IN THE SUPREME COURT OF FLORIDA

MICHAEL SCOTT KEEN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

Case No. 88,802
L.T. Case No. 84-9474
Broward County

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellant, MICHAEL SCOTT KEEN, was the defendant in the trial court below and will be referred to herein as “appellant” or "defendant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as “appellee” or "the State."

The following symbols will be used:

IB = Appellant’s Initial Brief

R = The pleadings portion of the record on appeal

SR = Supplemental Record

TV = Transcript portion of the record on appeal by volume, followed by the appropriate page number and at times by the line number on the page, i.e. TV 20, 155/20 refers to volume 20, page 155, line 20.

PM = Volume of transcript titled Pretrial Motions

STATEMENT OF THE CASE AND FACTS

The State accepts appellant's Statement of the Case and Statement of the Facts to the extent that they represent an accurate non-argumentative recitation of the procedural history and facts of this case, subject to the additions, corrections and or modifications contained in the body of this brief.

SUMMARY OF ARGUMENT

POINT I

Detective Amabile's testimony that (1) he became involved in this case as a result of information from two insurance companies that this was a homicide; and (2) as a result of a conversation he had with Patrick Keen he pursued his investigation in this case is not inadmissible hearsay, because it was not offered to prove the matter asserted, is not accusatory as to appellant, does not contain actual information in the statements and merely presents a logical sequence of events.

POINT II

Appellant invited Ms. Genova to respond that the file she had was from the last trial, so appellant can not now complain of this issue. Appellant has further waived review of this issue, because he declined the trial court's offer of a curative instruction and did not object to the testimony until after the witness had been excused. Nonetheless, a mistrial was not warranted, because Ms. Genova made no mention of any conviction in the last trial, and the last trial could have easily been interpreted by the jury to mean a civil trial involving the insurance policies.

POINT III

The trial court did not abuse its discretion in not admitting

extrinsic evidence of a letter Michael Moran sent to Judge O'Brien in Michigan. The letter was written in 1987, long before this trial in 1995. After Mr. Moran wrote the letter but before this trial, Mr. Moran was sentenced to life without parole in Michigan by Judge O'Brien. The letter is hearsay, does not contradict Mr. Moran's testimony, does not contain a prior inconsistent statement and is not relevant to show Mr. Moran's motive for testifying in 1995.

POINT IV

Witness Ken Shapiro was sufficiently familiar with the way appellant prints the name of his brother, Patrick, to give his opinion whether a document contained such a printing. Mr. Shapiro testified that he had seen appellant print the name before, and it looked just like it did on the subject document. Mr. Shapiro was so familiar with the printing that he saw nuances in the way the P, the A, the T and the R were formed.

POINT V

The trial court properly allowed Deputy Mimoso to testify that in his lay opinion someone on the fly bridge of appellant's boat could hear the splash of scream if someone else fall off the boat, because his testimony was based on firsthand knowledge through his personal observations.

POINT VI

It was not fundamental error for the trial court to admit a taped conversation between appellant and Ken Shapiro. The alleged prejudicial portion was very non-specific, only consisted of a little more than one sentence and did not become a feature of the trial. Further, before waiving an objection to its admission, defense counsel wanted and got assurances that the tape was the one which had previously been redacted to meet with his approval.

POINT VII

There is no reasonable possibility that the jury could have been misled by the instruction on jurisdiction. It stated the law correctly and merely gave premeditation as an example of an element that must have occurred in Florida. This did not improperly highlight the State's theory of the case.

POINT VIII

The trial court correctly limited appellant from cross-examining Michael Moran about his expressed intent to invoke his fifth amendment privilege if called to testify. It is improper for either party to benefit from any inference that the jury may draw simply from a witness' assertion of this privilege. Further, during cross-examination appellant repeatedly elicited testimony from Mr. Moran that he did not want to testify

POINT IX

The State was not obligated to call attorney Bruce Randall before initiating interrogation with appellant in August of 1984. When appellant gave a statement to officers in December of 1981, although he was represented by Mr. Randall, Mr. Randall never said that he would be continually representing appellant and never demanded that all further communication with appellant go through him. Mr. Randall merely responded to Detective Scarbrough's inquiry of how he could reach appellant in the future by indicating that he (Randall) would likely know how to do so. When appellant gave this statement in 1981, he was not in custody. The statement took place in attorney Randall's office, and appellant was free to go, which he did. Even if he had been in custody, calling Mr. Randall before reinitiating interrogation would have been unnecessary, due to the break in custody between December, 1981 and August, 1984. The trial court did not abuse its discretion in denying appellant's motion to suppress for this and the other reasons argued by appellant.

POINT X

No evidence has ever been presented to show that the indictment in this matter was based on knowingly perjured grand jury testimony. In fact, the likelihood is very great that the

grand jury testimony is true and the subsequent recantation is false. Therefore, the trial court did not abuse its discretion in denying appellant's motion to dismiss.

POINT XI

Defense counsel failed to proffer the facts he wanted to elicit from Officers Amabile and Scheff on cross-examination. Appellant only stated that they had been disciplined for improper interrogation techniques in another homicide. This was an insufficient predicate to the admissibility of this testimony. Appellant suggest that the testimony was relevant to show that motive for lying, but there is nothing in the record to support this assertion. It is not reasonable that a prior minor infraction would motivate a police officer to perjure himself. Nonetheless, because the proper foundation was not established the trial court did not abuse its discretion in disallowing this cross-examination.

POINT XII

Whether Florida has jurisdiction to prosecute this case was settled by this Court in a prior appeal of this matter.

POINT XIII

Whether prosecutorial misconduct in a prior trial of this matter resulted in double jeopardy was settled by this Court in a prior appeal of this matter.

POINT XIV

This Court has repeatedly rejected such constitutional challenges to Florida's standard jury instruction on reasonable doubt.

POINT XV

The trial court properly overrode the jury's recommendation to a life sentence, because the jury considered the pecuniary gain, HAC and CCP aggravating circumstances but considered no statutory mitigating circumstances and only inconsequential non-statutory mitigating circumstances.

POINT XVI

Appellant argues that if a co-participant in a crime is a principal in the first degree, then unequal punishment amounts to disparate treatment in mitigation. This is not accurate. Being a principal is but one factor as is the level of participation in the crime. The trial court's findings in regard to aggravating and mitigating circumstances is supported in the record. The trial court did not improperly consider the split vote in reaching his decision to override the jury recommendation, he merely mentioned the split vote as commentary on the course of the proceedings. To the extent that the trial court considered the length of the jury's deliberations it was harmless, in light of the fact that the

sentencing order clearly demonstrates that the trial court made a thoughtful and careful analysis of the aggravating circumstances and the mitigating circumstances, as well as the standard under *Tedder*.

POINT XVII

Since the sentencing option of life without parole was not available when this crime was committed, the trial court was correct not to consider it.

POINT XVIII

This Court has repeatedly held that use of the electric chair in Florida is not cruel and unusual punishment.

POINT XIX

This Court has repeatedly rejected the arguments presented by appellant in support of his position that Florida's death penalty statute is unconstitutional.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTION TO ALLEGED HEARSAY TESTIMONY.

Detective Amabile testified that he became involved in this case because the office had received information from two insurance companies that they (the insurance companies) had received

information that this case was a homicide.[1] Detective Amabile also testified that as a result of reopening the case he spoke with Patrick Keen, and that as a result of this conversation he pursued his investigation in this case. Appellant argues that this is inadmissible hearsay. It should be noted that Detective Amabile went on to testify that this investigation led him to Ken Shapiro (TV XIII, 1327/9) and as a result of taking a statement from Ken Shapiro he prepared an arrest warrant for appellant (TV XIII, 1331/20).

An officer can testify to what he did as a result of information received from others, so long as he does not relate the actual information itself unless it otherwise meets some recognized exception to hearsay. *Collins v. State*, 65 So. 2d 61 (Fla. 1953). However, *Baird v. State*, 572 So. 2d 904, 906 (Fla. 1991) clarified that information received is not hearsay if offered for a purpose other than to prove the truth of the matter asserted, for example to present a logical sequence of events to the jury. The *Baird* opinion also indicates that when the information received is accusatory and the only purpose for its admission is to show a logical sequence of events leading to an arrest, then the need for

[1] Although not before the jury, Patrick Keen's grand jury testimony indicates that it was he who called the insurance companies (SR VIII, 221/12).

the evidence is slight and the likelihood of misuse is great. *Id*. at 908. The information received in *Baird* was accusatory. Agent Griffith testified that, "I had received information that he [Baird] was a major gambler and operating a major gambling operation in the Pensacola area." *Id*. at 905.

This is the rationale of each of the cases cited by appellant. For example, in *Wilding v. State*, 674 So. 2d 114 (Fla. 1996) the information received was also accusatory. The lead detective testified that his office received an anonymous tip accusing the defendant by name, among others, in connection with the murder. Although the detective never specifically repeated what the informant told him, the clear inference to be drawn from the testimony was that the informant had implicated the defendant in the murder and the information received was reliable because it had been verified by the police. *Id*. at 119. This Court recognized that the tip in *Wilding* was not as detailed as the information received in *Baird* but nonetheless held that where the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay.

The testimony of Detective Amabile was not hearsay. It neither related the actual information contained in any out-of-

court statement nor was offered to prove the matter asserted but only to show a logical sequence of events. Clearly, his testimony, that as a result of his conversation with Patrick Keen he pursued his investigation, does not give any details of this conversation. It also is not accusatory and could provide no basis for an inference that Patrick Keen furnished the police with evidence of appellant's guilt. This statement falls squarely under *Collins*, in that it only indicates what Detective Amabile did as a result of the information received.

His testimony, that he reopened the case when he received information from the insurance companies that this was a homicide, is also not accusatory. Nowhere did Detective Amabile indicate that the insurance companies implicated appellant in the homicide. Again, nothing in this testimony provides the inescapable inference that the insurance companies furnished the police with evidence of appellant's guilt. Appellant cites to *Pullen v. State*, 622 So. 2d 19 (Fla. 4th DCA 1993) as persuasive authority that no direct reference to appellant was necessary. While this may be true, the *Pullen* opinion is clearly very case (fact) specific and indicates that in other cases the same information may be admissible; therefore, *Pullen* does not state precedent for the instant issue. In order for *Pullen* to be in harmony with *Wilding* one must

conclude, however, that the hearsay statement in *Pullen*, when combined with the other facts adduced at trial, provided an inescapable inference that the non-testifying witness/declarant had furnished evidence of the defendant's guilt. Here, on the other hand, Detective Amabile merely testified that two insurance companies had called him and told him that they had information that this was a homicide. Nothing in that statement is accusatory or infers in any way that appellant committed the homicide.

