IN THE SUPREME COURT OF FLORIDA

JOHNNIE L. NORTON,

Appellant,

v.

Case No. 88,803

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Around 7:00 a.m. on November 3, 1994, Lillie Thornton's body was discovered in an open field in Tampa (T. 287-288, 290-292, 316). Lillie had been shot in the back of the head and left among the trash and debris of the vacant lot (T. 293, 296, 444). She was lying face down and had a tire track on the back of her right leg (T. 293, 350-351, 442, 448). There were no signs of a struggle and it appeared that she had been placed there after she was dead (T. 443, 683-684). The medical examiner estimated that Lillie had been killed between 7:30 p.m. on November 2 and 1:30 a.m. on November 3, but it could have been as early as 9:30 a.m. on November 2 or as late as 5:30 a.m. on November 3 (T. 444, 461, 463).

The last time Lillie had been seen alive was about 10:30 or 11:00 p.m. on November 2, when Kim McDonald saw Lillie get out of the appellant's car and go around to the back of a store to purchase drugs (T. 324-330). Kim had known Lillie for several months, and spoke to her and the appellant that night (T. 324, 335). Kim had known the appellant for several years (T. 324, 335). After the transaction, Lillie got back into the appellant's car and they left (T. 327). The appellant was driving; there was no one else in the car (T. 326-327).

Lillie had left her apartment with the appellant about noon on November 2. Lillie had just gotten a monthly check and was headed out to pay some bills (T. 281). The appellant and Lillie had been

seeing each other for about a month; the appellant was at Lillie's apartment frequently and often **gave** her rides (T. 256, 261, 262). Johnnie Seay was Lillie's boyfriend for about five years before Lillie started seeing the appellant; Seay was the father of three of Lillie's daughters (T. 268, 279-280). **Seay** and Lillie still saw each other nearly every day, as **Seay** came by to see his children and sometimes spent the night (T. 251, 269-270). It was unusual for Lillie to stay out all night without calling home (T. 254, 262, 281).

The police got the appellant's name from McDonald on November 4 and Detective Rick Childers went to the appellant's house, about a mile from the field where Lillie had been found (T. 354-56, 370, 688, 708). Childers saw a car matching the description provided by McDonald parked on the street and noted an apparent blood smear on the passenger side window (T. 689). Childers called for other detectives to watch the appellant's car and went back to the station to prepare a request for a search warrant (T. 690). Detectives Townley and Holland responded and about noon Detectives Black and Pedersen arrived to relieve them (T. 393-394). The appellant came out about that time and the detectives followed in two police cars (T. 395-396). The appellant seemed to be trying to get away from them and Detective Black attempted to have him pull over; instead the appellant turned off into a drive-in theater parking lot and, when the police had the exit blocked, jumped out

of his car and ran (T, 398-399). Black called for the appellant to stop, which he did, and Pedersen chased the appellant's car down before it could hit a fence (T. 400). The appellant was put in the back of a police car and Detective Childers was notified and responded to the scene (T. 400-401, 691-692).

Childers told the appellant that he was investigating Lillie's death and that the appellant's name had come up (T. 693). The appellant told him that he had known Lillie for two or three months, and that he had picked Lillie up on November 2 around 11:30 or 12 noon so that she could pay some bills, but that his car broke down a few blocks away and Lillie had walked off (T. 695). He stated that he had not seen her again; that he stayed with his car until about 6:00 or 6:30 that evening, when his brother Trumell finally showed up, did something under the hood, and got the car started (T. 695-697). The appellant told Childers that he went home and went to bed, he didn't get up again, and no one else had used his car (T. 697-698).

Childers pointed to the blood smear on the window and the appellant asked where any blood was on the seat (T. 699). Childers told him that it wasn't on the seat, it was on the window, but the appellant did not respond (T. 699). Photographs of the car which were taken at that time were admitted into evidence (T. 701). Childers observed that the car smelled as if it had been freshly cleaned, and that there was no carpet in the car (T. 702-703, 707).

He asked the appellant what had happened to the carpet, and the appellant stated that the car didn't have carpet when he bought it several months earlier (T. 703). However, Childers noticed that the metal on the floor was fresh and had not been scratched by people getting in and out; in addition, Star Thornton testified that the car had carpet when she had ridden in it a few days after October 22 and James Ferguson testified that he had sold the car to the appellant in August of 1994 and that the car had carpeting at that time (T. 257-260, 703, 748-749).

