to provide details of not only this murder/robbery/kidnapping, but also of the earlier robbery. Moreover, these details were remarkably consistent with other evidence presented. The jury reasonably could have concluded that he knew these details because, as he testified, he had talked to someone who had participated in these crimes.

Not only did Ferrell admit to Williams that the murder was planned, but, as the prosecutor argued below, if Ferrell and the others had just wanted to rob Mayhew, "they could have done it right there at Washington Heights, but their intention was not to just rob him, they were going to kill him and that's why they removed him from that area at Washington Heights to that isolated area of the school grounds at Sherwood Forest .... [and why] they needed [the] getaway vehicle .... [T]hey were going to leave him there in that Blazer and they needed transportation to get away from that school. And that's why [Sylvester Johnson] followed in that purple truck." (T 841). The fact that Mayhew was shot five times is additional evidence of premeditation. In short, there was substantial, competent evidence presented in this case to support a conviction for first degree murder, and the trial court properly denied Ferrell's motion for judgment of acquittal. Asay v. State, 580 So.2d 610 (Fla. 1991); Sireci v. State, 399 So.2d 964 (Fla. 1981).

ISSUE V

THE TRIAL COURT DID NOT ERR IN DENYING FERRELL'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE ROBBERY

Much of what was said in the State's argument as to Issue IV, concerning the standard of review of a denial of a motion for judgment of acquittal, applies here. Substantial, competent evidence supports Ferrell's robbery conviction, and the trial court did not err by denying the motion for judgment of acquittal and allowing the jury to consider this issue.

Robbery is defined as "the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear." §812.13 (1), Fla. Stat. (1989) (emphasis supplied). The use of force, violence, assault, or putting in fear is considered "in the course of the taking" if it occurs "either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events." §812.13(3)(b), Fla. Stat. (1989). See Jones v. State, 652 So.2d 346, 349-350 (Fla. 1995).

The evidence shows that before being forced to drive to the Sherwood Forest Elementary School at gunpoint, Mayhew had a large sum of cash and some $2,000 worth of crack cocaine. When his body was discovered the next morning Mayhew had neither cash nor drugs. Compare Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984) (robbery finding not supported because "state failed to present any evidence that the victim had anything of value with

him before the murder or that no cash or valuables were on the victim's body when he was found"). Even in a purely circumstantial evidence case, "[t]he State is not required to rebut every possible hypothesis that can be inferred from the evidence; it need only present evidence that is inconsistent with the defendant's version of events. [Cits.]" Finney v. State, supra, 20 Fla. L. Weekly at S403. The State did that here. Ferrell's contention at trial was that he was not a party to the crime. The eyewitness testimony presented by the State was inconsistent with that contention. Moreover, the evidence in this case is not based solely on circumstantial evidence; Ferrell admitted to Robert Williams that he and two others planned to and did rob Mayhew of money and drugs. This admission is direct evidence of guilt. Hardwick v. State, supra. The evidence was more than sufficient to withstand Ferrell's motion for judgment of acquittal. Melendez v. State, 498 So.2d 1258 (Fla. 1986); Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993); Ferguson v. State, 417 So.2d 631, 635 (Fla. 1982).

ISSUE VI

THE TRIAL COURT DID NOT ERR IN SENTENCING FERRELL AS AN HABITUAL FELONY OFFENDER; HOWEVER, THE STATE AGREES THAT FERRELL'S HABITUAL OFFENDER SENTENCES SHOULD RUN CONCURRENTLY

The trial judge sentenced Ferrell as an habitual felony offender on both the robbery count and the kidnapping count. The court imposed consecutive sentences on these two counts.

The trial court's findings are sufficient to support the habitual offender sentences. Proper notice was given, and the trial court's sentencing order shows that Ferrell has the requisite prior convictions to support habitualization. It was not necessary that the trial judge specifically find that Ferrell's habitual offender sentences were necessary for the protection of the public. King v. State, 597 So.2d 309, 314 (Fla. 2d DCA 1992). Nevertheless, the trial court specified in its sentencing order that it had considered "The protection of the public" (R 234). Moreover, Ferrell's prior record, which is summarized in the sentencing order, suffices to demonstrate that habitual offender enhancement was necessary for the protection of the public (R 229-230). (Notably, Ferrell had received three early releases, and had committed serious crimes soon after each early release)).

