IN THE SUPREME COURT OF FLORIDA.

ANDRE FISHER,

Appellant,

v.

CASE NO. 86,~~656~~ 665

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Fisher's Statement of the Case generally is acceptable. The State would note that Fisher's co-defendant, Derek Cummings, also was convicted and sentenced to death. His appeal is pending in this Court (Case No. 86,413) and presently is scheduled to be argued orally on June 2, 1997.

STATEMENT OF THE FACTS

Guilt phase: The State generally accepts Fisher's statement of the facts as to the guilt phase subject to the following amplification and clarification:

Between 7:30 and 8 p.m. the evening of the murder, Fisher started a fight with Karlon Johnson, otherwise known as Dap (VIII 709, 711-12, 724-26). During the fight, Fisher was struck in the head with a beer bottle (VIII 712). Jason Robinson broke up the fight and, with difficulty, persuaded Fisher to leave (VIII 713, 726).

At 8 p.m., Fisher's nephew, Derrick Cummings, was paged on his pager while he was at Richard Motes' apartment with Michael Gardner (VIII 769; IX 871). Cummings returned the call and learned that Fisher had 'got jumped on" by Dap (VIII 770-71; IX 872). Cummings' first reaction was to get his gun and go looking for Dap (VIII 770-71). Gardner drove Cummings to his apartment to get the gun, and

then to the place where the confrontation had taken place. Jason Robinson was still there. Cummings asked him where Dap was (VIII 771-72, 727-30). Robinson observed that Cummings had an Uzi in his lap (VIII 730). Gardner drove Cummings to Fisher's house, where Gardner left him (VIII 772).

At nine p.m., Robinson observed a Honda owned by Marion King proceeding towards the residence Dap shared with his sister and her family (VIII 684, 718, 731-32).[1] Robinson identified Fisher sitting in the front passenger seat. "[S]eeing what they [were] going to do," Robinson threw his hands up. The people in the Honda ignored Robinson and 'pulled on down the street" toward the victim's house (VIII 732). Unknown to Fisher and the others, Dap had already left (VIII 713). Dap's car, however (which he described as "distinguishable" by its rims and tires and color, VIII 719), was in the carport (VIII 638). Dap's brother-in-law, Shelton Lucas, Sr., was sitting in back of the carport, next to the kitchen door, just finishing a cigarette (VIII 639-40, 653). Shelton Lucas, Sr., is approximately the same height and weight as

[1] Dap testified that he stayed at his sister's house "three or four or five times a week" (VIII 718). Jason Robinson testified that Dap lived there (VIII 735-36).

Dap, and was wearing a white T-shirt and blue jeans, just like Dap had been wearing earlier that evening (VIII 638-39).

The Lucas house is located at 5206 Washington Estates Drive, on the corner of Washington Estates Drive and Dostie Drive (VIII 650-51). The carport faces south to Dostie Drive. The west wall of the carport is wood and has a door to a utility room; the north wall is brick and has a door to the kitchen (as is clear from the photographs, this door is on the far left side of the brick wall, immediately adjacent to the wooden west utility-room wall); the east side of the carport has a low wall but mostly is open. The kitchen door faces toward Dostie, but from inside the kitchen one can look through the screened window of the kitchen door out the east side of the carport to see Washington Estates Drive (VIII 651, 791-92; IX 833-34). As the photographs in evidence show, from Dostie Drive one can see through the kitchen door and into the living room (State's Exhibits 1-8).

Fisher and his accomplices approached the Lucas residence from Washington Estates Drive, started to turn left, but then made a wide right turn onto Dostie (VIII 735). Just as the elder Lucas entered the house, the occupants of the Honda fired at least 35 nine-millimeter rounds from at least three separate guns at the

doorway which Lucas had just entered (IX 832, 979, 982, 989; X 1010-12).[2]

The lights were on in the kitchen and in the living room (VIII 654-55). From the kitchen door to the living room was "about four" steps (VIII 665). As he walked into the living room, Shelton Lucas, Sr., heard a "popping sound" (VIII 640, 660). He thought it was "firecrackers," but as the popping sounds continued, his wife woke up and yelled, "He's hit" (VIII 640).

Charlsie Lucas, the victim's mother (and Dap's sister) testified that she was asleep on the living-room couch with the victim in her arms (VIII 680-81). She was awakened by the sound of "firecrackers being thrown into the house," As she got up, "shots started entering the home" (VIII 681). A bullet passed by her face so closely that she could 'feel the heat from it" (VIII 681-82). Immediately afterwards, she realized that her son had been hit. Shelton Lucas, Jr., was five years old (VIII 682).

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[2] There were 35 expended cartridges in the street in front of the Lucas home. If a gun had been fired from inside the car, ejected cartridge casings would have been "bouncing around inside the car," and could have landed there instead of in the street (X 1012). Furthermore, although each of the 35 expended cartridges was identified with one of three guns fired at the house, there was one jacket fragment which could not be identified as coming from any of these three guns (X 1011).

A neighbor across the street testified that the shooting seemed to last "five minutes," and then she heard a car speed away (VIII 684-85).

Investigators found marks from eleven bullets in the brick wall around the kitchen door (IX 850). They found five bullet strikes in the wood flashing at the top of the brick wall, plus another six that hit the door frame or went through the door (IX 851-52). The car sitting in the carport had been hit five to six times (IX 837). There were three bullet holes in the wooden utility-room wall on the west side of the carport, but no hits to the east wall or to the ceiling (IX 843, 846, 859, 864). (As State's Exhibit 18 shows, two of the three bullet holes in the utility-room wall were adjacent to the kitchen door,) There were 35 spent shell casings in the street in front of the carport, fired from at least three different nine millimeter guns (IX 832, 841, 992-94, 997-98; X 1010).