Detective Noblitt also noted the blood smear on the passenger side window while the car **was** at the drive-in; Noblitt also discovered a spent shell casing in the back seat (T. 360-362). The car was taken to the police department impound lot and later transferred to FDLE for processing (T. 363, 703-704). The shell casing found in the car was compared to ammunition components (including a jacket, core, and fragments) removed from Lillie's skull and both were determined to be 380 caliber, manufactured by Federal Cartridge Company, and probably from a jacketed hollow point hydroshock bullet with a center post weighing 9 grains (T. 408-410, 414). Although there were millions of Federal brand 380 automatics manufactured in the last year, the hydroshock bullet is not very common and the center-post hydroshock is "very unique" and not a choice of the majority of shooters (T. 434). The firearms expert also testified that he could not determine the distance from

which the shot had been fired, because Lillie's hair was an intervening object between the gun and her skin which would prevent any strippling (T. 428).

The blood found on the passenger window and some more on the rubber tubing around the window track were matched by DNA analysis to Lillie (T. 451, 481-482, 485-486, 595-596, 605, 644-646, 650, 652). Three tire tracks from the field where Lillie was found and the tire track on imprinted on her leg had the same tread characteristics as the left front tire on the appellant's car (T. 527-532, 539). After the appellant's arrest, Det. Childers told him that the police had collected tire tracks from the scene, and that they would be compared to his tires, and they could be matched like fingerprints (T. 779). Later that day, the appellant mentioned to Det. Bell that he had purchased the tires for his car the day before, from a tire store at 21st Street and Nebraska Avenue, for fifty dollars (T. 773). There was no tire store at that location; however, Det. Childers went to other tire stores in the vicinity but could not locate anyone that had sold tires to the appellant (T. 780).

The appellant's car was delivered to FDLE for processing on November 8, 1994 (T. 465, 495). Car cleaner, air freshener, automobile carpet stain remover, a utility knife, packaging from the utility knife, and a carpet brush were found in the car; some of these items were in the front passenger foot well area and

others were in the back bench seat (T. 474-479). Two receipts, dated November 3, 1994, were also found; a Western Auto receipt time stamped at 8:56 a.m. and a Discount Auto Parts receipt stamped at 9:18 (T. 471). All of the carpeting had been removed except for bits of remnants in the crevices, and certain areas of the passenger seat had been cut and removed and replaced with something obviously different (T. 468).

James Watson testified that he worked with the appellant between September and November, 1994, and that the appellant had mentioned wanting to sell a gun at one point, but Watson didn't have any money (T. 751-753).

The appellant's hypothesis of innocence was that he was home in bed at the time of Lillie's killing (T. 817-819, 830-835, 853-859). His mother testified that he was home between 4 p.m. and 5 p.m. on November 2, and that he left with his brother around 6 but returned home between 8:00 and 8:30 p.m., went to his bedroom, and stayed there all night (T. 818-819, 830, 835-836). His sister testified that he came to her house between 4:30 and 5:00 p.m. on November 2, and was at their mother's house about 8:30 or 9:00 p.m. (T. 849-850, 853, 858-859). She stated that the appellant was drunk, went to bed, and was still there when she left the house around 10:00 or 10:30 p.m. (T. 853-854, 857). Another sister testified that she saw a bullet and shell in the appellant's car when he first bought the car and that she later noticed that he had

taken the carpet out of the car (T. 865-867, 870-874). A doctor also testified for the defense that he had seen Lillie on October 27 and that she had light vaginal bleeding (T. 900-905).

The jury found the appellant guilty as charged (T. 1026). Following the penalty phase, the jury recommended death by a vote of 8 to 4 (R. 373). The trial court followed the jury's recommendation, finding that the aggravating circumstance of prior violent felony conviction was proven by the appellant's convictions for resisting an officer with violence, battery on a law enforcement officer, two aggravated battery convictions, and second degree murder (R. 398-399). The court reviewed the evidence presented in mitigation but determined that there was nothing mitigating about the facts and that, therefore, no mitigating factors existed (R. 399-400). He concluded that the aggravating circumstance outweighed the mitigation and imposed a sentence of death (R. 400-401). This appeal follows.

SUMMARY OF THE ARGUMENT

I* The appellant's conviction is supported by competent, substantial evidence. The appellant's identity as the perpetrator of Lillie Thornton's murder was well established. Thornton was seen with the appellant in his car approximately eight hours before her body was discovered, Her blood was found on the passenger side window and window track in the car; a shell casing of the same type and caliber as the bullet found in Thornton's head was found in the seat. The appellant denied having been with Thornton that evening and made statements inconsistent with the evidence at trial, The carpeting was removed from his car and cleaning supplies had been purchased about two hours after Thornton's body was discovered. Based on the evidence admitted at trial, a reasonable jury would reject the appellant's alibi defense.