A trial court has wide discretion concerning the admissibility of evidence, and a reviewing court should not disturb a trial court's evidentiary ruling unless a clear abuse of that discretion has been demonstrated. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *Jent v. State*, 408 So. 2d 1024 (Fla. 1981), *cert. denied*, 457 U.S. 1111 (1982). Discretion is abused where no reasonable person would take the view adopted by the trial court. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985). Certainly at the very least, reasonable persons could differ as to the propriety of the trial court's ruling; therefore, there was no abuse of discretion.

Even if error, however, admission of the above statements was harmless pursuant to Fla. Stat. § 59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). As Detective Amabile testified, the logical sequence of events led to

his taking a statement from Ken Shapiro. Ken Shapiro testified at trial that appellant pushed the victim into the ocean. Clearly, the jury believed the testimony of Ken Shapiro. Therefore, there is no reasonable possibility that the alleged error contributed to the conviction. Therefore, appellant's motion for mistrial was also properly denied, in that if error it was not so prejudicial as to vitiate the entire trial. *Duest v. State*, 462 So. 2d 446 (Fla. 1985).

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL.

On cross-examination, defense counsel asked Maddie Genova whether appellant had ever collected any benefits on the Prudential life insurance policy (TV XII, 1276/14). When Ms. Genova responded that she did not know, defense counsel told her that she had indicated that she had the entire file and that if she did she would know the answer to his question. Ms. Genova retorted that she did not have the complete up-to-date file but the file from the last trial.

A party may not invite error during the trial and then attempt to raise that error on appeal. *Terry v. State*, 668 So. 2d 954, 962 (Fla. 1996); *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990). Defense counsel's probing questions invited Ms. Genova's direct response that she had a file from the last trial. *Norton v. State*, 23 Fla. L. Weekly, S12 (Fla. Dec. 24, 1997)(although an unsolicited comment is not "invited" where it is unresponsive to the questions asked, where defense counsel merely receives a direct answer in response to his question, defense counsel invited the witness' response). Appellant may therefore not now complain on appeal of this error that he himself induced at trial.

Further, where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal. *Sullivan v. State*, 303 So. 2d 632, 635 (Fla. 1974). In this matter, the trial court repeatedly told defense counsel that he was prepared to give any curative instruction he desired, but defense counsel declined (TV XIII, 1312/18-1314/13).

Additionally, appellant has waived his right to argue this issue on appeal, since defense counsel did not object at the time the comment was made but waited until after redirect and the close of Ms. Genova's testimony, at which time he moved for a mistrial. *Norton v. State*, 23 Fla. L. Weekly, S12 (Fla. Dec. 24, 1997). In fact, appellant waited until Ms. Genova had been excused and left the courtroom.

Be that as it may, the trial court properly denied appellant's motion for mistrial. Appellant cites to cases which hold that a mistrial is appropriate when jurors are made aware of a prior conviction in the same cause. Although appellant admits that Ms. Genova only mentioned "his last trial" but not the resulting conviction, he argues that a mistrial is still required because the jurors would naturally speculate that there may have been a conviction at that last trial. However, appellant gives no legal

basis for this argument. In an appellate proceeding, the decision of the trial court has the presumption of correctness, and the burden is on appellant to demonstrate prejudicial error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1980). Appellant has failed in this burden.

Further, it is well settled that generalized references to an earlier trial that do not in fact or fairly suggest that the earlier trial resulted in a conviction do not prejudice the defendant so as to warrant a mistrial. *Cook v. State*, 632 So. 2d 86 (Fla. 3d DCA 1994); *See also Sims v. State*, 444 So. 2d 922, 924 (Fla.), *cert. denied*, 104 S.Ct. 415 (1983). Although in a penalty phase context, this Court stated that it is not uncommon for jurors to become aware that the case before them may have been previously tried as a result of references to prior testimony, but that there is no basis for a mistrial where there is no indication that the jurors found out what occurred at the previous trial. *Jennings v. State*, 512 So. 2d 169, 174 (Fla. 1987), *cert. denied*, 484 U.S. 1079 (1988). *See also Sireci v. State*, 587 So. 2d 450 (Fla. 191); *Robinson v. State*, 574 So. 2d 108 (Fla. 1991). In *Weber v. State*, 501, So. 2d 1379, 1382 (Fla. 3d DCA 1987), cited by appellant, the court noted that the prejudice that arises in cases like this is from the exposure of the jurors to the fact that the defendant was

convicted of the very offense for which he is on trial. In this matter, Ms. Genova said nothing that would suggest that the earlier trial resulted in a conviction. Further, as the trial court pointed out, Ms. Genova did not indicate that appellant's last trial was a criminal matter (TV XIII, 1311/2) and the Petition for Order of Presumption of Death filed by appellant was admitted into evidence (TV XII, 1286/14, 1287/7; TV XIII, 1311/6), so the jury could have just as likely concluded that the past trial was this or another civil matter.

A ruling on a motion for mistrial is within the sound discretion of the trial court, and such motions should be granted only when it is necessary to insure that the defendant receives a fair trial. *Gorby v. State*, 630 So. 2d 544 (Fla. 1993), *cert. den.*, 513 U.S. __, 130 L. Ed. 2d 48 (1994). The power to declare a mistrial and discharge a jury should be exercised with great caution and should only be done in cases of absolute necessity. *Salvatore v. State*, 366 So. 2d 745 (Fla. 1979). A mistrial is a device used to halt the proceeding when an error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful if not futile, because the error was so prejudicial as to vitiate the entire trial. *Duest v. State*, 462 So. 2d 446 (Fla. 1985). Although the State argues that there was

no resulting prejudice from Ms. Genova’s testimony, certainly any resulting prejudice was not sufficient to vitiate the entire trial. Therefore, the trial court did not abuse his discretion by denying appellant’s motion for mistrial.

POINT III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ADMITTING EXTRINSIC EVIDENCE.

The subject letter to Judge O'Brien (appellant's appendix and the court's exhibit #4) was written in 1987 after Mr. O'Brien testified in a previous trial of this matter (TV XIV, 1568/6-10, 1476/1). This is clear from the content of the letter. This trial took place in 1995. Mr. Moran also wrote the letter prior to his sentencing in Michigan (TV XIV, 1508/11), when Judge O'Brien sentenced him to life in prison with no chance for parole (TV XIV, 1504/8, 1507/25).

As appellant points out, the prosecutor elicited testimony from Michael Moran that the State of Florida had not offered him any promises in return for his testimony in this trial and indeed could not help him in Michigan, in that he was serving the life sentence with no chance for parole (IB 31; TV XIV, 1504).

Appellant further states that on cross-examination Michael Moran denied testifying against his co-defendant, Ted Scafey, in the Michigan case (IB 31). Mr. Moran also affirmatively testified that he did not testify against Ted Scafey (TV XIV, 1507/17). He testified that he was offered seven to fifteen years if he would testify against Ted Scafey, but he refused and got the life

sentence (TV XIV, 1507/22). However, he testified that he did give information about who he was with the evening of the Michigan homicide (TV XIV, 1507/20). Immediately thereafter, defense counsel brought up Mr. Moran's letter to Judge O'Brien (TV XIV, 1508/4) and asked if he wrote to the judge that he "not only identified but caused the arrest and testified against the real killer" (TV XIV, 1508/22). Mr. Moran responded that that was a little inaccurate (TV XIV, 1509/1). Defense counsel again asked Mr. Moran if he wrote in the letter that he testified against the real killer, and Mr. Moran responded that he had (TV XIV, 1510/1-14) and offered an explanation (TV XIV, 1510/19). Mr. Moran then admitted that he had caused Ted Scafey's arrest in hopes of getting leniency for himself (TV XIV, 1510/22-1511/3). Shortly thereafter, Mr. Moran again indicated that he told the judge that he had caused the arrest of Ted Scafey and again offered to explain what he meant in the letter (TV XIV, 1555). On redirect, Mr. Moran was allowed to explain:

> The problem I have with that is, he is trying to make an insinuation like I testified against the co-defendant, which I never did, which I was given the opportunity twice. You're playing on the wording on that about I gave evidence. What it was is, I gave evidence which amounted to this guy getting arrested. I did not testify or say anything about the crime.
>
> The person who I was with that led to this person's arrest, okay, it had nothing to do. I didn't give no

> evidence. The guy, we had separate trials. When I testified, I testified to the State evidence which was the co-defendant's 12-page statement that was presented to my jury implicating me in the crime, which was a lie.

(TV XIV, 1570/10-24).

After the State subsequently rested its case, defense counsel offered the subject letter into evidence (TV XV, 1616/20).

Appellant argues that this letter is relevant to Mr. Moran's motive for testifying at this trial; however, such is not the case. This letter was written in 1987 after Mr. Moran previously testified in this matter. Subsequent to writing the letter Mr. Moran was sentenced by Judge O'Brien to life without parole. Certainly, this letter is not relevant to Mr. Moran's motive for testifying in 1995.

Appellant also argues that the letter was admissible as a prior inconsistent statement, because (1) appellant testified that he could receive no benefits in Michigan from testifying in Florida; and (2) appellant stated that he had no interest in the Michigan authorities knowing about his testimony here (IB 33). The letter is not inconsistent with this testimony, in that the letter was written long before Mr. Moran testified in this latest trial and long after he was sentenced to life without parole in Michigan. Further, his testimony was entirely accurate that Florida could do nothing to help him in Michigan as a result of his latest

testimony.

Appellant finally argues that the letter directly contradicts Mr. Moran's testimony that he did not testify against his Michigan co-defendant, Ted Scafey (IB 34). However, this is not the test for the admissibility of extrinsic evidence of a prior inconsistent statement. The test is whether a witness denies making or does not distinctly admit making the prior inconsistent statement. Fla. Stat. § 90.614(2). In this matter, Mr. Moran distinctly admitted that he had made the statement that he "testified against the real killer" (TV XIV, 1510/14). Furthermore, the statement that he "testified against the real killer" does not contradict the in-court statement that he did not testify against Ted Scafey. Note that it was defense counsel, not Michael Moran, who kept referring to Ted Scafey as Mr. Moran's co-defendant. In order for the two statements to be contradictory, then Mr. Moran would have to believe that the "real killer" was Ted Scafey. Nothing in the record suggests this. In fact, when Mr. Moran was given an opportunity to explain his testimony, he did make the point that the person against whom he testified was not his co-defendant. He explained that he only gave authorities information (about who he was with the evening of the homicide) which resulted in Scafey being arrested. The testimony referenced in his letter to Judge

O’Brien was to rebut his co-defendant’s statement that implicated him in the crime. Clearly, the real killer referenced in the letter was the same co-defendant, who is not Ted Scafey.