However, the State agrees that the two cases cited by Ferrell seem to require that sentences enhanced under the habitual offender statute must run concurrently, whether or not the sentences involve any issue of mandatory minimum sentences. Thus, Ferrell's sentence must be corrected to this extent.

Trotter v. State, 20 Fla. L. Weekly D749, 750 (Fla. 2d DCA 1995).

ISSUE VII

THE TRIAL COURT'S CCP FINDING IS SUPPORTED BY THE EVIDENCE

Ferrell here argues, once again, that this Court should disregard the testimony of Robert Williams. The State would respond that at the penalty phase as well as at the trial, the question of the weight and credit to be given Williams' testimony, and to the other evidence presented, was a matter properly resolved by the fact finder. Card v. State, 453 So.2d 17, 23 (Fla. 1984) ("It is the province of the court to determine the weight to be given to the testimony in the sentencing phase. [Cit.] [The trial judge] took into account the psychologist's testimony.... He weighed this against the facts of the case and it is not within our province to reweigh the testimony now."). Moreover, as noted previously, in the State's argument as to Issue IV, there is good reason to credit Williams' testimony, not only because of the likelihood that Williams could only have learned the details of the crime by talking to Ferrell, but also because all the circumstances of the crime indicate a preplanned killing. The defendants 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. The evidence supports the trial court's determination that Ferrell and the others planned "[f]rom the inception" not just to rob Mayhew but also to murder him (R

239). As the trial court found in its sentencing order, "This was a classic cold-blooded execution" (R 239).

Because the evidence in this case clearly establishes that Ferrell and the others planned a murder, not just a robbery, cases such as Jackson v. State, 498 So.2d 906 (Fla. 1986); Perry v. State, 522 So.2d 817 (Fla. 1988); and Hardwick v. State, 461 So.2d 69 (Fla. 1984), which Ferrell cites for the proposition that the CCP aggravator is not established by proof of premeditation merely to commit a felony other than murder, are inapposite here.

In addition, there is no evidence in the record, including Ferrell'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). Ferrell 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). Ferrell coldly and calmly joined in the careful plan and prearranged design to kill his friend Gino Mayhew -- a plan which entailed the advance

procurement of a weapon and a getaway vehicle, required 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. Ferrell cites Gamble v. State, 20 Fla. L. Weekly S242 (Fla. May 25, 1995), in which the evidence showed six "days of advance planning." Nothing in Gamble, however, requires six days of advance planning to establish heightened premeditation. The murder of Gino Mayhew clearly was planned sufficiently in advance to afford Ferrell "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, Ferrell has not at any time raised any issue of the existence of 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). However, regardless of whether any of Ferrell's codefendants were really the least bit worried about any threats that 17-year-old Gino Mayhew might have made, Ferrell himself was never threatened. Mayhew was unaware that Ferrell was involved in the initial robbery, and threatened no retaliation against him. (That is why Ferrell was the one who initially approached Mayhew). Ferrell clearly had not even a pretense of moral or legal justification for his participation in the surprise attack, kidnapping and execution killing of someone who was supposed to be his friend. Williamson v. State, 511 So.2d 289 (Fla. 1989) (no pretense existed where evidence showed that the victim had never been violent or threatening and had been attacked by surprise and stabbed repeatedly).

Finally, Ferrell makes too much of what is at most an inadvertent typographical error in the trial court's sentencing

order when he argues that the trial court's findings are "wholly incorrect" and in "direct contradiction" of the record, in that the order states that the "defendant" shot the victim in the back of the head from a distance of one inch. Brief of Appellant, p. 42. The State would note, first, that Ferrell's quotation from the trial court's sentencing order contains its own typographical error, which surely was inadvertent. (Such things happen.) The order does not say, as quoted in the brief, "Hartley was the triggerman with Hartley beside him ..." Rather, the trial court found that "Hartley was the triggerman with Ferrell beside him during the kidnap, robbery and murder" (R 239) (emphasis supplied).