II. The appellant's allegation that the evidence was insufficient to prove that Thornton's murder was premeditated is without merit. The circumstances of the crime clearly demonstrated the premeditated nature of this offense. Lillie Thornton was shot in the back of the head; her body unceremoniously dumped in a field. There was no hypothesis of innocence offered to suggest this murder was anything other than the execution-style killing it appears to have been.

III. The trial court properly denied the appellant's motion for mistrial after Det. Childers responded to defense counsel's

question during cross examination. The appellant is estopped from complaining about Childers' statement, since any possible error was invited by the defense, as Childers was being responsive to a question asked by defense counsel during cross examination; furthermore, there was no contemporaneous objection or request to have the comment stricken. Even if this issue is considered, Childers' remark was not reasonably susceptible of being a comment on the appellant's failure to testify, Finally, any impropriety regarding the challenged comment was clearly harmless beyond any reasonable doubt.

IV. The appellant is not entitled to a new trial due to the state's asking Det. Childers if Trumell had corroborated the appellant's alibi. This argument has not been preserved for review since the appellant's objection was sustained and no further relief was sought until after Childers' had completed his testimony. Since the prosecutor could reasonably have believed this question had been invited by defense counsel's cross examination and no response was actually given, the trial court properly denied the appellant's motion for mistrial.

V. The appellant is not entitled to a new trial due to the trial court's alleged failure to conduct a Richardson hearing. The circumstances of the claimed possible discovery violation were explored, and no further inquiry or findings were requested. Neither a discovery violation nor prejudice has been shown. Even

if a more thorough hearing should have been held, any inadequacy was clearly harmless beyond any reasonable doubt.

VI. The trial court properly permitted the state to introduce the challenged penalty phase testimony relating to the appellant's prior violent felony conviction from his assault on Rosa Warmack. This Court has repeatedly acknowledged the importance of the jury's knowledge of the facts underlying a capital defendant's prior violent convictions in order to properly weigh the strength of this aggravating factor.

VII. The appellant's death sentence is proportional to factually similar cases. The appellant's multiple prior violent felony convictions, including a prior murder, clearly justify imposition of the death penalty in this case, particularly in light of the inconsequential mitigation presented.

ARGUMENT

ISSUE I

WHETHER THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT IT WAS APPELLANT WHO KILLED LILLIE THORNTON.

The appellant initially challenges the sufficiency of the evidence presented below to establish that he was the person that killed Lillie Thornton. As the trial court found in denying the appellant's motion for judgment of acquittal, there was substantial, competent evidence admitted to support the jury's verdict of guilt against the appellant. Therefore, he is not entitled to relief on this issue.

A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. DeAngelo v. State, 616 So. 2d 440, 441-442 (Fla. 1993); Tavlor v. State, 583 So. 2d 323, 328 (Fla. 1991), cert. denied, U.S. , 115 S. Ct. 518, 130 L. Ed. 2d 424 (1994); Lynch v. State, 293 so. 2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, a defendant admits the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn

from conceded facts, the court should submit the case to the jury. Lynch, Taylor.

While this Court has recognized that circumstantial evidence may be deemed insufficient where it is not inconsistent with a reasonable theory of defense, this Court has also recognized repeatedly that the question of whether any such inconsistency exists is for the jury, and this Court will not disturb a verdict which is supported by substantial, competent evidence. Spencer v. State, 645 So. 2d 377, 380-381 (Fla. 1994); Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Heiney v. State, 447 So. 2d 210, 212 (Fla.), cert. denied, 469 U.S. 920 (1984); Williams v. State, 437 so. 2d 133, 134 (Fla. 1983), cert. denied, 466 U.S. 909 (1984); Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). It is not this Court's function to retry a case or reweigh conflicting evidence; the concern on appeal is limited to whether the jury verdict is supported by substantial, competent evidence. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd., 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). As will be seen, the state clearly presented substantial, competent evidence that the appellant killed Lillie, and therefore the appellant is not entitled to any relief on this issue.

The appellant specifically reviews the evidence presented below -- the testimony of Kim McDonald; the appellant's flight at time of arrest; the blood found in his car; items from car that

tested positive for blood; the tire tread evidence; and the state's alleged failure to prove or present facts which he deems could be relevant -- and attempts to explain why the testimony was not inconsistent with his theory that someone else killed Lillie. This review would make a nice closing argument to attempt to persuade a jury not to give weight to the state's evidence; but clearly does not dilute the evidence presented.

Although the appellant accuses the state of improperly pyramiding inferences to convict him, all inferences independently pointed to his guilt, and are not founded on other inferences. However, the appellant misuses inferences by drawing conclusions from the evidence that are clearly weighted to the defense, He fails to acknowledge any reasonable inferences favorable to the state, not even indulging the state with the presumption that a cash register receipt would be accurately date-stamped (Appellant's Initial Brief, p. 42). He does acknowledge that the state's evidence was sometimes "inconsistent" with his defense, but claims that such inconsistent evidence "lacked probative value" (Appellant's Initial Brief, p. 46).