Finally, appellant stated that the prosecution opened the door to “this entire area” (IB 32, 34). However, relevancy is of no consequence if the document cannot overcome the hearsay objection made by the prosecutor (TV XV, 1617/2). Clearly the letter is an out-of-court statement made by a non-party and is hearsay pursuant to Fla. Stat. § 90.801. Be that as it may, the letter was still not material to this matter. As discussed above, this letter was not probative of Mr. Moran’s motive or bias in a 1995 trial. Absent these issues, the letter was not probative of any other material issue in this trial.

Even if error, however, it was harmless pursuant to Fla. Stat. § 59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986), in that there was no reasonable possibility that the alleged error contributed to the conviction.

POINT IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING APPELLANT'S OBJECTION THAT THE WITNESS LACKED PERSONAL KNOWLEDGE OF HIS HANDWRITING.

The prosecutor handed Mr. Shapiro State's Exhibit N for identification (TV XII, 1185/20). This exhibit was later admitted into evidence through Mr. Moran (TV XIV, 1496/4). This exhibit contained the information that Mr. Moran got from appellant concerning among other things where he might locate Mr. Shapiro (TV XIV, 1494/23-1495/5). Mr. Moran testified that the handwriting at the bottom of this document was that of appellant (TV XIV, 1495/5).

As soon as the prosecutor showed Mr. Shapiro this document,

defense counsel asked for a sidebar (TV XI, 1156/22) and then a proffer (TV XI, 1163/2, 1167/21). During the proffer, Mr. Shapiro testified that he recognized the way that the word “Patrick” was printed because he had seen appellant print his brother’s first name before (TV XI, 1169/20). Mr. Shapiro testified that the way that appellant prints the name Patrick looked just like it did on the document (TV XI, 1169/5). Mr. Shapiro explained that he recognized it by the way the P, the A, the T and the R looked (TV XI, 1169/7). Mr. Shapiro admitted that the only word that he could definitely recognize as appellant’s printing was the name Patrick although the rest of the printing looked similar (TV XI, 1169/24-1170/15).

Although Mr. Shapiro did testify that he thought that he would only be able to identify appellant’s signature, that was in terms of recognizing his cursive writing and was because Mr. Shapiro had mainly perceived appellant’s signature on checks (TV XI, 1166)

After the proffer, defense counsel interposed an objection to this testimony on the basis that Mr. Shapiro lacked personal knowledge (TV XI, 1174/16). After argument, the trial court overruled the objection, but only to the extent that Mr. Shapiro could testify that he recognized that the name “Patrick” was printed by appellant (TV XI 1178).

As appellant points out, a non-expert may give opinion testimony on handwriting when they are sufficiently familiar with the handwriting in question. Sufficient familiarity is established when the witness testifies that he has seen the purported writer sign his name on different occasions and believes that he or she is familiar with the writer's signature. *Pittman v. State*, 51 Fla. 94, 41 So. 385, 393 (1906). Mr. Shapiro testified that he had seen appellant print his brother's name before, albeit rarely, and could recognize it. Mr. Shapiro pointed out nuances in the manner in which appellant printed certain letters that he recognized. Although Mr. Shapiro testified that the name Patrick was the only word that he definitely recognized, the fact that the witness cannot state positively that the other printing on the document is that of the alleged writer does not bar such testimony. *Thalheim v. State*, 38 Fla. 169, 20 So. 938 (1896). Based on Mr. Shapiro's proffered testimony, the State would argue that the necessary foundation for Mr. Shapiro's testimony was laid and that there was a sufficient foundation to permit Mr. Shapiro's testimony about the remaining printing on the bottom of the document.

Appellant argues that Mr. Shapiro was not sufficiently familiar with appellant's printing and in support thereof cites to *Fassi v. State*, 591 So. 2d 977 (Fla. 5th DCA 1991), where it was

found to be error to allow the witness to compare spray painted graffiti to the defendant's handwriting. However, *Fassi* is not comparable to this case, because (1) this case involves only one medium and (2) Mr. Shapiro clearly testified that he had previously seen appellant print the word "Patrick" the same as it was printed on the document. The record shows that Mr. Shapiro was sufficiently familiar with appellant's printed word.

A trial court has wide discretion concerning the admissibility of evidence, and a reviewing court should not disturb a trial court's evidentiary ruling unless a clear abuse of that discretion has been demonstrated. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *Jent v. State*, 408 So. 2d 1024 (Fla. 1981), *cert. denied*, 457 U.S. 1111 (1982). Discretion is abused only where no reasonable man would take the view adopted by the trial court. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985). Based on Mr. Shapiro's proffer, there was no abuse of discretion.

Even if error, however, it was harmless pursuant to Fla. Stat. § 59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986), in that there was no reasonable possibility that the alleged error contributed to the conviction.

POINT V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING OPINION TESTIMONY OF A LAY WITNESS.

Hector Mimoso was the Broward deputy dispatched to appellant's

home when appellant or Mr. Shapiro called in the missing person report (TV XII, 1189/13-25). Mr. Mimoso testified without objection that while there he went up to the fly bridge of appellant's boat to determine is someone in that location could hear the splash or scream of a person falling off the boat (TV XII, 1199/10-18). The prosecutor then asked Deputy Mimoso whether based on his own observations he had an opinion as to whether such a person could have been seen or heard from the fly bridge, and defense counsel interposed an objection solely on the basis of speculation (TV XII, 1199/19-23). The trial court overruled the objection to the extent that Deputy Mimoso's opinion was based on his observations. Deputy Mimoso testified that according to his observation of the location of the fly bridge relative to the back of the boat he believed it was possible to hear a scream or a splash from the fly bridge (TV XII, 1200/4). On cross-examination Deputy Mimoso was asked if he ever started the boat engines to determine what could then be heard, and Deputy Mimoso responded that he had not (TV XII, 1202/12-16).

As below, appellant's sole argument now is that Detective Mimoso's testimony was mere speculation (IB 37). Appellant has preserved no other issue for review. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992). Appellant cites to *Durrance v. Sanders*, 329

So. 2d 26 (Fla. 1st DCA 1976) in support of this argument, but *Durrance* points out that testimony is purely speculative when it is not based on any premise of fact. *See also Drackett Products Co. v. Blue*, 152 So. 2d 463, 465 (Fla. 1963). Section 90.701 Fla. Stat. (1995) further requires that opinion testimony of a lay witness be based on something the witness perceived. *See also Somerville v. State*, 584 So. 2d 200 (Fla. 1st DCA 1991). A lay witness may give opinion testimony when he has firsthand knowledge through personal observations of the facts which are the basis of his opinion. *Barnes v. State*, 415 So. 2d 1280, 1283 (Fla. 2d DCA 1982), *rev. denied*, 424 So. 2d 760 (Fla. 1982).

Detective Mimoso testified that he based his opinion on the location of the fly bridge relative to the location of the back of the boat, both of which he personally perceived. Therefore, this opinion is not based on pure speculation but a premise of fact. Again, a trial court has wide discretion concerning the admissibility of evidence, and a reviewing court should not disturb a trial court's evidentiary ruling unless a clear abuse of that discretion has been demonstrated. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995). Based on the above, there was no abuse of discretion.

The fact that Detective Mimoso did not start the engines of the boat does not affect the admissibility of his testimony but the

weight. Further, on cross-examination defense counsel asked Detective Mimoso whether he had started the engines to determine what could be heard with them running.

Even if error, however, it was harmless pursuant to Fla. Stat. § 59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986), in that there was no reasonable possibility that the alleged error contributed to the conviction.

POINT VI

WHETHER IT WAS FUNDAMENTAL ERROR FOR THE TRIAL COURT TO ADMIT INTO EVIDENCE A TAPED CONVERSATION BETWEEN APPELLANT AND KEN SHAPIRO.

The taped conversation between Ken Shapiro and appellant was admitted into evidence as State's Exhibit 7 (TV X, 998/8). As it was received into evidence and before it was published to the jury, defense counsel asked for a sidebar discussion and indicated that he would object to its admission, unless the prosecutor would represent on the record that Exhibit 7 was the redacted copy of the tape (TV X, 998/14-999/14). The prosecutor assured him that it was.

Appellant argues that Mr. Shapiro's comment to appellant, "in light of your past history, even she believes that you're guilty" amounts to fundamental error. Appellant concedes that he made no objection to the admissibility of the tape and that absent fundamental error this issue has not been preserved for appellate review.

In order for an error to be considered fundamental, it must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the

assistance of the alleged error. *Brown v. State*, 124 So.2d 481 (Fla. 1960). None of the cases cited by appellant discuss the legal principle of fundamental error. However, in *State v. Davis*, 290 So. 2d 30 (Fla. 1974), which was cited by appellant, the reason this Court affirmed the district court in *Davis v. State*, 276 So. 2d 846 (Fla. 2d DCA 1973) was because the collateral crimes evidence became a feature of the trial, taking up 25 pages of transcript.

In this case the alleged error took up approximately one sentence. Furthermore, the jury obviously believed the testimony of Ken Shapiro and would have convicted appellant even without this portion of the tape being played for them.

A case very much on point is *Lowe v. State*, 650 So. 2d 969 (Fla. 1994), where the defendant failed to make a contemporaneous objection to the playing of a tape of an interrogation of him, during which a police officer referred to the defendant's prior robbery conviction and the fact that the defendant had been previously incarcerated and also stated his opinion that the defendant was guilty of the murder in the instant case. Similar to this case, prior to trial in *Lowe* the State redacted portions of the tape at defense counsel's request. Defense counsel approved of the redactions and made no further objection to the admissibility

of the tape. This Court ruled that under those facts the issue had not been preserved for appellate review. Further, this Court found that any error in admitting the unredacted portions of the tape was not fundamental error.

In *Lowe*, the opinion regarding guilt was made by a law enforcement officer, while in this matter the opinion was made by a lay witness. In *Lowe*, the collateral crimes evidence was also made by a police officer and specifically referred to a prior robbery conviction and prior incarceration. In this matter, the only collateral crimes evidence was the vague comment "in light of your prior history." Other than what was said, the facts in *Lowe* are almost identical to this case. However, what was said and who said it in *Lowe* was much more prejudicial. Nonetheless, this court found no fundamental error. Therefore, any alleged error in this case is also not fundamental error and therefore has not been preserved for appellate review.

Even if error, however, it would be harmless pursuant to Fla. Stat. §59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986), in that there was no reasonable possibility that the alleged error contributed to the appellant's conviction.