Following the shooting, Derek Cummings and Andre Fisher went to the home of Margie Manley, who was Cummings' girlfriend (IX 908-09). Fisher, she noticed, had a "big knot . . . and some blood on his head," for which he gave inconsistent explanations (IX 909-10). Fisher made a point of watching the news when it came on at 11 p.m. One of the news stories involved the shooting. Fisher was

surprised to learned that a boy had been shot (IX 911). Both Fisher and Cummings spent the night--Cummings in the bedroom with Manley, Fisher in the living room (IX 911-12). The next evening, Fisher telephoned Manley and informed her that he had left a note for her (IX 913). In the note, Fisher asked Manley to tell the police that he was her girlfriend and that he was with her at the time the murder happened (IX 913-14, 929-29, 970-71).[3] Manley testified that, in fact, she was not Fisher's girlfriend and Fisher was not with her at the time of the murder (IX 914-15).

The bullet that struck Shelton Lucas, Jr., in the head is consistent with having been fired from the Glock pistol found in Manley's apartment with Cummings' fingerprint on it, and is inconsistent with having been fired from either of the other two guns known to have been fired at the scene of the murder (IX 925-26, 952-54, X 1008-10).

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[3] The note read: "Margie, this note is from Andre. If anything jumps down, question or anything, you are my girlfriend. You came and pick me up from my mother's house about 7:00 P.M. last night because I told I had just got robbed, so you came to get me and we went from there to home. We were arguing cause you wanted me to go to the hospital, but I refused. Other than that, we stayed home all night." (IX 973).

Penalty phase: Fisher's penalty-phase statement of the facts generally is acceptable, but the State would note these additional facts and circumstances:

Fisher's mother testified that she had brought up all her children in the church, and had brought them up the right way (XIV 1531). Andre Fisher, however, had gotten involved with the 'wrong crowd" starting at age ten (XIV 1532).

Fisher's grandmother testified that she thought that Andre's prior robbery conviction was based on a "prank." Someone had taken Andre's money, and instead of reporting it, he just took it back (XIV 1537). She was not aware that Andre had taken jewelry and a car (XIV 1541).[4] She testified that the "first laws of nature is self-preservation," and that, although she felt "for the little boy that lost his life, . . . his uncle started it all," and therefore the uncle (Dap) should lose his life, too (XIV 1538).

Ella Greene, a friend of the family, testified that she had never known Andre Fisher to be disrespectful or violent (XIV 1547). She had no knowledge of whether the grandmother was correct that Fisher had began getting into trouble at a young age when he

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[4] According to the PSI, Fisher took four gold rings, two herringbone gold chains, one class ring and a 1988 Hyundai Excel. PSI at p. 6.

started running around with the wrong crowd. Nor--apparently--was she aware of Fisher's prior armed robbery conviction (XIV 1548-49).

Fisher's older sister testified that Andre was not violent, but, on cross-examination acknowledged that Andre had got into trouble at an early age by running with the wrong crowd and acknowledged that armed robbery was a crime of violence (XIV 1553).

The jury was given an "Enmund" instruction (Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), viz.:

> In order for you to return a recommendation of death, you must first determine that the defendant did kill, or attempt to kill, or did contemplate that lethal force would be used during the course of the murder, or **was a** major participant in the murder and the defendant's acts demonstrated a reckless disregard for human life.

(XIV 1605). The jury recommended a death sentence, by an eight to four vote (XIV 1614). The trial court found as fact in its sentencing order that "the defendant, Andre Fisher, did contemplate that lethal force would be used during the course of the mission to search and destroy 'Dap' and was, in addition, a major participant in that crime and that his acts demonstrated a reckless disregard of human life and that he did, with another, kill the victim." (II 298).

As noted in Fisher's statement of the facts, the trial court found four aggravating circumstances: defendant had a prior violent felony conviction, defendant knowingly created a great risk of death to many persons, murder was committed during a burglary, and murder was cold, calculated and premeditated (II 284-304).

SUMMARY OF THE ARGUMENT

There are four issues on appeal: (1) The evidence is sufficient to support the jury's conclusion that Fisher is guilty of premeditated murder. Although the most likely scenario is that Fisher himself was one of the shooters, even if he was not, the jury was authorized from the evidence to conclude that Fisher was a party to the crime of premeditated murder, and to reject any defense theory that he was merely an innocent bystander to a murder that was committed at his behest and for his benefit, and for which he concocted a false alibi. (2) (A) The evidence supports the trial court's CCP finding. After Fisher came out on the short end of a confrontation with Dap, he enlisted the assistance of his nephew Derek Cummings and two others, and went on a "search and destroy" mission to Dap's home, where Fisher spotted someone who looked like Dap sitting in the carport. They stopped the car, exited the vehicle, and fired 35 rounds of nine-millimeter gunfire at a doorway which Dap's brother-in-law had just entered. Fisher had over an hour to reflect on his actions, and to consider the consequences. Although the wrong person was murdered, this was a cold, calculated and premeditated killing. (B) The trial court was authorized to find that Fisher and the others knowingly created a great risk of death to many persons when he and two others fired 35

nine-millimeter rounds into a dwelling occupied by five persons, located in a residential area. Any error, however, is harmless because the trial court gave this aggravator only "slight" weight, and because there are three other strong aggravators to support Fisher's death sentence. (C) Because entry by instrument is sufficient to establish the element of entry where the instrument is actually used to commit the contemplated crime, the trial court properly found that the murder was committed during the commission of burglary. Although there seems to be no Florida precedent addressing specifically an entry by bullets, there is Florida precedent for finding entry by instrument, and the treatises indicate that a bullet can be such an instrument. (3) In this case, four aggravators were found, against no mitigation. Fisher's death sentence is not disproportionate to sentences imposed in similar cases. (4) There was no error in admitting victim impact testimony at the penalty phase describing the personal characteristics of the victim and the impact his death had on his family.