The state clearly established a prima facie case of the appellant's identity, based on the facts that the appellant was seen with the victim the night that she was killed, he removed the carpets from his car and purchased auto cleaning supplies the morning that Lillie's body was found, Lillie's blood **was** found on

the passenger side window and window track in his car, a casing matching the bullet components that killed Lillie was found in his back seat, the appellant ran from officers surveilling him shortly after Lillie was discovered, and the appellant had tried to sell a gun to a coworker. The appellant offers two hypotheses of innocence based on his version of events: that Johnnie Seay killed Lillie, or that Lillie **was** killed by an unknown person.

The first hypothesis is easily refuted by the fact that Johnnie Seay testified at trial that he had not killed Lillie (T. 274-275). Thus, the jury clearly could have rejected this hypothesis of innocence based on Seay's testimony. Certainly, **a** jury is not required to accept any theory on which the state has produced conflicting evidence. Finnev v. State, 660 So. 2d 674, 679 (Fla. 1995); Cochran v. State, 547 So. 2d 928 (Fla. 1989). Furthermore, the trial court properly excluded evidence that Seay and Lillie had a physical encounter about five months prior to her death and that Seay expressed his concern over Lillie to Star Thornton, fearing that Lillie had "pulled a fast one." As the trial court found, without some other evidence that Seay was involved in this crime, this evidence was irrelevant. Pose v. State, 679 So. 2d 710, 714 (Fla. 1996) (prior battery irrelevant).

The appellant's second hypothesis could also be rejected by the jury based on circumstances showing it to be false. The appellant's argument asserts that the evidence in this case was not

inconsistent with his theory that he was home in bed when Lillie was killed. Clearly, Kim McDonald's testimony as to seeing the appellant out with Lillie the night Lillie was killed directly refutes his alibi; even the appellant admits that the testimony of his witnesses "clashed" with McDonald (Appellant's Initial Brief, pp. 36-37).

The appellant's defense was internally inconsistent and itself lacked probative value, if this Court is going to get into judging probative value. The appellant claimed to have spent the day Lillie disappeared waiting at his car from about noon until about 6:00 p.m., within a few miles of his mother's house, until his brother came and got him and took him to their mother's. His mother testified that the appellant was home between 4 and 5 p.m., left with Trumell about 6:00, and returned at 8 or 8:30, staying in for the rest of the night (T. 820, 830-836). His sister saw the appellant at her house between 4:30 and 5 and with Trumell at another house around 6, arriving back at their mother's around 8:30 or 9 (T. 849-850, 853-855, 857, 859).

Given McDonald's testimony rebutting the appellant's alibi, the scientific and incriminating evidence found in the appellant's car, the physical evidence placing the appellant at the scene, and the appellant's actions in trying to sell a gun and running from the police, the state clearly presented sufficient evidence to

establish the appellant's identity as Lillie's murderer, Therefore, he is not entitled to be acquitted of these crimes.

ISSUE II

WHETHER THE COURT BELOW ERRED IN DENYING APPELLANT'S JUDGMENT OF ACQUITTAL, AS THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATED MURDER.

The appellant next asserts that even if the evidence established that he was the perpetrator of this offense, his conviction cannot stand because the state failed to prove that Thornton's murder was premeditated. However, the evidence presented below clearly established a prima facie case of premeditation, and the trial court properly denied a judgment of acquittal on this basis.

Premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act. Spencer v. State, 645 So. 2d 377, 380-381 (Fla. 1994); Asay v. State, 580 So. 2d 610, 612 (Fla. 1991); Wilson v. State, 493 so. 2d 1019, 1021 (Fla. 1986); Preston v. State, 444 So. 2d 939, 944 (Fla. 1984), cert. denied, U.S. , 113 S. Ct. 1619, 123 L. Ed. 2d 178 (1993). There is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent; it may occur a moment before the act. Provenzano v. State, 497 So. 2d 1177, 1181 (Fla. 1986), cert. denied, 481 U.S. 1024 (1987); Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); McCutchen v. State, 96 So. 2d 152 (Fla. 1957). This Court has characterized the

duration of the premeditation as "immaterial so long as the murder results from a premeditated design existing at a definite time to murder a human being." Sonser v. State, 322 So. 2d 481, 483 (Fla. 1975), vacated on other grounds, 430 U.S. 952, 97 S. Ct. 1594, 51 L. Ed. 2d 801 (1977).

Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury which may be established by circumstantial evidence. Penn v. State, 574 So. 2d 1079, 1081-1082 (Fla. 1991); Asay, 580 So. 2d at 612; Cochran, 547 so. 2d at 930; Wilson, 493 So. 2d at 1021; Preston, 444 So. 2d at 944; Spinkellink v. State, 313 so. 2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). Weighing the evidence in light of these standards it is clear that the appellant's premeditation was proven beyond a reasonable doubt.

Whether or not the evidence supports a finding of premeditation in the commission of a murder is a question of fact for the jury. Sochor v. State, 619 so. 2d 285 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 596 (1993); Bedford v. State, 589 So. 2d 245, 250 (Fla. 1991); Preston v. State, 444 So. 2d 939 (Fla. 1984). This Court has acknowledged a finding of premeditation in cases involving similar circumstances. In Griffin v. State, 474 so. 2d 777 (Fla. 1985), the victim was shot without provocation at close range. Although the appellant attempts to distinguish Griffin by noting that it involved a particularly

lethal gun, the state would submit that the appellant's gun was just as lethal. Lillie was also shot without provocation, and at seemingly close range since she and the appellant were within the confines of the appellant's car.

Similarly, in Williams v. State, 437 so. 2d 133 (Fla. 1983), the victim was a girlfriend of the defendant's and had received some disturbing calls from him the night she was killed. The defendant had expressed anger with her and borrowed a gun. The victim was shot in her own apartment; the defendant claimed that he had not been there at the time. And in Hamblen v. State, 527 So. 2d 800 (Fla. 1988), although this Court struck reliance on the cold, calculated and premeditated aggravating factor, the court noted the evidence "unquestionably" demonstrated simple premeditation: Hamblen shot a store employee in the head after she angered him by triggering a silent alarm. The fact that these cases involved evidence of anger or possible provocation not present in the instant case is not significant, since there was no evidence of a struggle or a frenzied rage that to suggest that this was an emotional crime.

The traditional factors for consideration in determining the existence of premeditation support a finding of premeditation in the instant case. Such factors include the nature of the weapon, the presence or absence of provocation, previous difficulties between the parties, the manner in which the homicide was

committed, the nature and manner of the wounds, and the accused's actions before and after the homicide. Larry v, State, 104 So. 2d 352, 354 (Fla. 1958). The weapon in this case was the deadliest of weapons, a firearm. There is absolutely no evidence of anything that would have provoked a rage or frenzy, and no evidence of prior difficulties between the parties. The homicide was committed by pointing a gun at the back of Lillie's head and pulling the trigger. After the homicide, the appellant attempted to destroy evidence by cleaning his car and removing the carpet and tried to evade the police. Even if other factors had not been shown, the fact that Lillie was killed in a manner commonly characterized as "execution-style" (even defense counsel referred to this as an "execution" in his opening, (T. 239), is persuasive evidence of premeditation.

The cases cited by the appellant do not compel a contrary result. In Munain v. State, 21 Fla. L. weekly S66 (Fla. Feb. 8, 1996), the victim was a convenience store clerk killed in a robbery; the defendant had shot two other store clerks in prior separate robberies, neither of which had died. This Court found the evidence consistent "with a killing that occurred on the spur of the moment." The appellant did not kill a stranger during a robbery, he shot a woman he had been seeing for a month or so in the back of the head while they were in his car. Kirkland v.

State, 684 So. 2d 732 (Fla. 1996), did not involve a victim that had been shot in the head.

As in Roberts v. State, 510 So. 2d 885, 888 (Fla. 1987), and Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986), "the evidence in this case does not support the conclusion that the murder was the result of a 'spontaneous, blind and unreasoning reaction' to the circumstances leading up to the murder." Rather, there was clearly substantial, competent evidence presented to support a finding of premeditation on the facts of this case, and there is no evidence to support a suggestion that this murder was anything other than premeditated. Therefore, the appellant is not entitled to have his conviction reduced to second degree murder.

ISSUE III

WHETHER THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER STATE WITNESS DETECTIVE RICK CHILDERS COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AT HIS TRIAL.

The appellant's next issue claims that the trial court should have granted a mistrial during the testimony of state witness Detective Rick Childers, alleging that Childers offered a remark which violated his right to remain silent. However, a review of the transcript clearly demonstrates that the appellant is not entitled to any relief.

It must be noted initially that the appellant's argument as to this issue has not been preserved for appellate review. Once Childers made the suggestion that defense counsel ask his client about the cleaner, the appellant did not object to the comment until after Childers finished testifying. Thus, the objection was not timely so as to preserve this issue for appellate review. Nixon v, State, 572 So. 2d 1336, 1340-41 (Fla. 1990); Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984); Castor v. State, 365 So. 2d 701 (Fla. 1978).