POINT VII

WHETHER THE JURY WAS REASONABLY MISLED BY THE COURT'S JURY INSTRUCTION ON JURISDICTION.

Appellant filed a pre-trial motion to dismiss alleging that the State of Florida does not have jurisdiction to prosecute a homicide when the only element occurring in Florida is premeditation (R 67). When this instruction was brought up in the charge conference, defense counsel objected to the second paragraph again on the basis that mere premeditation within the State of Florida does not invest the State of Florida with jurisdiction (TV XV, 1629/23-1630/13). Defense counsel stressed that his objection was made to be consistent with his pre-trial motion (TV XV, 1630/6-10). Appellant nonetheless told the trial court that a venue instruction was necessary (TV XV, 1630/16), but he never provided

the trial court with a proposed written instruction.

Now in addition to arguing that mere premeditation in Florida does not invest the State of Florida with jurisdiction, appellant argues that the language "such as premeditation" improperly highlights the State's theory of the case and is one-sided.

A party may not raise on appeal the giving or the failure to give a jury instruction unless he makes an objection in the trial court, stating distinctly the matter to which he objects and the grounds of his objection. Fla. R. Crim. P. 3.390(d). The objection must be sufficiently specific both to apprise the trial court of the alleged error and to preserve the issue for review. *Castor v. State*, 365 So. 2d 701,703 (Fla. 1978); *Gainer v. State*, 633 So. 2d 480 (Fla. 1st DCA 1994). The second issue now argued was not made in the trial court and has therefore not been preserved for appellate review.

Nonetheless, the standard of review is whether there was a reasonable possibility that the jury could have been misled by the instruction, when examined within the context of the entire charge to the jury. *Cronin v. State*, 470 So. 2d 802 (Fla. 4th DCA 1985). The instruction as given would not have misled the jury. It stated the law correctly and gave premeditation as an example of an element that must have occurred in Florida. This jury had likely

never before heard the term element, as used in the context of a criminal trial, and this instruction would have helped them to better understand their charge.

The first issue, whether mere premeditation in Florida is sufficient to acquire jurisdiction, was resolved by this Court in *Keen v. State*, 504 So. 2d 396 (Fla. 1987), pursuant to *Lane v. State*, 388 So. 2d 1022 (Fla. 1980), and is law of the case.

POINT VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION TO CROSS-EXAMINATION THAT MICHAEL MORAN HAD EXPRESSED AN INTENT TO INVOKE THE FIFTH AMENDMENT PRIVILEGE.

Michael Moran testified that he met appellant in 1984, when they were in the same cellblock together (TV XIV, 1484/7-11). Moran had been extradited to Florida on an outstanding warrant for robbery and grand larceny (TV XIV, 1484/20). Instead of killing Ken Shapiro according to appellant's plan, Mr. Moran went to the State Attorney's office with the information (TV XIV, 1501/7). He

testified in this matter in 1987 (TV XIV, 1476/1), and in return for his testimony the charges against him were dropped (TV XIV, 1503). Subsequently, he wound up in Michigan serving a life sentence without chance of parole, and there is nothing that his current testimony could do to change that sentence (TV XIV, 1504).

On cross-examination, defense counsel asked Mr. Moran, "You did not want to come back here and testify, did you?" (TV XIV, 1511/17). Moran responded that he did not (TV XIV, 1511/19). Then when defense counsel brought up the letter Mr. Moran had sent him, which among other things indicated that it was his intention to raise his Fifth Amendment right not to testify, the prosecutor objected to any mention of his stated intent to invoke this right (TV XIV, 1512-13). The court sustained the State's objection in regard to the Fifth Amendment but told defense counsel that he could go into the fact that Mr. Moran was trying to put up whatever roadblocks he could to not testify (TV XIV, 1513/14-20). Subsequently, defense counsel again asked Mr. Moran if he had written him indicating that at all costs he would refuse to testify in this case, and after reviewing the subject letter Mr. Moran indicated that he had (TV XIV, 1514/9-24). Mr. Moran also responded that he had written in the letter that he could care less of any contempt of court charge that might emanate from his failure

to testify (TV XIV, 1515/6-10). Defense counsel then asked Mr. Moran if he had told co-counsel Mr. Kukec not to bother visiting him because it was his intent not to testify, and Mr. Moran testified that he did not say that (TV XIV, 1515/14-1516/18).

Based on the above, the only issue properly before this Court is whether the trial court erred in sustaining the State's objection to any mention of Mr. Moran's initial threat of invoking his Fifth Amendment privilege. Appellant argues that the trial court abused its discretion by doing so but has provided no case law on point. In an appellate proceeding, the decision of the trial court has the presumption of correctness, and the burden is on appellant to demonstrate prejudicial error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1980). Appellant has not fulfilled this burden.

Appellant merely cited to three cases which stand for the proposition that erroneous restrictions on cross-examination is reversible error. However, these three cases are not comparable to the instant case. In each of these cases, the direct testimony purportedly gave a complete picture of the facts when in reality it was not and left a mistaken impression with the jury. *See Coco v. State*, 62 So. 2d 892 (Fla. 1953)(mistaken impression that the latent fingerprints were those of defendant); *Coxwell v. State*, 361

So. 2d 148 (Fla. 1978)(mistaken impression that the witness actually killed defendant's wife according to the discussed plans); and *Zerquera v. State*, 549 So. 2d 189 (Fla. 1989)(mistaken impression that the bullets belonged to defendant). In this case, on the other hand, there was no mistaken impression made on direct that required the requested testimony to clarify.

In regard to the Fifth Amendment privilege, appellant argues that Mr. Moran had no such privilege, but that is not the issue. The issue is the inference that the jury might have drawn. It is clearly improper for the State or defense to call a witness to the stand for the purpose of invoking this privilege. *Richardson v. State*, 246 So. 2d 771 (Fla. 1971); *Faver v. State*, 393 So. 2d 49 (Fla. 4th DCA 1981). The rationale for this rule is that neither side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege. *Apfel v. State*, 429 So. 2d 85 (Fla. 5th DCA 1983). This rationale would logically also apply when a witness has threatened to assert this privilege.

Trial courts have broad discretion to impose reasonable limits on the scope of cross-examination. *Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991); *Maggard v. State*, 399 So. 2d 973 (Fla. 1981). A trial court's ruling should not be overturned on appeal absent a

clear abuse of that discretion. *Tompkins v. State*, 502 So. 2d 415 (Fla. 1986). Based on the above, appellant has not shown that the trial court abused its discretion.

Even if error, however, the trial court's ruling was harmless pursuant to Fla. Stat. §59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). What appellant was trying to accomplish was to show that Mr. Moran's willingness to testify had a direct relationship to any benefits that he might obtain in return. Appellant made this point quite effectively on cross-examination, and the additional fact that Mr. Moran threatened using is Fifth Amendment privilege would have added nothing but an improper inference.

POINT IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Appellant recognizes that this Court has already affirmed the trial court's denial of his motion to suppress,[2] but argues that this Court should reevaluate its ruling on several bases.

Appellant states that he now raises for the first time that his taped statement of December 10, 1981, indicates that his then attorney, Bruce Randall, would be continually representing him and that he wanted all communications with authorities to go through Mr. Randall. Appellant argues that since Officer Amabile testified that he had reviewed Mr. Keen's prior police statements, he was aware of the 1981 relationship between appellant and Mr. Randall and was therefore obligated to contact Mr. Randall before reinitiating the interrogation of Mr. Keen in August of 1984. In support of this position, appellant cites to *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Del Duca v. State*, 422 So. 2d 40 (Fla. 2d DCA 1982). These cases hold that once an accused has invoked his right to have counsel present during custodial interrogation a valid waiver of that right cannot be established by merely showing only that the accused responded to police initiated interrogation after again being advised of his *Miranda* rights. Therefore, the

[2] *Keen v. State*, 504 So. 2d 396 (Fla. 1987).

first issue is whether appellant was in custody when he gave his statement on December 10, 1981.

A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with an actual arrest. *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). Application of this test requires a consideration of the totality of all the surrounding circumstances. *Noe v. State*, 586 So. 2d 371 (Fla. 1st DCA 1991). Interrogation at the police station at the request of the police is inherently more coercive than interrogation in other less suggestive settings. *Id.*; *Drake v. State*, 441 So. 2d 1079, 81 (Fla. 1983). Thus, the location of the interrogation has a significant bearing on the reasonableness of an individual's belief that his or her freedom of movement has been curtailed. *Noe v. State*, 586 So. 2d 371 (Fla. 1st DCA 1991). For example, an interrogation at a suspect's home is normally not custodial. *Morris v. State*, 557 So. 2d 27 (Fla. 1990). So too, an interrogation at the office of the defendant's probation officer has been found to be non custodial. *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

Detective Scarbrough testified that appellant was not in custody at the time and was free to come and go at will (TV XII,

1208/18-23), and the objective facts also support his statement. Appellant was not under arrest and his freedom of action was not curtailed. Appellant was not arrested until almost three years later on August 23, 1984 (TV XIII, 1333/21). Furthermore, appellant's statement was not given at the sheriff's office but at a place familiar to appellant, his attorney's office at the bank building on the corner of Commercial Boulevard and Federal Highway in Fort Lauderdale (TV XII, 1207, 1211). Moreover, during the initial part of the taped statement Detective Scarbrough stated that appellant had earlier mentioned that he may be moving and was asking appellant how he could get in touch with him in the future (TV XII, 1212). Attorney Randall told Detective Scarbrough that appellant had indicated that he would stay in touch with him and that Detective Scarbrough could probably reach appellant through him (TV XII, 1213/2). Clearly, a reasonable person would believe that he was free to go, since Detective Scarbrough was asking how he could contact appellant in the future. At the end of the meeting, appellant was in fact free to go and did so.

However, even if appellant were in custody when he gave his statement on December 10, 1981, any invocation of right to counsel at that time did not continue to operate in 1984, because he was released after his statement in 1981. *Keys v. State*, 606 So. 2d

669 (Fla. 1st DCA 1992); *Wilson v. State*, 573 So. 2d 77 (Fla. 2d DCA 1990). These cases point out that in *Edwards* the defendant had been in continuous custody after he invoked his right to counsel and that the holding of *Edwards* does not apply when there is a break in custody.

Appellant also asks that in light of his above argument this Court revisit its holding in *Keen v. State*, 504 So. 2d 396,400 (Fla. 1987), that when appellant was arrested and asked one of his employees to call an attorney it was not an invocation of his fifth amendment rights because the statement was made before his initial advisement of *Miranda*. However, in that appellant was never in custody on December 10, 1981, or if he was in custody, since there was a break in custody for approximately three years this Court should not revisit that holding.