The order goes on to recite that "Mayhew was shot execution style - three bullets to the back of the head, one of which was fired by the defendant at a distance of one inch" (R 239) (emphasis supplied). This sentence does not unambiguously designate the defendant Ferrell, rather than the defendant Hartley, as the triggerman, although that certainly is a plausible interpretation of the sentence, if read out of context. However, when read in conjunction with the order as a whole, it is obvious that the trial court did not mean to imply that defendant Ferrell, rather than defendant Hartley, shot the victim. After all, the court had just stated in the previous sentence that Hartley was the triggerman. Moreover, on the previous page of the order, in its discussion of the HAC aggravator, the trial court had observed: "Hartley was the triggerman - but Ferrell was there participating in the robbery

and murder." (R 238). And on the next two pages of the sentencing order following its discussion of the CCP aggravator, the trial court again referred to Hartley as the triggerman, and explained why the court assigned only slight weight to Ferrell's nontriggerman status (R 240-241). Throughout its order, then, the trial court had acknowledged that Hartley, rather than Ferrell, was the triggerman, except for the one ambiguous reference to "the defendant" about which Ferrell now complains. Whether this reference was a typographical error or just a careless choice of words really is inconsequential. The trial court's analysis obviously was based on a conclusion that Hartley was the triggerman, but that, in this case, death was warranted also for the nontriggerman Ferrell.

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 (two of which Ferrell 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

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE MURDER OF GINO MAYHEW WAS COMMITTED FOR FINANCIAL GAIN

Citing no cases whatever, Ferrell argues that the evidence is not sufficient to support the pecuniary gain factor. The record shows, however, that, as the trial court found, the gain of money and drugs was an integral part of the plan to take Mayhew off and kill him. A necessary component of the plan was that Ferrell determine in advance that Mayhew possessed a large quantity of "juggle," or crack cocaine (T 579-580). Obviously, Ferrell and the others never really meant to purchase Mayhew's cocaine. Instead, Mayhew was taken to an isolated area where he was robbed and then murdered (T 675-676). Ferrell not only told Robert Williams that "they" had robbed Mayhew of drugs and money, but Ferrell also admitted that he personally had removed a gold rope chain from around Mayhew's neck (T 676). Even if, as Ferrell contends, the evidence shows that Ferrell and his two codefendants "concocted a plan to 'do away with' Mayhew because he had recognized Johnson and Hartley during the previous robbery," Brief of Appellant at p. 48, the codefendants clearly were motivated also by the desire for pecuniary gain, and acted on that desire by robbing Mayhew. Cf. Thompson v. State, 553 So.2d 153, 156 (Fla. 1989) ("There is no doubt that Thompson's conduct was motivated in part by revenge. However, it is clear that the purpose of the beatings inflicted in the boat was to prevail upon Savoy to divulge where the money was located.... The evidence supports the conclusion that the crime was

committed for pecuniary gain."). The fact that Ferrell and the others had robbed Mayhew previously is an additional factor supporting the trial court's finding that this crime was motivated by the desire for pecuniary gain. Wuornos v. State, 644 So.2d 1012, 1019 (Fla. 1994).

The evidence establishing Ferrell's guilt of the offense of robbery supports beyond a reasonable doubt that Mayhew's murder was committed for pecuniary gain. Larkin v. State, 655 So.2d 95, 99-100 (Fla. 1995) ("We find that the evidence described above of the robbery and killing of the store clerk supports beyond a reasonable doubt that the murder was committed for pecuniary gain."); Henry v. State, 613 So.2d 429, 433 (Fla. 1992) ("The state proved that Henry committed both robbery and arson, thereby supporting the pecuniary gain and felony murder aggravators."); Harmon v. State, 527 So.2d 182, 187-188 (Fla. 1988) (evidence that victim shot while being robbed supported pecuniary gain aggravator). But even if this aggravator was found erroneously, any error would be harmless because other strong aggravators remain to weigh against minimal mitigation.