ARGUMENT

ISSUE I

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT FISHER'S CONVICTION FOR PREMEDITATED MURDER

It is the State's contention that the evidence is legally sufficient to support the jury's conclusion that Fisher and Cummings were engaged in a common criminal scheme to avenge Fisher's beating at the hands of Dap by searching him out and retaliating massively with a barrage of nine-millimeter gunfire aimed at the person they thought was Dap. "As such each was a principal to the death. . . . By actively operating together each was guilty of the acts of the other." Hall v. State, 403 So.2d 1319, 1320 (Fla. 1981). Even if Fisher himself did not fire a gun, he was a principle to the crime of murder, because an 'aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme." Hall v. State, 403 So.2d 1321, 1323 (Fla. 1981).

When reviewing a motion for judgment of acquittal:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. [Cit.] The state is not required to "rebut conclusively every possible variation"

> of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events.

State v. Law, 559 So.2d 187, 189 (Fla. 1989). Furthermore:

> If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury.

Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). Once the case is submitted to the jury, whether the State's evidence is sufficient 'to exclude all ***reasonable*** hypotheses of innocence is for the jury to determine," and this Court 'will not reverse a judgment based upon a verdict returned by a jury where there is substantial, competent evidence to support the jury verdict." Rose v. State, 425 So.2d 521, 523 (Fla. 1983). Accord, State, supra ('Once that threshold is met, it becomes the jury's duty to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.").

Fisher contends the evidence shows only his presence at the scene of the shooting. Notably, this is more than the evidence showed in Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978), which Fisher cites. Unlike the defendant in Chaudoin, Fisher indisputably was present at the scene of the shooting. But he was

more than just present. This whole incident occurred to avenge Fisher's defeat in an altercation with Dap. Fisher argues on appeal that being "hit on the head with a beer bottle hardly establishes a motive for a murder." Initial Brief of Appellant at 25. Fisher is confusing motive with justification. Fisher clearly was not legally justified in using deadly force to avenge being conked on the head with a beer bottle over an hour earlier, but just as clearly such act was the *motive* for Fisher's massive deadly retaliation. The evidence points to no other reasonable explanation for the attack on the house where Dap stayed.

> The elements of assistance of the perpetrator and intent may be proven by a combination of surrounding circumstances from which a jury can reasonably infer defendant's guilt. [Cits.]

> Mere presence at the scene, knowledge of the crime, and flight are insufficient to justify a conviction. [Cit.] Where the state presents additional evidence, however, which contradicts the defendant's theory of innocence, the trial court's decision to deny a motion of acquittal must be affirmed. [Cits.]

A.B.G. v. State, 586 So.2d 445, 447 (Fla. 1st DCA 1991).

The evidence shows that Fisher did not willingly terminate his initial confrontation with Dap; he had to be forced to leave. Shortly thereafter, Fisher's nephew Derek Cummings was contacted on

his pager.[5] When Cummings heard about the attack, he got a gun and attempted to ascertain Dap's whereabouts. Then he went to Fisher's house and, very soon afterwards, Jason Robinson saw a car with four people in it--including Fisher in the front passenger seat--heading up the street toward's Dap's house. (Robinson, by the way, knew exactly what they were up to, and tried to stop them.) Sitting in the darkened carport of the Lucas home, next to Dap's car, was a person of the same height and build as Dap, dressed in a white T-shirt and blue jeans like Dap had been dressed earlier that evening (as Fisher knew, and could see from his vantage point in the passenger seat). At least three people in the Honda fired a total of 35 nine-millimeter rounds at the kitchen doorway just seconds after this person entered the house. Following the shooting, Fisher went with Cummings to the latter's girlfriend's house, where he spent the night. The next day, Fisher attempted to concoct a false alibi for his whereabouts the previous evening.

Although the most likely scenario is that Fisher himself was one of the three shooters, even if he was not, the evidence, in toto, is sufficient to contradict the defense theory that Fisher

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[5] Although Fisher argues on appeal that it "cannot be assumed" that he was the one who paged Cummings, the State would note that trial counsel conceded during closing argument that Fisher had called Cummings about the incident (XI 1240).

merely was present at the scene of a crime to which he was not a party.[6] As the State noted at trial, Fisher had the motive. He was the one who started a fight with Dap, he was the one with the knot on his head as a result, he was the one who had to be forced to leave the scene of the original altercation, and he was the one who had the most reason to seek vengeance. Fisher was the instigator of the murder. Without Fisher, Cummings would never have gotten involved and there would have been no murder. Furthermore, Fisher not only accompanied Cummings to the murder scene with two others in a car whose occupants collectively were armed to the teeth, he remained in Cummings' company for' the remainder of the night and attempted the following day to concoct a false alibi. Fisher's attempt to establish a false alibi is direct evidence that he was guilty of murder. Brown v. State, 391 So.2d 729, 730 (Fla. 3d DCA 1980)(fact that defendant lied about his whereabouts on the day of the crime was evidence of guilt);

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[6] The most reasonable scenario is that Fisher was one of the shooters. At least three of the four people in the Honda fired nine millimeter weapons, most likely from outside the car (because otherwise at least one of the shooters would have had to shoot through the other two and also because expended shells would have been flying throughout the inside of the car). If one of the four was not a shooter, it most likely was the driver, who would have remained inside the car during the shooting to prepare for a quick getaway. Fisher, the evidence clearly shows, was not the driver.