This Court previously held that although Keen was not taken before a judicial officer within twenty-four hours of arrest, which violated Rule of Criminal Procedure 3.130, he had the burden of showing that the delay induced his subsequent statement(s) in order to have them suppressed. *Keen v. State*, 504 So. 2d 396, 400 (Fla. 1987). Appellant argues that since this Court has subsequently held that under both the State and Federal Constitutions the right to counsel attaches at first appearance, the above holding is no

longer valid. *Owen v. State*, 596 So. 2d 985 (Fla. 1992) and *Phillips v. State*, 612 So. 2d 557 (Fla. 1992), both cited by appellant, make it very clear that under the State and Federal Constitutions a defendant is entitled to counsel at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at (when a defendant attends) first appearance. In *Owen,* since the questioning took place before first appearance there was no Sixth Amendment violation. In *Phillips*, since the questioning took place after first appearance the statements were inadmissible. In this case, the statement took place before first appearance; therefore, there was no Sixth Amendment violation. Again, the only violation is of the rule of criminal procedure and this Court's prior holding is still applicable.

Appellant also argues that *Gerstein v. Pugh*, 420 U.S. 103 (1975) holds that the failure to take him to first appearance within twenty-four hours is a violation of the Fourth Amendment. This is not so. *Gerstein* deals with preliminary hearings and the issue therein was whether a person arrested and held for trial under an information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint. The

holding was that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Although the opinion did mention Florida's procedure regarding initial appearances, this holding has nothing to do with the failure to bring someone arrested to an initial appearance within twenty-four hours.

Appellant also argues that he invoked his right to remain silent, when he was arrested by Detectives Amabile and Scheff in Orlando and subsequently made an equivocal request to remain silent. Detective Amabile testified that when Detective Scheff told appellant that he could not predict whether appellant would get a lighter sentence by confessing, appellant then said that he could see no strategic reason to confess (TV XIII, 1348/22). Nonetheless, appellant continued his conversation with Detectives Amabile and Scheff for a while longer, until they returned appellant to the Seminole County Jail for the evening (TV XIII, 1349). The next day, appellant and the officers conversed on their return to Broward County but about nothing pertinent (TV XIII, 1349/23). However, once back in Broward County and after having been re-advised of his rights, appellant signed a waiver of rights form and agreed to give a statement to the officers (TV XIII, 1350-52, 1357)(the signed waiver of rights form is found at R 181).

First, there was not even an equivocal request to remain silent. Appellant merely indicated that he wanted quid pro quo for his confession. In no manner did appellant state that he wished to remain silent. But even if this statement were construed an equivocal request to remain silent, it came after a knowing and voluntary waiver of his *Miranda* rights. *See Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984). Detective Amabile testified that when he arrested appellant he advised him of his *Miranda* rights (TV XIII, 1336/22). Appellant indicated that he understood those rights (TV XIII, 1337/17). At no time thereafter but before Detective Amabile began speaking to appellant about the case did appellant request an attorney (TV XIII, 1337/14). First Detectives Amabile and Scheff transported appellant to the Seminole County Sheriff's Office Jail (TV XIII, 1335/15). While there, appellant indicated a willingness to discuss the case with them (TV XIII, 1336/1), so Detectives Amabile and Scheff took appellant to the sheriff's office headquarters, where they questioned appellant (TV XIII, 1336/2). It was not until very shortly before they returned appellant to the Seminole County Jail that appellant indicated that he saw no strategic reason to confess (TV XIII, 1349).

Davis v. State, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d

362 (1994), which applies to all the rights under *Miranda*, holds that neither *Miranda* nor its progeny require a police officer to stop interrogation when a suspect in custody, who has made a knowing and voluntary waiver of his or her *Miranda* rights, thereafter makes an equivocal or ambiguous request for counsel (or to remain silent). This Court held that the principles in *Davis* apply to confessions in Florida, in light of *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). *Owen v. State*, 696 So. 2d 715 (Fla. 1997).

Finally, appellant now argues that his statements were involuntary and the product of improper coercion. He argues that his asking for an attorney for his business,[3] his refusal to give a statement on tape and his refusal to sign the handwritten transcript support his contention that his statements were involuntary. However, appellant gives no legal basis or support

[3] It should also be noted that although Officer Amabile testified on cross-examination that immediately after he arrested appellant, appellant asked one of his employees at his place of business to call a lawyer for him (TV XIV, 1442/5-9), on redirect Officer Amabile explained that appellant asked Mr. Sparks to get the attorney for his business, so the business would continue running (TV XIV, 14665-16). Officer Amabile went on the testify that when he was subsequently conducting the written interview of appellant, appellant stated that he did not want an attorney, because he knew more than an attorney anyway (TV XIV, 1466/22-1467/5).

for this argument. To the contrary, his refusal to give a taped statement or sign the written statement is irrelevant. *See Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987). Appellant also states that his physical and emotional state prevented him from giving a voluntary statement, but he does not explain his condition or relate it to any legal standard. Appellant has clearly not fulfilled his burden of showing error or prejudice in this regard. Appellant also states that his statements were induced by promises, but he does not indicate what those promises were or cite to the record. To the contrary, Detective Amabile testified that he made no promises to appellant (TV XIII, 1357/7). Appellant also argues that the officers used improper influence by playing on his anger, when they told him that Ken Shapiro was not in custody and that the State Attorney might be less likely to offer Ken Shapiro immunity if he would make a truthful statement. Again, appellant offers no legal basis for his argument other than citing to *Bram v. United States*, 168 U.S. 532 (1987), which has nothing to do with finding that a confession is coerced where an interrogator suggests that an accuser might be less likely to get immunity if the accused gives a truthful statement. Appellant here argues that his statement was the product of his anger, but in *Bram* the

confession was the product of fear. These cases are not comparable. Further, the Court in *Bram* noted that absent other circumstances surrounding that confession the confession may well have been admissible. The circumstances were that the accused was in a foreign land and was being or had been stripped of all his clothing while being interrogated. *Bram* at 563. No such circumstances were present in this matter. The facts in this case show that appellant was repeatedly advised of his *Miranda* rights (TV XIII, 1336/22, 1351/2), waived *Miranda* and signed a waiver of rights form before being questioned (TV XIII, 1356/4, 1357/3) and agreed to speak with the detectives.

A ruling on motion to suppress is presumed correct and will be upheld if supported by the record. *Rhodes v. State*, 638 So. 2d 920, 925 (Fla. 1994). Furthermore, a reviewing court should interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. *Ascensio v. State*, 497 So. 2d 640 (Fla. 1986); *Johnson v. State*, 438 So. 2d 774 (Fla. 1983). Based on the above, the record of this case supports the trial court's ruling and there was no abuse of discretion.

Nonetheless, an error on a ruling on a motion to suppress is not per se reversible but can be found to be harmless. *Owen v.*

State, 560 So. 2d 207 (Fla. 1990). Even if appellant's August 24, 1984, statement was admitted in error the trial court's ruling was harmless pursuant to Fla. Stat. §59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). Although Ken Shapiro changed his story in regard to what happened on the open sea in a manner which would inculpate him in the crime, the jury clearly believed his testimony and perceived the insurance proceeds as the motive for the killing. There is no reasonable possibility that appellant's second exculpatory version of the facts would have contributed to the verdict.

Although appellant does not allege error in regard to his December 10, 1981 statement, it should be briefly addressed in that appellant filed a pretrial motion to suppress all statements he made to law enforcement officers (R 93) and on appeal now argues that the trial court erred by admitting his police statements (IB 42). Appellant filed a pretrial motion to suppress all statements he made to law enforcement officers (R 93). The trial court denied appellant's motion before the trial began (R 115). When the State offered into evidence appellant's taped statement of December 10, 1981, defense counsel stated, "We don't voice any objection" (TV XII, 1210/21). Although a pre-

trial motion to suppress may have been filed and denied, the defendant must also interpose the appropriate objection when the evidence is offered at trial to preserve the motion to suppress as an appellate issue. *Terry v. State*, 668 So. 2d 954 (Fla. 1996). Since appellant interposed no objection at trial in regard to this statement, the issue in regard to this statement has not been preserved for appellate review.

POINT X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S

MOTION TO DISMISS.

Appellant argues that the trial court erred in not dismissing his indictment, because appellant contends that it was based on the perjured grand jury testimony of his brother Patrick Keen. Patrick Keen testified before the grand jury on September 12, 1984 (SR III, 204). His testimony was essentially that appellant told him that he had killed his wife for the insurance proceeds. Subsequently on May 18, 1987, after the first trial of this matter, Patrick Keen gave a statement to an assistant state attorney which recanted his grand jury testimony and indicated that appellant had told him that his wife's disappearance was an accident (SR III, 245).

Patrick Keen was convicted of perjury by giving inconsistent statements (SR 171). No evidence has ever been presented to prove which of the statements was perjured testimony, and no decision has ever been entered making such a finding (SR 170). In fact, defense counsel admits that there is only a 50% probability that the indictment was predicated upon perjured testimony (SR 172/13).

Appellant relies on *Anderson v. State*, 574 So. 2d 87 (Fla. 1981) and *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), but both these cases hold that due process is violated when a

defendant has to stand trial on an indictment which the government knows is based in part on material perjured testimony.

However, this Court has stated as a general proposition that recanted testimony is exceedingly unreliable, and in the context of a motion for new trial that it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994). In this matter, the recanted testimony of Patrick Keen should even be more suspect, in that he is appellant's brother.

In that the prosecutor did not know that the grand jury testimony of Patrick Keen was perjured testimony, and in that the recanted testimony of Patrick Keen is highly suspect, the trial court did not abuse its discretion in denying appellant's motion to dismiss.

Further, *United States v. Bracy*, 566 F.2d 649, 655 (9th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) is helpful in that the court distinguished *Basurto*, because in *Basurto* the case turned on the perjured testimony of the grand jury witness. Also helpful is *Francois v. Wainwright*, 741 F.2d 1275, 1283, where the court held that although there may be a basis to quash an indictment, if the evidence is such that there is no question that the defendant would be reindicted then there is no

prejudice. In this matter, the case did not turn on the grand jury testimony of Patrick Keen. The State's chief witness was Ken Shapiro, who also testified before the grand jury. There is no question that the testimony of Ken Shapiro alone would be sufficient to reindict appellant.

POINT XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION TO CROSS-EXAMINATION.