In addition, the disputed remark was clearly invited by the defense. The relevant exchange occurred when defense counsel was cross examining Childers with regard to Childers' testimony about having observed that the appellant's car did not have carpeting when Childers observed the car on November 4, 1994.

Q. The receipt says he was at Western Auto and he bought lifter, carpet cleaner, upholstery top brush, right?

A. Yes, sir.

Q. And at 9:45 his car is in front of his house, and you're saying at that point the carpets were gone?

A. The carpet is gone when I see it, yes, sir.

Q. And there's 30 minutes in between, right?

A. Yes, sir.

Q. Well, twenty-nine **and** a few seconds, 9:16 to 9:45. Do you agree that that's the time frame that Johnnie Norton is allegedly accused of taking all the carpets out of his car and disposed of them?

A. No, sir.

Q. Took them out before?

A. No, sir.

Q. So why is he buying carpet cleaner?

A. That you'll have to ask him.

Q. So you're not saying he bought carpet cleaners to clean up the carpets?

A. No.

Q. He just bought it for some other reason?

A. Could be for the seats.

Q. Could be the seat. When you showed him the blood stain on the window, and he said where on the seat is it, and to you that's incriminating, right?

A. Yes, sir.

(T. 711-12). Thus, when defense counsel questioned why the appellant would have bought carpet cleaner if that **was** the case, Childers advised counsel to ask the appellant. Defense counsel continued to cross examine Childers, and thirty-four transcript pages later, counsel moved for a mistrial, alleging that Childers' remark **was an** improper comment on the appellant's failure to testify.

On these facts, the appellant is precluded from challenging Childers' response. Any possible error that could be identified by Childers' comment was invited by the defense. It is well established that a party may not make or invite an error at trial and then take advantage of the error on appeal. Terry v. State, 668 So. 2d 954, 962 (Fla. 1996); Thomson v. State, 648 So. 2d 692, 695 (Fla. 1994); Pose v. State, 441 so, 2d 1073, 1076 (Fla. 1983). Although the "invited error" doctrine does not apply if the response given could not have been anticipated and was not responsive to the question asked, this exception is not present in the instant case. Counsel had asked a question to which only the appellant would know the answer. The answer "you' 11 have to ask him" may not have been the exact response defense counsel had in mind, but it was responsive to the question.

Even if the remark itself is considered, the appellant has failed to demonstrate any error. Det. Childers' comment was not reasonably susceptible of being interpreted as a comment on the appellant's failure to testify. Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995) (telling jurors they had heard nothing to create reasonable doubt, in context of argument, was not fairly susceptible of being interpreted as comment on silence); Jackson v. State, 522 So. 2d 802, 807 (Fla.), cert. denied, 488 U.S. 871 (1988). Although Childers suggested that defense counsel find out why the appellant bought the carpet cleaner by talking to his

client, defense attorneys are permitted to talk to their clients without putting them on the witness stand. Childers was not suggesting that the appellant should testify; thus, the remark did not highlight the appellant's decision not to take the stand.

When this comment was challenged in a defense motion for a new penalty phase jury, the trial judge noted:

> Okay. The court will deny your motion. I might just say, make in passing this observation about Detective Childers' remark. Mr. Hendrix asked Detective Childers an impossible to answer rhetorical question, provoking Detective Childers to try to probe your clients mind, a question that Detective Childers obviously wouldn't know the answer to, but only asked for effect. And so I think his response was to an open-the-door question, an honest answer to a dishonest question, not a comment on the right to remain silent.
>
> Mr. Hooper [defense counsel]: And quite appropriate had he been a lay witness. My point is he's not a lay witness. Thirteen years in homicide, he knows better.

(T. 1032-1033). Defense counsel's concession that this was an appropriate response to the question is cogent. A comment does not become interpreted as a comment on silence just because the witness should have "known better."

The state is permitted to infer that evidence which could only come from the defendant has not been presented where the defense has assumed a burden of proof by placing a particular fact in issue, such as offering an affirmative defense. See, Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991); State v. Michaels, 454 So. 2d 560, 562 (Fla. 1984). In this case, the defense was attempting

to use Det. Childers to suggest that it would not have made sense for the appellant to have bought carpet cleaner if he had removed the carpeting from his car. Childers truthfully advised that only the appellant would know why he bought the cleaner. The comment was merely a remark about an affirmative fact the defense was trying to elicit; it was not a remark about the appellant's failure to testify.