State v. Frazier, 407 So.2d 1087, 1089 (Fla. 3d DCA 1982) (false exculpatory statement affirmatively shows consciousness of guilt and unlawful intent); Smith v. State, 424 So.2d 726, 730 (Fla. 1983) (fact that defendant had lied to police to avoid detection was relevant indication of guilt); Hartley v. State, 686 So.2d 1316, 1320 (Fla. 1996) (after-the-fact evidence of desire to evade prosecution is evidence of consciousness of guilt).

Contrary to Fisher's contention, finding him guilty does not require 'an impermissible pyramiding of inferences." Initial Brief of Appellant at 21. Instead, the State has presented "a chain of substantial, credible evidence to support appellant's conviction of first degree murder." Fratello v. State, 496 So.2d 903, 908 (Fla. 4th DCA 1986).[7] As in Fratello, the jury here could properly have

[7] A pyramid of inferences would occur only if each of the succession of inferences rested entirely on the preceding one being accepted, so that the ultimate inference fails if any one of the subsidiary inferences fails. A chain of independent circumstances, on the other hand, may support an ultimate conclusion even if one or more subsidiary circumstances are rejected outright; furthermore, even weakly-established circumstances can contribute some weight in support of the ultimate conclusion. Guilt ultimately is established beyond a reasonable doubt by the *combined* weight of all the facts and circumstances of the case. The more the circumstances, the more strongly the ultimate conclusion is supported. The State makes these common-sense observations only because the appellant seems almost to be implying that the State's case would be stronger if it relied upon fewer circumstances, when in fact the contrary is true.

concluded that Fisher was a participant in the crime, and that any theory that he was an innocent bystander was "not reasonable." The jury was authorized to conclude that any defense theory that Fisher did not aid, abet, counsel, or otherwise procure this murder (8777.011, Fla. Stat.) was not reasonable under the evidence.

Fisher argues further, however, that, even if the evidence establishes that he participated in the crime, the evidence 'fell far short of establishing premeditated murder." Initial Brief of Appellant at 23. Fisher acknowledges that premeditation may be inferred from such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, and the manner in which the homicide was committed. Fisher further acknowledges that evidence of planning, motive, and the manner of killing are all relevant to premeditation. Fisher insists, however, that the evidence does not demonstrate a premeditated intent to kill. The state does not agree.

First of all, the evidence shows "prior conduct of the victim known to have angered the defendant," which is precisely the kind of fact from which a motive to kill may be inferred according to the very authority cited in Fisher's brief. W. R. LaFave and A. W. Scott, 2 Substantive Criminal Law, § 7.7 at 238 (1986), quoted in

Initial Brief of Appellant at 24. Secondly, the evidence shows that ***as the result of this prior conduct,*** Cummings and other members of the shooting party armed themselves and set out after Dap. This is precisely the kind of evidence which, according to LaFave and Scott, supra, illustrates planning activity directed toward a killing purpose. Thirdly, the manner of killing shows premeditation. Although this **was** not **a** close-range, precision attack, the evidence does demonstrate a preconceived intent to kill. Upon arrival at Dap's residence, Fisher and the others did not wait to see if the person they thought was Dap would attack them. The person in the carport, in fact, made absolutely no threatening moves, and did nothing whatever to provoke the occupants of the Honda. Instead, the occupants of the Honda simply exited the vehicle and began blasting away **at** the **doorway** into which Shelton Lucas, Sr., had just entered, firing *35* rounds in all, of which the majority struck in, through or immediately around the door.[8] As the photographs in evidence show, this person would

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[8] Fisher contends the State conceded at trial that the shooters may simply **have** been shooting at the car. The prosecutor did say--sarcastically--that "I guess anything is possible," but it is obvious that the State did not concede that such purpose **was** a **reasonable** possibility; in **fact,** Mr. de la Rionda's argument was a clear rejection of any theory that the defendants were shooting **at** the car: the car was hit only five times by 'fragments" and all of the car windows were intact; most of the shots had hit in and

have been visible through the doorway as he proceeded from the kitchen to the living room. A rational trier of fact readily could find from the evidence that the shooters intended to kill, not merely to "intimidate, harass, threaten, or warn him to leave them alone," as appellant argues in his brief (p. 28).[9]

The Constitutional test for sufficiency of the evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This test 'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to ***draw reasonable inferences from basic facts to ultimate facts."*** Ibid. (Emphasis supplied.)

On appeal, only the legal sufficiency, not the weight, of the evidence is in issue. Tibbs v. State, 397 So.2d 1120, 1123 (Fla.

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around the kitchen door through which Lucas had entered the house (XI 1219-23).

[9] Fisher contends that shooting into a dwelling is no more than second degree murder. However, none of the cases he cites in his brief for this proposition involve defendants who fired massive numbers of rounds at a doorway into which their target had just entered, as is the case here.

1981), aff'd, 457 U.S. 31, 102 S.Ct. 221, 72 L.Ed.2d 652 (1982). This Court has held that a judgement of conviction comes to this Court with a presumption of correctness, and a defendant's claim of insufficiency will not prevail where there is substantial, competent evidence to support the verdict and judgment. Spinkellink v. State, 313 So.2d 666, 671 (Fla. 1975). Moreover, this Court has specifically applied the Jackson v. Virginia standard in Melendez v. State, 498 So.2d 1258 (Fla. 1986). So have the District Courts of Appeal. Kaufman v St-at-e, 429 So.2d 841 (Fla. 3d DCA 1983); D.M. v. State, 394 So.2d 520 (Fla. 3d DCA 1981). As in these cases, Cummings' jury weighed the evidence, resolved any conflicts in the testimony, and drew reasonable inferences from the basic facts to the ultimate facts.