Appellant argues that the trial court erred by prohibiting the cross examination of Officers Amabile and Scheff in regard to discipline they received for improper interrogation techniques in another homicide case (R 43)(PM 47/5). However, nothing in the record shows what the improper interrogation techniques alluded to were, when they were allegedly employed, why they were improper, whether there actually was resulting discipline or what the resulting discipline was. An appeal challenging a trial court's refusal to allow a defendant to cross examine a witness is not preserved for review where the defendant fails to proffer the testimony he sought to elicit from the witness and the substance of that testimony is not apparent from the record. *Finney v. State*, 660 So. 2d 674 (Fla. 1995). The substance of what appellant wanted to elicit in regard to this cross-examination is not sufficiently discernible from the record, so appellant has failed to preserve this issue for appellate review.

Further, a party may attack the credibility of a witness with evidence relating to character only to the extent that it in turn relates to truthfulness. Section 90.609, Fla. Stat. (1995). A party may also attack the credibility of a witness by evidence that the witness has been convicted of certain crimes. Section 90.610, Fla. Stat. (1995). A party may further impeach a witness by (1) introducing prior inconsistent statements; (2) showing that the witness is biased; (3) showing a defect in the witness' ability to observe, remember or recount the matters about which the witness testified; and (4) introducing statements by other witnesses which contradict the testimony of the impeached witness. Section 90.608, Fla. Stat. (1995).

Appellant wanted to cross-examine the officers, not using one of the above proper techniques, but by using alleged prior bad acts under Section 90.404(2), Fla. Stat. (1995). Clearly, in this context, the only purpose for wanting to place this alleged evidence before the jury was to show propensity. There is nothing in the record to suggest that this alleged evidence was relevant to prove any material fact in issue in this case. Without showing that the evidence is relevant to a material fact in issue, it is not admissible. *Id*.

Appellant cites to *Mendez v. State*, 412 So. 2d 965 (Fla. 2d

DCA 1982), *Henry v. State*, 688 So. 2d 963 (Fla. 1st DCA 1997) and *Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993) in support of his argument. Each of these cases can be distinguished. First, each of them involves the alleged use of excessive force. This case does not. Also, each involves officers who had been the subject of prior investigations for use of excessive force. These cases hold that where there is an issue of whether or not excessive force was used in the instant case, prior investigations into the officer's use of excessive force are relevant to show motive and bias. *Mendez* noted that the motive sought to be established was to avoid being suspended or even dismissed for another incident involving excessive force. It should also be noted that in *Mendez* and *Henry* the opinions show that defense counsel proffered detailed information concerning the prior investigations.

In this case, on the other hand, it is not apparent from the record that the officers' alleged prior discipline would have provided a motive for lying at trial. It is unlikely that one prior minor violation of department rules would provide a motive to commit perjury. Although *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991) involves law enforcement officers under criminal investigation, this Court pointed out that if the State's witness

is merely under investigation, the ability to cross-examine in regard to this investigation is not absolute and in order to be relevant must not be too remote in time and must be related to the case in hand. In this case, the record does not show whether the conduct alluded had actually been investigated and resulted in sanctions, when the conduct happened or how the conduct was related to conduct in this case.[4]

Trial courts have broad discretion to impose reasonable limits on the scope of cross-examination. *Jones v. State*, 580 So. 2d 143, 145 (Fla. 1991); *Maggard v. State*, 399 So. 2d 973 (Fla. 1981). Moreover, a trial court's ruling should not be overturned on appeal absent a clear abuse of that discretion. *Tompkins v. State*, 502 So. 2d 415 (Fla. 1986). Based on the above, appellant has not shown that the trial court abused its discretion.

Even if error, however, the trial court's ruling was harmless pursuant to Fla. Stat. §59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986), in that there is no reasonable possibility that it contributed to the conviction.

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[4] Appellant only alleges that it generally involved interrogation techniques.

POINT XII

WHETHER THE STATE OF FLORIDA HAD JURISDICTION TO PROSECUTE THIS CASE.

This issue was resolved in *Keen v. State*, 504 So. 2d 396 (Fla. 1987) and is law of the case. Appellant offers no substantial reason for this Court to reevaluate its prior opinion. For example, appellant argues that premeditation is not an essential element of the crime of first degree murder, but this and other Florida courts have repeatedly held that it is. *Forehand v. State*, 126 Fla. 464, 171 So. 241 (1936); *State v. Powell*, 636 So. 2d 138 (Fla. 1st DCA), *review denied*, 645 So. 2d

454 (Fla. 1994). *See also Asay v. State*, 580 So. 2d 610 (Fla.), *cert. denied*, 502 U.S. 895 (1991).

Further, appellant argues that premeditation is a mental state and is therefore not conduct under Florida's criminal jurisdiction statute. However, the term conduct, as used in criminal law, is an action or omission and its accompanying state of mind. Model Penal Code § 1.13l; *Black's Law Dictionary* 296 (6th ed. 1991). Therefore, premeditation is conduct and does subject an accused to Florida's jurisdiction when alone committed within this state.

POINT XIII

WHETHER THE STATE OF FLORIDA HAD JURISDICTION TO PROSECUTE THIS CASE.

This issue was resolved in *Keen v. State*, 504 So. 2d 396 (Fla. 1987) and is law of the case. Appellant offers no substantial reason for this Court to reevaluate its prior opinion.

Appellant cites to *Oregon v. Kennedy*, 456 U.S. 667 (1982)

and *Duncan v. State*, 525 So. 2d 938 (Fla. 3d DCA 1988) in support of his argument. However, in the above *Keen* opinion, this Court cited to *Oregon*'s holding that for prosecutorial misconduct to be the basis for barring retrial under the double jeopardy clause, the prosecutor must intentionally "goad" the defense into requesting a mistrial, and that mere overreaching by a prosecutor is not enough. The *Oregon* opinion also states that to provoke a mistrial intentionally would allow a prosecutor to shop for a more favorable trier of fact, or to correct deficiencies in his case or to obtain an unwarranted preview of the defendant's evidence. *Id*. at 941. The test under *Oregon*, therefore, is one of prosecutorial intent, and the court must infer the existence or non-existence of such intent from the objective facts and circumstances of each case. *Id*. It should be noted that the *Duncan* court specifically stated that it would not adopt a standard broader than the *Oregon* standard to determine when double jeopardy will bar retrial following a defendant's motion for mistrial due to prosecutorial misconduct. *Id*. at 941 n. 1.

In regard to this matter, this Court found that the prosecutor's conduct was during the heat of trial and done in order to win his case; it was not done intentionally in order to afford the state a more favorable opportunity to convict the

defendant. *Keen* at 402, n. 5. The facts have not changed, and appellant has provided no basis for this Court to recede from its previous opinion.

POINT XIV

WHETHER FLORIDA'S STANDARD JURY INSTRUCTION ON REASONABLE DOUBT IS UNCONSTITUTIONAL.

This Court has repeatedly rejected constitutional challenges to this standard instruction. *Monlyn v. State*, 705 So. 2d 1 (Fla. 1997); *Archer v. State*, 673 So. 2d 17 (Fla.), *cert. denied*, 117 S.Ct. 197 (1996); *Esty v. State*, 642 So. 2d 1074 (Fla. 1994), *cert. denied*, 514 U.S. 1027 (1995). Appellant has offered no substantial reason for this Court to recede from its prior opinions.

POINT XV

WHETHER THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE.

Appellant was initially sentenced to death following a jury's unanimous recommendation. *Keen v. State*, 504, So. 2d 396 (Fla. 1987). On retrial, appellant was again sentenced to death after the jury recommended death by a seven-to-five vote. *Keen v. State*, 639 So. 2d 597 (Fla. 1994). Again on retrial, this jury recommended a life sentence by a vote of seven-to-five (R 385).

The jury considered the pecuniary gain, HAC, and CCP aggravating circumstances (R 322-23)(TV XVII, 1890/20-1891/18). However, the jury considered no statutory mitigating circumstances and only inconsequential non-statutory mitigating circumstances (R 324, 419)(TV XVII, 1894/22-1895/17). Under such circumstances an override is proper. *Washington v. State*, 653 So. 2d 362 (Fla. 1994), *cert. denied*, 116 S.Ct. 387 (1995).

The first mitigating circumstance argued by appellant is the disparate treatment of Ken Shapiro. Disparate treatment of equally or more culpable accomplices is sufficient to preclude a jury override. *Parker v. State*, 643 So. 2d 1032 (Fla. 1994); *Jackson v. State*, 599 So. 2d 103 (Fla.), *cert. denied*, 113 S.Ct.

612 (1992). Appellant relies principally on *Brookings v. State*, 495 So. 2d 135 (Fla. 1986), *Fuente v. State*, 549 So. 2d 652 (Fla. 1989) and *Harmon v. State*, 527 So. 2d 182 (Fla. 1988), all of which are distinguishable from the instance case. *Brookings* and *Fuente* involved contract murders, where the accomplices helped plan and carry out the homicide. In both cases one accomplice was the individual who placed the contract and the other accomplice had a high level of involvement in planning and carrying out the execution. For example, the accomplice in *Brookings* helped purchase the murder weapon, helped devise a plan to lure the victim from his home, drove to and from the murder scene and ran over the victim's body. In *Fuente*, the accomplice dug the victim's grave prior to the homicide, took the murder weapons to the mutual meeting place, attempted to kill the victim with three shots to the head, but his weapon misfired, helped drag the body to the grave site, buried the body and incinerated the car. In *Harmon* the homicide was committed during a robbery and the accomplice could have been found guilty of first degree murder under a felony murder theory. In this case, Ken Shapiro could not have been found guilty under a felony murder theory.

Furthermore, Ken Shapiro was not an equally or more culpable accomplice. This case is very much like *Thompson v. State*, 553

So. 2d 153 (Fla. 1989), where the defendant and three of his associates kidnaped the victim and took him offshore in Thompson's boat. After they beat the victim, Thompson shot him in the back of the head. The victim was wrapped in chains and dumped overboard. As appellant does here, Thompson argued that the jury may have recommended life, because the others involved in the murder received lesser sentences or were granted immunity in exchange for their testimony. This Court, however, found that the override was proper because the record showed that (1) it was Thompson who was in charge and his accomplices who were subordinates; (2) it was Thompson that ordered that the victim be apprehended; and (3) it was Thompson who inflicted the fatal shot. Similarly, in *Craig v. State*, 510 So. 2d 857, 870 (Fla. 1987), this Court indicated that where the evidence shows that the defendant was the planner, instigator and prime mover with regard to the homicide, disparate treatment is not a factor that would require the court to follow a jury's life recommendation. In *Craig*, the accomplice actually shot and killed the two victims, took the bodies to a different location and helped dispose of them in a deep sinkhole.