In addition, any possible error that could be discerned from Childers' comment would clearly be harmless beyond any reasonable doubt. Heath v. State, 648 So. 2d 660, 663 (Fla. 1994); State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). This was an isolated comment that was obviously not mentioned again during the trial. The comment had little to do with the evidence or the defense presented to the jury. Of course, the jury was thoroughly instructed of the appellant's right not to testify, and that no adverse inference could be drawn from his failure to testify (T. 1018-1019).

Motions for mistrial are addressed to the discretion of the trial court and should only be granted when necessary to ensure that the defendant receives a fair trial. Terry, 668 So. 2d at 962. The facts of this case do not demonstrate an abuse of discretion in the denial of the appellant's motion for mistrial, and no new trial is warranted on this issue.

ISSUE IV

WHETHER THE APPELLANT IS ENTITLED TO A NEW TRIAL DUE TO THE PROSECUTOR'S QUESTIONING OF DET. CHILDERS.

The appellant's next issue criticizes the state for allegedly attempting to elicit hearsay testimony from Det. Childers which the appellant claims undermined his efforts to present his defense. This is another issue which has not been preserved for appellate review. At the time the prosecutor asked Childers whether the appellant's brother, Trumell, had verified the appellant's alibi, defense counsel objected on hearsay grounds, and the objection was sustained (T. 741-742). There was no request for any further relief from the court. Since the appellant did not request the court to instruct the jury to disregard the question, or move for a mistrial, he cannot fault the trial judge for not taking further action. The appellant's later motion for mistrial based on the prosecutor's question was not contemporaneous so as to preserve the issue; the motion was not made until Childers had completed his testimony. Nixon, 572 So. 2d at 1340-41; Jackson, **451** So. 2d at **461.** On these facts, this Court should expressly find the appellant's argument on this issue to be procedurally barred.

Even if the appellant's argument is considered, no new trial is warranted by the prosecutor's question to Childers. This issue arose because, on cross examination, defense counsel was pointing out, through Childers, that the appellant's statements at the time

of his arrest were consistent with some of the evidence that had been presented:

> **Q.** And he sat down and talked to you, didn't he?
> A. Yes, sir, he did.
> Q. And a lot of what he told you is consistent with your investigation. For instance, he picked up Lillie to go pay bills. He admits to that, doesn't he?
> A. Yes, sir.
> Q. Okay. He told you he went home and spent the evening at home with his family, didn't he?
> A. Yes, sir.
> Q. And did you interview members of his family?
> A. Yes, sir.
> Q. Did they verify that?
> MS. COX: Your Honor, I'm going to object. Well, never mind.
> THE COURT: You may answer.
> THE WITNESS: Did I verify what, sir?
> BY MR. HENDRIX:
> Q. That he was at home with his mother and two sisters and father?
> A. To a time limit,
> Q. A time limit on the front end or back end?
> A. When you say the back end, I say 10:00 time.
> Q. Okay. Hold on. 10:00 is the arrival or the leaving time? He arrived home at 10:00 or left at 10:00?
> A. When last seen by his sister.
> **Q.** When last seen by his sister was lo:oo.
> And your understanding was he left the house at 10:00?
> A. No, the sister left. That's all she can account for.
> Q. What about the mom and other sister?
> A. I never talked to the mother.
> Q. You never talked to the mother?
> A. No. Other detectives did.
> Q. You never talked to the other sister?

A. No.

(T. 724-25).

Based on this line of questioning, the prosecutor reasonably assumed that she would be permitted to question Childers about whether Trumell had verified the appellant's story. It is apparent that she withdrew her objection to defense counsel's elicitation of hearsay believing that the door was being opened to ask the same question. Even if her assumption was wrong, the mere asking of the question was not unreasonable and certainly not egregious prosecutorial misconduct that vitiated any possibility of a fair trial for the appellant.

The jurors knew that Trumell Norton should have been a key witness. According to the appellant's statements, the appellant was with Trumell the evening that Lillie disappeared, and Trumell could verify that the appellant had had car trouble that day and corroborate the appellant's other alibi witnesses. The prosecutor had elicited through Det. Childers that, after Childers initially interviewed Trumell, Childers was asked to tape Trumell's statement, and Childers starting looking for Trumell and leaving messages for him but he had never been able to find him again (T. 704-706). Defense counsel questioned Childers as to whether Childers was implying that the defense was hiding Trumell, to which Childers responded that he didn't know, it could be the family didn't know where to find Trumell (T. 726-27) .

The appellant's complaint with the prosecutor's question is simply that the question created the inference that Trumell would not verify the appellant's alibi. This inference, however, was already established in this case and furthermore there is nothing improper about such an inference. The same inference could be drawn from the fact that the defense did not present Trumell as a defense witness. See, Michaels, 454 So. 2d at 562 (prosecutor entitled to comment on defense's failure to present a witness particularly available to the defense where defendant had accepted burden of presenting an affirmative defense) .