ISSUE IX

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE MURDER OF GINO MAYHEW WAS HEINOUS, ATROCIOUS OR CRUEL

It is true 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). It is also true that multiple gunshots alone do not establish HAC, as the cases cited in Ferrell's

brief demonstrate. 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. The evidence demonstrates that Mayhew was shot at least twice while still alive and conscious. Mayhew was shot once in the face, through his eyeglasses. This shot was not fatal. 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 (T 517). The most reasonable explanation for this wound was that it was inflicted after Mayhew looked back "as a response to a verbal or some other stimulus" (T 531). Under this scenario, everything would "align," and this wound would come "from back to front, right to left in the same direction as the others" (T 531). 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 surely was inflicted by the same bullet that failed to penetrate Mayhew's skull (T 529, 533). As the medical examiner testified, if this bullet had merely been a "dud," it would have impacted nose first; instead, it was a "tumbling" bullet that had already

passed through something before striking the skull (T 533). The most reasonable inference is that Mayhew had "brought his hand up" to protect himself, "probably as a response" to a previous wound, 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 (T 529). 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. Ferrell's argument ignores the events leading up to the shooting. 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). None of the cases cited by Ferrell in his brief involves a victim who was abducted at gunpoint, taken to an isolated location and then killed. McKinney v. State, 579 So.2d 80 (Fla. 1991), is the only case he cites that remotely resembles this case, and this Court emphasized in McKinney that "the record is unclear on the exact sequence of events that led to [the victim's] death;" the victim very possibly was murdered before being transported two blocks to an alley where the body was dumped. Here, Mayhew was not murdered in the parking lot of the apartments; he was forced at gunpoint to leave that parking lot and to drive to an isolated area several miles 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 frightened and very, very scared" (T 584). Mayhew had to have realized that if only a robbery was planned, Ferrell and Hartley 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 his "treacherous" friend Ferrell seated beside him and Hartley's gun to the back of his head, "Mayhew must have been seized by 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 (two of which -- prior violent felony and kidnapping -- Ferrell 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

FERRELL HAS NOT PRESERVED FOR APPEAL ANY ISSUE OF APPROPRIATENESS OF THE CCP INSTRUCTION DELIVERED TO THE JURY IN THIS CASE

Ferrell now contends that the CCP instruction in this should not have been delivered at all, because there was no evidence to support it, and also contends that the instruction as to the CCP aggravator was inadequate under this Court's decision in Jackson v. State, 648 So.2d 85, 89 (Fla. 1994). Ferrell has preserved neither contention for appeal. At trial, Ferrell's trial attorney not only did not object to the CCP instruction on either of the grounds that Ferrell belatedly raises here, he affirmatively "agreed" to both the jury instructions and to the verdict forms (T 1027). Therefore, this issue is procedurally barred. E.g., 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 too vague was procedurally barred); Windom v. State, 20 Fla. L. Weekly S200, 202 (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); Beltran-Lopez v. State, 626 So.2d 163, 164 (Fla. 1993) (same as to HAC).

Moreover, because there was credible, competent evidence to support the CCP aggravator, it was not error to have instructed the jury as to this aggravator. Hunter v. State, 20 Fla. L. Weekly S251, 254 (Fla. June 1, 1995). And even if any issue had been preserved concerning the vagueness of the CCP instruction, 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," 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). Also, e.g., Fennie v. State, 648 So.2d 95, 99 (Fla. 1994); Henderson v. Singletary, 617 So.2d 313, 315 (Fla. 1993).

ISSUE XI

THE TRIAL COURT DID NOT IMPERMISSIBLY DOUBLE THE KIDNAPPING AND PECUNIARY GAIN STATUTORY AGGRAVATORS

Ferrell argues here that because "the kidnapping was such an essential part of the robbery" in this case, 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, Ferrell 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 237), it was improper to consider pecuniary gain and kidnapping as two separate aggravators. Ferrell is defeated by his own argument.