In this case, it was appellant who was clearly in charge and Ken Shapiro who was the subordinate. As the trial court

indicated in his sentencing memorandum:

> Mr. Shapiro's testimony was filled with references to the fact that the defendant was more successful and made more money than he did. He stated that the defendant often loaned him money when he had none and, consequently, Mr. Shapiro ended up owing him several thousand dollars. The defendant even bought a new Cadillac which was registered in his own name but was primarily driven by Mr. Shapiro. Eventually Ken Shapiro moved out of his grandparents' home and into an apartment the defendant leased in Hialeah. Later the two moved into a larger apartment in North Miami. After Mr. Shapiro returned from an unsuccessful job in Tampa, he again moved in with the defendant, this time into a waterfront home in Dania. The defendant also rehired Mr. Shapiro to work for him as a training supervisor.
>
> Not only did the defendant provide Mr. Shapiro with a job and a place to live, he also became a social outlet for him. The evidence revealed that the two went to numerous sporting events together, as well as to the movies. The sporting events created some of Mr. Shapiro's indebtedness to the defendant in the form of gambling debts. Clearly, Mr. Shapiro functioned in the defendant's shadow throughout their association.

(R 456-57).

The evidence also shows that appellant chose the victim, planned the murder and carried it out. There is no question that appellant was the instigator and prime mover in this homicide. Ken Shapiro testified that as early as 1980 appellant planned to marry Anita Lopez to kill her for profit (TV X, 943). At first his plans were only general methods to employ (TV X, 945/1, 945/11). His second plan was to take her into the ocean and

drown her. By October of 1981 appellant started to formulate specific plans (TV X, 955/6). Appellant admitted to Detective Philip Amabile that he discussed murdering Anita for the insurance money but contended that he was not serious (TV XIII, 1384/22-1385/10). Unlike *Thompson,* appellant did not order Shapiro to kidnap Anita because that was unnecessary, but appellant did order Shapiro to comply with his demands and cooperate or he would kill Shapiro or his grandparents (TV X, 954/5, 958/1). Appellant carried out the first phase of his plan by purchasing the two double indemnity life insurance policies on Anita's life which named him primary beneficiary. Nothing in the record shows that Ken Shapiro played any role at this stage. Appellant finally told Shapiro that he intended to carry out his final plans on November 15, 1981, weather permitting (TV X, 956). On that day as planned, appellant drove the boat out Port Everglades into the ocean (TV X 964). Shapiro testified that appellant was the one who pushed Anita overboard (TV X, 970/7). Appellant then ordered Shapiro to put the boat in gear to distance it from Anita (TV X, 970/15, 24). Shapiro testified that he just gently engaged the gears, and appellant immediately thereafter took control of the boat (TV X, 971/6).

Ken Shapiro's involvement in this homicide was much less

than the accomplices in both *Thompson* and *Craig*. The disparate treatment of Ken Shapiro is not a reasonable basis for the jury's recommendation of life.

Appellant also argues that the life recommendation was reasonable, based on the credibility problems of Ken Shapiro. Both appellant and Shapiro originally gave consistent statements under oath that Anita Lopez disappeared off the boat (TV X, 981/13; XII, 1220/15). Subsequently, Ken Shapiro gave another sworn statement to authorities indicating that appellant had pushed Ms. Lopez in the ocean to collect the insurance proceeds. Mr. Shapiro admitted at trial that he put the boat in gear when told to do so by appellant (TV X, 971/6) and also admitted that he originally corroborated appellant's story that Ms. Lopez was missing (TV X, 977/5). However, Mr. Shapiro also testified that appellant threatened to kill him or his grandparents, if he failed to cooperate or ever opened his mouth about the incident (TV X, 954/5, 981/1, 981/9).

Appellant also gave a subsequent statement changing his version of the facts (TV XIII, 1359/13). However, appellant's new story was that Ken Shapiro accidentally pushed him and Anita into the water (TV XIII, 1361/7, 1363/20). Based on these two changed statements, the death of Anita Lopez was either caused by

homicide or accident. The jury chose to believe Mr. Shapiro.

This case is different from *Pomeranz v. State*, 703 So. 2d 465 (Fla. 1997), where there was no question that the death was the result of a homicide and where the defendant and the State's chief witness both claimed the other committed the murder.[5] This case is also different from *Douglas v. State*, 575 So. 2d 165 (Fla. 1991), where again there was no question that the death was the result of a homicide and where several defense witnesses testified that the defendant had an alibi.

Clearly, the jury believed Shapiro's testimony at guilt phase. If during penalty phase the jury's recommendation was influenced based on what they perceived as a credibility problem with Shapiro's testimony, then their recommendation would have been the result of some lingering doubt. Lingering doubt cannot be the basis of a jury recommendation. *King v. State*, 514 So. 2d 354 (Fla. 1987), *cert. denied*, 487 U.S. 1241 (1988).

Additionally, Shapiro's credibility could not have been a reasonable influence on the jury's advisory recommendation, in that Shapiro's testimony inculpated himself in the homicide. Granted, he was given use immunity, but he was not given immunity

[5] Furthermore, unlike this case the witness had an extensive criminal record and a $3,000 per week cocaine habit.

until the day after he made the incriminating statement to authorities (TV XIV, 1408). On the other hand, appellant's changed statement was self-exculpatory. Furthermore, the acquisition of the insurance policies and testimony of Michael Moran corroborate the testimony of Ken Shapiro.

No one can deny that Michael Moran is an opportunist, but he nonetheless had a great deal of personal information pertaining to Ken Shapiro that he would not have known unless so informed by a third person. Ken Shapiro testified that a portion of this information was in appellant's handwriting (TV XII 1185-86), and Max Jarrell with the F.B. I. testified that appellant's left thumbprint was on the side where the writing was located (TV XV, 1597/1, 1603/8, 1604/16).

Based on the above, Ken Shapiro's credibility is not a reasonable basis for the jury's recommendation of life.

Appellant also argues that the jury's recommendation could have been based on a conflict in the evidence as to the identity of the actual killer, because appellant testified that it was Ken Shapiro who pushed him and Anita Lopez overboard. However, this would also be an unreasonable basis for a jury recommendation, in that it would necessarily be based on lingering doubt. The cases cited by appellant are distinguishable. In *Pentecost v. State*,

545 So. 2d 861 (Fla. 1989), *Hawkins v. State*, 436 So. 2d 44 (Fla. 1983), and *Cooper v. State*, 581 So. 2d 49 (Fla. 1991) there was other evidence that corroborated the defendant's assertion that another committed the homicide. In this case, the only conflicting evidence was appellant's statement. In *Malloy v. State*, 382 So. 2d 1190 (Fla. 1979), the jury could have found the defendant guilty of felony murder but such is not the case in the instant matter. Further, in *Malloy*, there was equal complicity of the other participants. In this matter, appellant was clearly the major participant and the major potential beneficiary. In *Harmon v. State*, 527 So. 2d 182 (Fla. 1988) this specific issue was not discussed, and in *Barrett v. State*, 649 So. 2d 219 (Fla. 1994), the opinion does not give enough factual background to make a clear analysis. Nonetheless, what makes the jury's recommendation reasonable in these cases is something in addition to the defendant pointing his finger to another. In this case that is all we have, and that makes this basis for a jury recommendation unreasonable.

Appellant also argues that because his father was an alcoholic who deserted the family is a reasonable basis for the jury's recommendation. Appellant's mother testified to this (TV XVII, 1842,/9). However, the entire focus of her testimony was

on appellant's father. There is not one scintilla of evidence that focuses on the resulting impact to appellant other than he assumed the father figure to his siblings. The evidence at the penalty phase is supposed to focus on the defendant's character, not the character or shortcomings of another person, and the evidence presented concerning appellant's father alone cannot support a jury recommendation to life. *Valle v. State*, 581 So. 2d 40 (Fla. 1991).

Appellant also argues that other bases for the jury's recommendation may have been his caring relationship with his family, his numerous positive achievements as a youth, his excellent employment record, his excellent record while incarcerated, his good behavior at trial, and his potential for rehabilitation. However, as pointed out in *Harmon v. State*, 527 So. 2d 182, 189 (Fla. 1988), it would not be reasonable for a jury to recommend a sentence of life based only on these non-statutory mitigating factors. *See also Washington v. State*, 653 So. 2d 362 (Fla. 1994), *cert. denied*, 116 S.Ct. 387 (1995); *Zeigler v. State*, 580 So. 2d 127 (Fla. 1991).

Appellant argues that the jury could have rejected or given less weight to the HAC, CCP and pecuniary gain aggravators. However, the evidence shows that appellant was planning to marry

someone and kill her for profit as early as 1980. As time passed, appellant planned different methods of accomplishing his goal. His first idea was to push her off a high building (TV X, 945/1). His second plan was to drown her in the ocean. He even contemplated the type of person he would target for death, that being an unsuspecting person without much intelligence (TV X, 944/10-16). He finally selected Anita Lopez and married her in August of 1981 (TV X, 952/10). He purchased two $50,000 life insurance policies both with double indemnity provisions.[6] Appellant argues that the fact that one of those policies was a whole life policy shows that his intent was savings and not homicide for profit; however, appellant fails to mention that the subject whole life policy was what is known as a model 3, which means that it has reduced premiums for the first three years (TV XII, 1268/4-7). So essentially this policy was also a term policy at the time of Ms. Lopez's death. When appellant finally implemented his plan and pushed Anita Lopez into the water some ten to twenty miles offshore, she was pregnant and appellant knew it. After pushing her into the water, appellant then kept the boat far enough away from her so she could not get aboard but

[6] Meaning that they would pay $100,000 if death was due to accident (TV XII, 1238/18).

close enough to see when she went down. This went on for some time, but appellant finally had to leave when it became dark and he could no longer see Anita. No one knows how long Ms. Lopez struggled for her life or how she eventually died. Drowning, although likely, is of course not the only possible manner of death under such circumstances. Exposure to the sun and heat over days or consumption by animals of the sea are also possibilities. Regardless, her death had to be horrific. As the trial court stated:

> This court cannot imagine greater torture than the mental anguish caused by being abandoned in the ocean nearly twenty miles from land at night. It certainly gave the victim time to think of her inevitable, if not immediate, death. Furthermore, the defendant's purposeful maneuvering of the boat to keep it just out of the victim's range is clear evidence of the extreme depravity and utter indifference to the suffering of another that this aggravating factor addresses.

(R 453-54)

Clearly, based on these facts it would have been unreasonable for the jury not to find the existence of each of these aggravating circumstances.

Appellant argues also that the jury may have merged the pecuniary gain and CCP circumstances; however, these circumstances do not double in that they are not based on the

same essential features of the crime or of the offender's character. *Fotopoulos v. State*, 608 So. 2d 784, 793 (Fla. 1992); *Echols v. State*, 484 So. 2d 568 (Fla. 1985). Therefore, it would have been unreasonable for the jury to merge these circumstances.