The evidence supports Fisher's conviction for premeditated murder.

ISSUE II

THE EVIDENCE SUPPORTS THE AGGRAVATING CIRCUMSTANCES OF (A) THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER; (B) FISHER KNOWINGLY CREATED A GREAT RISK OF HARM TO MANY PERSONS; AND (C) THE HOMICIDE WAS COMMITTED DURING A BURGLARY

A. The trial court did not err by finding this murder to have been cold, calculated and premeditated.

Fisher argues that this murder was not cold, calculated and premeditated. The State disagrees. The trial court accurately described this crime as a 'search and destroy operation" (11 292-93). Fisher had over an hour to reflect on his actions and their attendant consequences. He had time to call his uncle, to learn where Dap lived, to enlist well-armed allies, and to drive to Dap's residence to kill him. Fisher did not act out of emotional frenzy, panic, or a fit of rage. There was no evidence of any loss of emotional control; Fisher simply made the cold-blooded decision to murder the person who had the temerity to defend himself from Fisher's attack by hitting him on the head with a beer bottle. Walls v. State, 641 So.2d 381 (Fla. 1994). The murder clearly was planned sufficiently in advance to afford Fisher 'ample time . . . to reflect on his actions and their attendant consequences." Jackson v. State, 522 So.2d 802, 810 (Fla. 1988); Foster v. State,

654 So.2d 112, 115 (Fla. 1995). The evidence presents a compelling case of cold, calculated premeditation. The fact that Fisher and his accomplices fired at least 35 shots at the doorway Lucas had just entered is consistent with an intent to kill, and inconsistent with an intent merely to scare or harass. As the trial court stated, 'The premeditation was focused and the manner of execution by the firing of nearly three dozen shots cold and certainly calculated to kill" (II 292).

The fact that the Shelton Lucas, Jr., was not the actual subject of the planning 'does not preclude a finding of cold, calculated premeditation." Sweet v. State, 624 So.2d 1138, 1142 (Fla. 1993). The heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim. 'It is the manner of the killing, not the target, which is the focus of this aggravator." Ibid. (citing Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986)).

As for the factor of any pretense of moral or legal justification, there is no evidence that Dap planned to retaliate against Fisher. But even if he did, Fisher had no pretense of justification for participating in an armed raid of Dap's home or for firing 35 shots into that home at someone who offered no resistance whatever. Ferrell v. State, 21 Fla. L. Weekly S388

(Fla. September 19, 1996) (CCP aggravator upheld where evidence established that Ferrell, although not the triggerman, participated with Hartley in the murder of the victim to prevent him from retaliating for a previous robbery committed against him by the defendants).

The trial court properly found that this murder was cold, calculated and premeditated.

B. The evidence establishes that Fisher and his accomplices knowingly created a great risk of death to many persons when he and others fired 35 rounds into an occupied dwelling.

Fisher and his accomplices fired 35 times into the kitchen-door area of a well-lit, occupied dwelling in a residential neighborhood, at 9 p.m. on Tuesday night--a time when (as the trial court noted in its sentencing order) families typically are at home watching television. There were five persons in the house. The trial court found that the "time, location, neighborhood and the outward appearance of the home coupled with the firing of at least 35 shots from at least three semi-automatic weapons directly toward and into the home which was in a residential subdivision" was sufficient to demonstrate that Fisher knowingly had created a great risk of death to many persons (II 291).

This case is more like Welty v. State, 402 So.2d 1159 (Fla. 1981), Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983), and Suarez v. State, 481 So.2d 1201 (Fla. 1985), than it is to the cases cited by Fisher. In Welty, this Court held that "six" people "can be classified as many persons." Id. at 1164. In Fitzpatrick, this Court upheld the great risk aggravator where the defendant got into a gun battle with two police officers in the presence of three hostages. In Suarez, the great risk aggravator was upheld where the defendant fired at three officers in the presence of three accomplices in the driveway of a migrant labor camp.

Fisher relies on Bello v. State, 547 So.2d 914, 917 (Fla. 1989), which holds that "three people simply do not constitute 'many persons'" within the meaning of the great-risk-to-many-persons aggravator. In Bello, however, the defendant had been inside the house, in a bedroom, and had shot a mere five shots at drug officers attempting to enter that bedroom. In this case, by contrast, Cummings and his codefendants were not in a house, and they did not shoot only five times; they stood in the street in a residential area and fired thirty-five rounds from the street into a dwelling. Furthermore, there were five persons in the house, none of whom were Fisher's intended victim, and, even if two of them were in a bedroom, all of them were at great risk of being

fatally injured by one or more of the 35 nine-millimeter rounds fired into the house. Fisher's actions created an "immediate and present risk" to many persons. Although Dap ♦♋♦ the intended target, Fisher and his accomplices fired indiscriminately from the street towards a doorway of an occupied dwelling in a suburban residential area. The trial court was authorized to find that Fisher's actions presented a great risk of death not just to their intended target, but to many persons, including the innocent victim who was killed in the hail of gunfire. Johnson v. State, 22 Fla. L. Weekly S253, S256 (Fla. May 8, 1997); Johnson v. State, 22 Fla. L. Weekly S256, S259 (Fla. May 8, 1997).