First, he concedes that the language he relies upon 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 Ferrell 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. Ferrell 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, and, as well (assuming this Court agrees with the State's arguments as to Issues 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.

Finally, although Ferrell 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 non-triggerman defendants in cases similar to this one. Ferrell had previously been convicted of two violent

felonies (armed robbery in 1984 and riot in 1988), and was a major participant in this highly aggravated armed robbery/kidnapping/murder. Moreover, he was not merely "reckless[ly] indifferen[t] to human life," Tison v. Arizona, 481 U.S. 137, 151, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); he was one the planners of a crime in which murder was part of the plan. Hartley, the triggerman, has been sentenced to death. Death is an appropriate punishment for Ferrell also. Diaz v. State, 513 So.2d 1045, 1048 (Fla. 1987) (evidence unclear that Diaz was triggerman, but given his major participation in crime and his reckless indifference to human life, coupled with aggravating factors of prior capital felony conviction, kidnapping, pecuniary gain, and under sentence of imprisonment, death was proportionate); Engle v. State, 510 So.2d 881 (Fla. 1987) (life override upheld for nontriggerman directly involved in abduction and murder of victim); Cave v. State, 476 So.2d 180 (Fla. 1985) (death appropriate for nontriggerman who contemplated the use of lethal force and participated in and facilitated kidnapping/robbery/murder); State v. White, 470 So.2d 1377 (Fla. 1985) (death appropriate for nontriggerman who realized that lethal force was going to be used in carrying out robbery); Copeland v. State, 457 So.2d 1012 (Fla. 1984) (death penalty upheld for nontriggerman in robbery/kidnapping/murder case).

ISSUE XII

THE TRIAL COURT DID NOT ERR IN DENYING FERRELL'S REQUEST FOR SPECIAL VERDICT

As Ferrell notes in his Statement of the Case (Appellant's brief at p. 4), his trial attorney filed a motion for a special verdict on the first-degree murder charge, in which the jury would denote whether premeditated or felony murder was found, in order "to determine the aggravating circumstances at the time of sentencing" (R 98). Ferrell's trial attorney conceded that such motions "have been denied uniformly across the board," and that he had filed it only because he felt like "the Supreme Court" wanted him to raise such issues "whether they've ruled on them or not" (T 172). No other argument or citation of authority was offered in support of this motion (T 172), and the trial court denied it (T 174).

Given the concession quoted above, coupled with the lack of objection to the jury instructions at the guilt phase of the trial (T 957), and the lack of any mention at trial of "double jeopardy" or "collateral estoppel," this issue has not been preserved for appeal. Bertolotti v. State, 565 So.2d 1343, 1345 (Fla. 1990); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). But in any event, this motion was properly denied, as Ferrell's own case authority shows. Ferrell was not entitled to written findings from the jury from which it can be determined which aggravating circumstances have been found. Such findings are made by the judge. Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989). Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), involves a situation in which the trial

judge had found the evidence insufficient to go to the jury on a felony murder theory, in response to a motion for judgment of acquittal, and is obviously inapplicable here. Ferrell's motion for judgment of acquittal was denied, and the jury certainly did not acquit him of any offense.

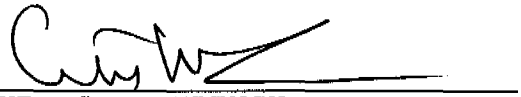
This procedurally-barred issue is without merit.

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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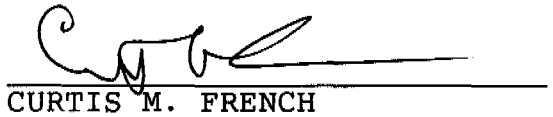
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Teresa J. Sopp, Esq., 7077 Bonnevcal Road, Suite 200, Jacksonville, FL., 32216-6062, this 25th day of September, 1995.



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