This is one of those rare cases where an override by the trial court is justified. There were three aggravating circumstances, two of which are very weighty. There were no statutory mitigating circumstances and the non-statutory mitigation was insignificant. The facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975).

POINT XVI

WHETHER THE TRIAL COURT ERRED IN THE PREPARATION OF THE SENTENCING ORDER.

Appellant first argues that the trial court applied incorrect law in regard to disparate treatment. Appellant argues that if a participant in the crime is a principal in the first degree then his comparable level of involvement in the homicide is irrelevant to a disparate treatment analysis. This is clearly incorrect. If such were the case, then the language and analysis in such cases as *Parker*, *Jackson*, *Thompson*, *Colina*, and *Craig*, all mentioned in the prior point, would be superfluous. It is highly unlikely that this Court would spend so much time analyzing what an equally or more culpable accomplice is, when the only required showing is that the accomplice qualified as a principal in the first degree. Being a principal in the first degree is but one factor in analyzing the relative culpability of a co-participant. This was clearly set out in *Thompson v. State*, 553 So. 2d 153, 158 (Fla. 1989). In *Thompson*, the co-participants and Thompson kidnaped the victim and took him on a boat into the open sea, where the co-participants joined in

torturing the victim, wrapping him in chains and, after Thompson shot him, dumping him in the water. There is no doubt that these co-participants were principals in the first degree, but nonetheless this Court found no basis upon which the jury could have recommended life in order to prevent disparity in sentencing, in that Thompson was in charge and inflicted the fatal shot. Undoubtedly, the mere fact that a co-participant is a principal in the first degree does not necessarily mean that he or she should be subjected to equal treatment.

Appellant also argues that the trial court erred in rejecting his potential for rehabilitation as a mitigating circumstance. Contrary to appellant's assertion, the prosecutor did not explicitly agree to the existence of this circumstance (TV XV, 1866/2). Appellant argues that this mitigator was shown by evidence of his good work history, his good prison record and his positive character traits and accomplishments. The trial court however indicated:

> This assertion is mere speculation and not grounded in any testimony or evidence in this case. Therefore, the court finds this mitigating circumstance does not exist.

(R 459)

Further, as the prosecutor noted in his override recommendation to the judge (R 270), appellant overlooks that the evidence shows

that while in prison he attempted to hire Michael Moran to kill Ken Shapiro.

Finding or not finding that a mitigating circumstance has been established is within the discretion of the trial court and will not be disturbed on appeal if supported by competent substantial evidence. *Bryan v. State*, 533 So. 2d 744 (Fla. 1988). The instant record supports the trial court's conclusion that this circumstance does not exist.

Appellant also argues that the trial court erred in failing to find in mitigation that his father was an alcoholic who deserted the family. However, as stated above, the testimony of appellant's mother in this regard focused entirely on the father and not on defendant's resulting character. Therefore, this cannot serve as mitigation. *Hegwood v. State*, 575 So 2d 170 (Fla. 1991).

Appellant also argues that based on the sentencing memorandum the trial court failed to consider such matters as his being a good brother and son and his achievements as a youth. However, defense counsel did not request that these specific matters be addressed to the jury or by the court (R 419). The trial court did give an instruction on all non-statutory mitigating circumstances requested by appellant, except for

lingering doubt (R 320), and addressed each of these matters in the sentencing memorandum (R 456-59). The defense must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish, and having failed to do so, appellant cannot now claim on appeal that additional mitigation existed. *Lucas v. State*, 568 So. 2d 18, 23-24 (Fla. 1990). Further, the failure of the trial court to specifically address every conceivable mitigating circumstance or to specifically address appellant's evidence and arguments in his findings of fact in his sentencing order does not demonstrate that such evidence was not considered. *Brown v. State*, 473 So. 2d 1260, 1268 (Fla. 1985); *Mason v. State*, 438 So. 2d 374, 379-80 (Fla. 1983). The trial court did indicate that he considered other aspects of the defendant's character or record and other circumstances of the offense (R 459). Appellant has failed to show any error by the trial court.

Appellant here makes the same argument he made in Point XV in regard to the aggravating circumstances. Please refer to Point XV for the State's response. However, in this context when a trial judge finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent substantial evidence to support it. *Raleigh*

v. State, 705 So. 2d 1324 (Fla. 1997); *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988). As mentioned above, there is a plethora of record evidence to support the trial court's findings in aggravation.

Appellant also argues that the trial court improperly relied on the length of the jury's deliberations and the split in their vote. The trial court prepared a thirteen-page sentencing order (R 449-61). In the sentencing order the trial court indicated that it gave great weight to the jury's sentencing recommendation (R 450). The court carefully analyzed each of the aggravating and mitigating circumstances (R 450-59). Near the end of the sentencing order, the trial court stated:

> The jury deliberated and, within sixty seconds, recommended that this court sentence the defendant to life in prison by a majority of seven to five. The law is clear that a jury recommendation of life or death must be given great weight by the sentencing judge and should not be overruled unless no reasonable basis exist for the opinion (citation omitted). In fact, this court cannot sustain a sentence of death following a jury recommendation of life unless "...the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ" (citation omitted). After careful consideration of the facts and circumstances of this case, the court has reached the conclusion that the jury's recommendation of a sentence of life in prison is inappropriate and an override of the jury's advisory sentence is warranted.
>
> The court finds the evidence in mitigation is minimal compared to the magnitude of the crime that has

> been committed by the defendant. In the final analysis, the mitigating circumstances found to exist have no relationship to the crime committed to such a degree that the jury could reasonably conclude life is a proper penalty.
>
> Furthermore, the jury's decision during the guilt phase of this proceeding essentially disregards any theory that the death of Anita Keen was accidental. If the jury believed that the victim's death was the result of premeditated murder, then the cold and calculated plan to kill her must necessarily outweigh the mitigating circumstances presented by the defense. This court can only conclude that the jury's hasty recommendation of life indicates that it was based on something other than the sound reasoned judgment required in such cases. Had the jury considered the aggravating and mitigating circumstances, the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. The mitigating evidence is wholly insufficient to outweigh the aggravating circumstances in support of a life sentence.

(R 459-461).

It is clear from the above excerpt that the trial court mentioned the seven to five vote only in passing and only as commentary on the course of the proceedings. Certainly, there was no consideration of it as a non-statutory aggravating circumstance. From a review of the sentencing order it is apparent that the split vote was not a factor upon which the trial court relied in deciding to impose the death sentence. Therefore, there was no error or at most harmless error. *Craig v. State*, 510 So. 2d 857 (Fla. 1987).

In regard to the length of the jury's deliberation, it does appear as the trial court did consider this in reaching his independent decision to override their recommendation. However, it is also abundantly clear from the sentencing order that the trial court carefully evaluated and weighed the aggravating and mitigating circumstances. It is clear that nonetheless the trial court gave great weight to the jury's recommendation. It is clear that the trial court justified its override on sufficient circumstances other than the length of jury deliberations. Therefore, if error it was harmless pursuant to Fla. Stat. §59.041, Fla. Stat. § 924.33 and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986).

Appellant cites to *McCampbell v. State*, 421 So. 2d 1072 (Fla. 1982), but *McCampbell* does not hold that concluding the jury did not have sufficient time to consider its penalty verdict is reversible error. In fact, in *McCampbell* the focus was not on this alleged error but on the fact that the trial court (1) considered that the appellant never acknowledged his guilt or showed any remorse to the court, which is an invalid non-statutory aggravating circumstance; and (2) concluded that the appellant procured the perjury of his girlfriend for the purpose of establishing an alibi defense, which was not supported by the

evidence and which also is an invalid non-statutory aggravating circumstance. In light of the otherwise thoughtful and seasoned analysis of the trial judge in this matter, the fact that he only based his opinion of the jury's reasonableness in small part on the length of their deliberations was harmless to the outcome.

POINT XVII

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONSIDER LIFE WITHOUT PAROLE AS A SENTENCING OPTION.

In this appeal, Appellant claims that the trial court committed fundamental error by failing to consider this

sentencing option in determining the proper sentence (IB 91). Appellant claims fundamental error, because he failed to preserve this issue for appellate review by objecting in the trial court. Not only did he not request the jury be so instructed (TV XVII, 1826-37), he in fact recommended that they be instructed that the alternative to death is life imprisonment without the possibility of parole for 25 years (R 414, 430). Appellant also failed to raise this issue in his sentencing memorandum (SR 141-153), at the *Spencer* hearing (TV XVII, 1910-1915), at sentencing (TV XVII, 1917-1943), or in his objections to the sentencing order (SR 154-59).

Nonetheless, this Court has held that under such circumstances the trial court was correct to apply Section 775.082, Florida Statutes (1981), which was in effect at the time of the crime in 1981. *Hudson v. State*, 23 Fla. L. Weekly S71 (Fla. Feb. 5, 1998).

POINT XVIII

WHETHER ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT.

Challenges to constitutionality issues must be preserved by motion or objection in the lower court. *See San Martin v. State*, 23 Fla. L. Weekly, S1 (Fla. Dec 24, 1997); *Eutzy v. State*, 458 So. 2d 755, 757 (Fla. 1984). Appellant made no such objection below, therefore this issue has not been preserved for appellate review.

Nonetheless, this Court has repeatedly held that use of the electric chair in Florida is not cruel and unusual punishment. *Jones v. Butterworth*, 22 Fla. L. Weekly S659 (Fla. Oct. 20, 1997); *Pooler v. State*, 704 So. 2d 1375 (Fla. 1997); *Fotopoulos v. State*, 608 So. 2d 784 n. 7 (Fla. 1992). Appellant has offered no substantial reason for this Court to recede from its prior opinions.

POINT XIX

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellant also argues that the death penalty is unconstitutional. This Court has repeatedly rejected this argument. *San Martin v. State*, 23 Fla. L. Weekly S1 (Fla. Dec 24, 1997); *Pooler v. State*, 704 So. 2d 1375 (Fla. 1997); *Hunter v. State*, 660 So. 2d 244 (Fla. 1995), *cert. denied*, 116 S.Ct. 946 (1996); *Fotopoulos v. State*, 608 So. 2d 784, 794 & n.7 (Fla. 1992). Appellant has offered no new argument or substantial reason for this Court to recede from its prior opinions.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State requests that this Honorable Court **AFFIRM** the trial court's judgment and sentence.

Respectfully submitted,

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by United States mail to Richard B. Greene, Esq., Assistant Public Defender, Office of the Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this ____ day of May, 1998.

_____
DAVID M. SCHULTZ
Of Counsel