Should this Court disagree, however, any error was harmless because the trial court only gave this aggravator "slight weight" (II 291), and because striking this aggravator would leave three aggravators and nothing in mitigation. Ibid.; Geralds v. State, 674 So.2d 96, 104-05 (Fla. 1996) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against one statutory mitigator and three nonstatutory mitigators); Pietri v. State, 644 So.2d 1347, 1354 (Fla. 1994) (striking CCP left three aggravators and, even if trial court had found mitigation, there was no reasonable likelihood of a different sentence).

C. **The trial court properly found as a statutory aggravating circumstance that the murder of Shelton Lucas, Jr., was committed while the defendant was engaged in the commission of a burglary. Entry by instrument is sufficient to establish the element of entry where the instrument actually is used to commit the contemplated crime.**

The trial court found as an aggravating circumstance that 'The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit a burglary" (R 451-52). Fisher contends this finding is not supported by evidence because the only "entry" was by bullets. The State agrees that all of the shell casings were found in the street and that most probably none of the shooters were ever physically on Lucas property. The State contends that where the defendant fires a gun into a home, intending to kill, he has committed the offense of burglary. §810.02, Fla. Stat. (1989).

Although the definition of the crime of burglary has been refined and expanded by statute in recent years, see Baker v. State, 636 So.2d 1342 (Fla. 1994), the "entry" element of burglary has been neither qualified nor specially limited by statute. § 810.011 Fla. Stat. (1989). It has long been held in Florida that entry may be accomplished by "an instrument instead of the body," so long as the entry by instrument is not merely for the purpose of

gaining entry but actually to commit the contemplated offense inside the structure. Foster v. State, 220 So.2d 406, 407 (Fla. 3d DCA 1969) (quoting *Miller on Criminal Law).* Accord, *S t a t* Spearman, 366 So.2d 775, 776 (Fla. 2d DCA 1979) ("It is well established that the unqualified use of the word 'enter' in a burglary statute does not confine its applicability to intrusion of the whole body but includes insertion of any part of the body or of an instrument designed to effect the contemplated crime."); Baker v. State, 622 So.2d 1333, 1335 (Fla. 1st DCA 1993) (entry by instrument sufficient where the instrument is "actually used to commit the contemplated crime") (affirmed as to definition of curtilage in 636 So.2d 1342, supra).

The State contends that a burglary was committed when Fisher and/or others fired into the Lucas dwelling intending to kill the person they thought had just entered the home; the entry by instrument (here, a bullet) was actually used to commit the contemplated crime (here, a murder). Fisher has two bases for disagreeing. First, he contends that the State failed to prove the intent to kill. If this contention is correct, then the burglary aggravator does not matter; Fisher's premeditated murder conviction cannot stand. Because the State has addressed the sufficiency of the evidence to support a finding of premeditation in its argument

at to Issue I, the State will not further address this question here except to say that intent to kill was established beyond a reasonable doubt. Fisher's second basis for disagreeing that a burglary by instrument was committed is his contention that a bullet fired from a gun does not qualify as an instrument of entry. Although it is well settled under Florida law that entry may be accomplished by instrument, there apparently is no Florida case directly holding that a bullet qualifies as an instrument of entry. However, the question of whether "the crime of burglary encompasses those situations in which a person, without making any physical intrusion, causes a bullet or other tangible object to intrude into another's structure with the intent that the object accomplish a criminal purpose," was addressed in the Oregon case of State v. Williams, 873 P.2d 471, 473 (Or. App. 1994) (review denied 877 P.2d 1203). The Oregon Court of Appeals answered this issue in the affirmative:

> At common law, the term "enter," when used in reference to the crime of burglary, had an established meaning. Under the common law definition of burglary, no "entry" occurs when an instrument is used solely to facilitate a subsequent entry and not to achieve a criminal purpose inside the structure. 2 East, *Pleas of the Crown 484, 490 (1803); 3 Wharton's Criminal Law § 333* (14th Edition 1980 and Supp 1993); 2 LaFave

and Scott, *Substantive Criminal Law § 8.13* (1986 and Supp 1994). Thus,

"there is no entry when a stick, being used by the defendant merely to break a window, happens to pass through the opening; when, after breaking the glass of a door or window, he pokes a stick inside for the purpose of unlatching the door; when the defendant throws a boulder at a window, and it smashes the window and lands on the inside, it having been thrown merely for the purpose of making an opening; or when the defendant, while standing outside, fires a bullet which smashes the lock of a door and lands inside, the gun having been discharged merely for the purpose of breaking the lock." *3 Wharton's Criminal Law, supra, § 333.*

However, an "entry does occur when an instrument intrudes into the structure for the purpose of consummating a criminal intent. See 2 East, *Pleas of the Crown, supra, § 333;* 2 LaFave & Scott, *supra, Substantive Criminal Law* § 8.13. Thus,

"there is an entry when the defendant, after breaking a window, pokes a stick inside for the purpose of impaling and stealing a fur coat; when, after breaking a window, the defendant pushes the barrel of a gun through the opening for the purpose of shooting and killing the occupant; or *when the defendant, while standing outside, fires a bullet which pierces a window and lands inside, the gun having been discharged for the purpose of killing the occupant." 3 Wharton's Criminal Law, supra, § 333.* (Emphasis supplied.)

Defendant has not cited, and we have been unable to locate, any source that remotely suggests a legislative intent to deviate from the common law meaning of the term "entry."

> We conclude **that the term 'entry," as used in** the burglary statutes, is utilized in its common law sense. . . .
>
> . . . Because defendant fired bullets into Hall's house for the immediate purpose of committing the offense of tampering with a witness, he thereby made an "entry" into the house under [Oregon law.]

The State would contend that the reasoning of the Oregon Court of Appeals is sound and should be adopted by this Court. See also People v. Tragni, Sup., 449 N.Y.S.2d 923 (1982) (by providing no definition of "entry," drafters of burglary statute are presumed to have adopted common-law and common sense definitions of instrumental entry; example of entry by instrument would include "the splintering of a door with a bullet intended to kill or to injure someone inside"); People v. Osegueda, 163 Cal.App.3d Supp. 25, 210 Cal.Rptr. 182 (Cal.Super. 1984) (burglary by instrument occurs even where instrument only accomplishes entry and not the ultimate criminal purpose). Burglary by instrument is a well-settled part of Florida law, Baker v. State, Foster v. State, and State v. Spearman, supra, and there is no reason to exclude a bullet fired from a gun as an instrument which may be used to commit burglary.[10]

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[10] The State acknowledges the rule of strict construction of criminal statutes, but Fisher's reasoning on this point would allow

In this case, the trial court did not instruct the jury on felony murder at the guilt phase of the trial. Only after the jury, by finding Fisher guilty of premeditated murder, determined beyond a reasonable doubt that he and/or his accomplices had shot into the Lucas home with the intent to kill, **was** the burglary issue presented to the jury at the penalty phase.

Shelton Lucas, Jr., was asleep on the couch in the living room of his own home when a bullet entered his home and struck him in the head. This event was just as great an intrusion into the sanctity of the home as if Fisher and the others had first smashed the door open and then fired. The circumstances of this case amply justify the finding of the burglary aggravator.

ISSUE III

FISHER'S DEATH SENTENCE IS NEITHER EXCESSIVE NOR DISPROPORTIONATE TO PENALTIES IMPOSED IN SIMILAR CASES, CONSIDERING BOTH THE CRIME AND THE DEFENDANT

Citing various single-aggravator cases, Fisher argues that his death sentence is disproportionate. This, however, is not a

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prosecution for burglary by instrument only as to such instruments as have been specifically approved in some previous case. The State would contend that burglary by instrument may reasonably be construed to include burglary by ***any*** instrument, and that such construction is not ambiguous.

single-aggravator case. The trial court found four aggravators: (1) Fisher previously had been convicted of armed robbery (for which he received a six-year sentence); (2) Fisher knowingly created a great risk of death to many persons; (3) the murder was committed while Fisher was engaged, or was an accomplice, in the commission of a burglary; (4) the murder was cold, calculated and premeditated. Fisher does not contest the prior violent felony aggravator, and the other three are supported by the evidence, for reasons discussed in argument as to Issue II.

The single-aggravator cases cited by Fisher are not similar to Fisher's case, in which multiple aggravators were found. Furthermore, the one aggravator which Fisher does not contest is the prior violent felony aggravator. This Court has affirmed numerous death sentences where the only aggravator was the prior violent felony aggravator, as the cases cited by Fisher in his brief demonstrate. Furthermore, this Court has affirmed death sentences in cases in which the only aggravator in addition to the prior violent felony was during the course of a felony. E.g., Hamblen v. State, 527 So.2d 800 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987); Jackson v. State, 502 So.2d 409 (Fla. 1986).

In this case, multiple aggravators were found, against no mitigation. Fisher does not even contend that any statutory

mitigation should have been found, and, although acknowledging that trial counsel did not propose any specific nonstatutory mitigation, argues that there was evidence that Fisher "was a good son, grandson, and brother," which can be mitigating, However, this Court has held that deciding whether family history establishes mitigating circumstances is within the trial court's discretion. Sochor v. State, 619 So.,2d 285, 293 (Fla. 1993). See also Zeigler v. State, 580 So.2d 127, 130 (Fla. 1991) (not error to reject mitigation where defendant's character was "no more good or compassionate than society expects of the average individual"). Furthermore, Fisher's own defense mitigation witnesses acknowledged that he had begun running around with the "wrong crowd" at a young age, and the evidence clearly shows that this 'good son" committed an armed robbery at age 18. The trial court did not err in rejecting nonstatutory mitigation. Bonifav v. State, 680 So.2d 413, 416 (Fla. 1996)(the decision as to whether a mitigating circumstance has been established, and the weight to be given to it if it is established, are matters within the trial court's discretion). Furthermore, Fisher is not mentally retarded, has no mental disorders, and neither drugs nor alcohol are involved in this crime. Even if the trial judge erred in failing to find that Fisher was a good son, grandson and brother in mitigation, such

mitigation would be minimal considered against the aggravating circumstances established in this case.

Fisher also contends that his individual culpability is insufficient to satisfy Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), because the evidence was insufficient to show that Fisher "took life, attempted to take life, or intended to take life." Fisher, however, was convicted of premeditated murder. Assuming this Court agrees with the State's argument as to Issue I, then there is no Enmund issue. Furthermore, as noted in the statement of the case, the trial court delivered an "Enmund" instruction to the jury at the penalty phase, specifically instructing the jury that it could not recommend death unless it first determined "that the defendant did kill, or attempt to kill, or did contemplate that lethal force would be used during the course of the murder, or was a major participant in the murder and the defendant's acts demonstrated a reckless disregard for human life" (XIV 1605). Since the jury did recommend death, it must be assumed that the jury made the requisite finding. In addition to the jury's finding, the trial court also found specifically that "the defendant, Andre Fisher, did contemplate that lethal force would be used during the course of the mission to search and destroy 'Dap' and was, in addition, a major participant in that

crime and that his acts demonstrated a reckless disregard of human life and that he did, with another, kill the victim" (II 298).

Fisher also contends that his death sentence is disproportionate to the lesser sentence given to Marion King, pursuant to a plea bargain. This Court has stated that equally culpable defendants should be given equal sentences. Slater v. State, 316 So.2d 539 (Fla. 1975). However, "[p]rosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principle of proportionality." Garcia v. State, 492 So.2d 360, 368 (Fla. 1986). Moreover, the record in this case does not establish that King and Fisher were equally culpable, even if, as Fisher contends, King was one of the shooters. As noted in argument as to Issue I, Fisher was the instigator of this murder. Fisher had the motive. Fisher was the person on whose behalf vengeance was sought. Had he not started a fight with Dap and been injured in that fight, this murder would never have happened. Furthermore, Fisher presented no significant mitigation, and had a prior armed robbery conviction. There is no indication in this record that Marion King has a prior violent felony conviction, or that he would be unable to present significant mitigation. Thus, the record does not establish that King and Fisher were equally culpable, and the trial judge found

that they were not, Demps v. State, 395 So.2d 501, 506 (Fla. 1981). Fisher's death sentence is not disproportionate to the sentence received by co-defendant King.

This Court's proportionality review entails consideration not merely of the statutory aggravators and of any mitigators, but includes consideration of the "totality of circumstances in a case." Sinclair, supra at 1142 (emphasis in original) (quoting Tillman v. State, 591 So.2d 167 (Fla. 1991). One of the undisputed circumstances of this case is that the victim was only five years old. Although the age of the victim was not a statutory aggravating circumstance at the time of the trial--and was not presented as such by the State or considered as such by the sentencer-- nevertheless, under present law it is an aggravating circumstance that the murder victim was under the age of 12. §921.141(5)(1), Fla. Stat. (1996). The State would contend that this Court properly may consider the age of the victim as a valid aggravating factor in its proportionality review of this case, in accordance with its "responsibility to review the entire record in death penalty cases and the well-established appellate rule that all evidence and matters appearing in the record should be considered which support the trial court's decision." Echols v.

State, 484 So.2d 568, 576-77 (Fla. 1985).[11] Even if this Court is reluctant to consider the age of the victim independently, however, the State would contend that, at the very least, this Court may consider the age of the victim as a matter going to the weight properly to be assigned to the aggravators found by the trial court, Slawson v. State, 619 So.2d 255, 260 (Fla. 1993) (age of victim relevant to weight assigned to prior-violent-felony aggravator); Terry v. State, 668 So.2d 954 (Fla. 1996) (in conducting proportionality review, circumstances of aggravator relevant to weight; Florida's sentencing scheme not founded on "mere tabulation" of aggravating and mitigating factors, but relies on "weight of underlying facts"); Demps v. State, supra, 395 So.2d at 506 (nothing prohibits trial judge from taking into consideration the "quality" of the aggravating circumstances).

The death penalty was imposed properly for the cold, calculated and premeditated drive-by shooting of a five-year old

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[11] The State is not contending that the death penalty may be affirmed solely on the basis of an aggravator that was not presented at trial, see Cannady v. State, 620 So. 2d 165, 170-71 (Fla. 1993). The State is contending only that, since several valid aggravators legally support Fisher's death sentence, then, in connection with this Court's review of the proportionality of Fisher's death sentence, this Court may consider the totality of the circumstances in the case, including: (a) the victim was less than twelve years old, and (b) such fact will establish a statutory aggravating circumstance in any future similar cases.

child lying asleep on the couch in his own home. Geralds v. State, 674 So.2d 96 (Fla. 1996) (death sentence proportionate when two aggravators weighed against one statutory and three nonstatutory mitigators); Finney v. State, 660 So.2d 674 (Fla. 1995) (death sentence proportionate where there were three aggravators and five nonstatutory mitigators); Gamble v. State, 659 So.2d 242 (Fla. 1995) (death sentence proportionate where there were two aggravators, one statutory mitigator, and several nonstatutory mitigators); Bogle v. State, 655 So.2d 1103 (Fla. 1995) (death sentence proportionate where there were four aggravators, one statutory mitigator and several nonstatutory mitigators); Fennie v. State, 648 So.2d 95 (Fla. 1994) (death sentence proportionate where there were three valid aggravators and both statutory and nonstatutory mitigators); Bruno v. State, 574 So.2d 76 (Fla. 1991) (death sentence proportionate with three aggravators and no statutory mitigators).

ISSUE IV

VICTIM IMPACT EVIDENCE WAS ADMITTED PROPERLY AT THE PENALTY PHASE

At the penalty phase, the State introduced victim impact evidence consisting of the victim's mother and grandmother reading from prepared statements which were reviewed in advance by the

trial court. Fisher's complaints about the constitutionality of the admission of victim-impact evidence have been answered contrary to his contentions in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). See also Archer v. State, 673 So.2d 17, 21 (Fla. 1996) (rejecting contention that victim impact is impermissible nonstatutory aggravator).

The statements admitted in this case described the personal characteristics of the victim and the impact that his death had on his family (XIV 1523-26, 1527-29). This is precisely the kind of evidence contemplated by §921.141(7), Fla. Stat. (1993). Bonifay v. State, 680 So.2d 413, 419-20 (Fla. 1996) (impact to family members relevant under victim-impact statute). The scope of the victim impact testimony presented in this case is virtually identical to that specifically approved by this Court in Damren v. State, No. 86,003 (Fla. May 8, 1997).

The State contends that none of the victim impact testimony admitted in this case was objectionable; however, even if some portion of the evidence was allowed improperly, any error was harmless in light of the strong aggravation and minimal mitigation presented in this case.

CONCLUSION

WHEREFORE,. for all the foregoing reasons, the State respectfully asks this Court to affirm the judgment below in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nada M. Carey, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 20th day of May, 1997.

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