The appellant's reliance on Dawkins v. State, 605 So. 2d 1329 (Fla. 2d DCA 1992) for any relief is misplaced. In Dawkins, the prosecutor cross examined the defendant and inquired as to a prior felony conviction. The prosecutor then asked, "You're not supposed to have a firearm, are you, Mr. Dawkins?" clearly implying that the defendant was guilty of an uncharged collateral crime. The prosecutor then emphasized during closing argument that the defendant was not supposed to have a firearm. This is a far cry from what happened in the instant case. Here, there was no direct implication of a collateral crime; only the inferential speculation that, while some members of the appellant's family would verify his alibi, his brother might not.

On these facts, any error in the asking of this question in this case must be deemed harmless beyond any reasonable doubt.

See, Jackson v. State, 522 so. 2d 802 (Fla. 1988) (any impropriety in state questioning defense witness about having been arrested and charged with homicide did not warrant mistrial, where question was not answered, state was attempting to show a specific bias, and witness' testimony did not go to heart of the defense).

Nor is any error suggested by the trial court's overruling the appellant's objection to Det. Childers testimony that he was not able to find anyone that had sold tires to the appellant. Here, the "extrajudicial fact" being proven was that the appellant's attempt to explain away potentially incriminating evidence itself indicated consciousness of guilt. In addition, it was proper to demonstrate the thorough nature of the investigation, since Childers had been extensively cross examined about the investigation of other possible suspects (T. 708-731, 735-737). Furthermore, Childers' testimony was offered as a reasonable conclusion and not a proven fact. Childers did not say that no one sold tires to the appellant; he stated he was unable to verify that the tires had been purchased. He was cross examined about the adequacy of the investigation he conducted in formulating this conclusion, with defense counsel asking who Childers had interviewed and what records, receipts and inventories he had evaluated (T. 781-782).

Det. Childers' testimony that he attempted, unsuccessfully, to verify the appellant's statement was not offered to prove that the

appellant owned the tires on his car prior to the day before his arrest; it was offered to established that the appellant gave an unlikely explanation in an attempt to distance himself from possibly inculpatory evidence. Since the statement was offered to prove the weakness of the appellant's explanation rather than the fact of tire ownership, this testimony was not hearsay.

On these facts, the appellant has failed to demonstrate that his untimely motion for mistrial was should have been granted. Any possible error in the state's questioning of Det. Childers would clearly be harmless beyond any reasonable doubt, and certainly would not rise to a level of vitiating the fundamental fairness of the appellant's trial. No new trial is warranted on this issue.

ISSUE V

WHETHER THE COURT BELOW ERRED IN FAILING TO CONDUCT A RICHARDSON HEARING AFTER THE DEFENSE CALLED HIS ATTENTION TO A DISCOVERY VIOLATION COMMITTED BY THE STATE.

The appellant next contends that a new trial is warranted due to the trial court's failure to conduct a Richardson[1] hearing. Once again, however, this issue has not been preserved for review. Although the appellant now faults the trial judge for allegedly failing to make a satisfactory inquiry when advised of a potential discovery violation, he never complained to the judge about the adequacy of the inquiry that was conducted. He never specifically requested a Richardson hearing, or any further development of the facts involved.

While Richardson places an obligation on judges to conduct an adequate inquiry when a discovery violation has been alleged, the burden remains on the parties to alert the judge that a hearing is necessary. When there is no alert, there is no error in the trial court's failure to hold a hearing. Brazell v. State, 570 So. 2d 919 (Fla. 1990); Copeland v. State, 566 So. 2d 856 (Fla. 1st DCA 1990).

On these facts, no issue regarding the lack of a Richardson hearing was preserved for review. See, Susss v. State, 644 So. 2d 64, 67 (Fla. 1994) (in considering claim that trial court failed to

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[1]Richardson v. State, 246 So. 2d 771 (Fla. 1971).

conduct a Richardson hearing, court must determine (1) whether a discovery violation occurred, (2) whether a Richardson hearing was requested, and (3) if so, whether the judge made a sufficient inquiry), cert-. denied, U.S. ___, 115 S. Ct. 1794, 131 L. Ed. 2d 722 (1995); Justus v. State, 438 So. 2d 358, 365 (Fla. 1983) (Richardson hearing only required where court determines discovery violation has occurred), cert. denied, 465 U.S. 1052 (1984); Lucas v. State, 376 So. 2d 1149, 1151-52 (Fla. 1979), cert. denied, 510 U.S. 845 (1993).

Even if the appellant's claim is considered, no error has been established. This issue arose because, on direct examination, state witness Gary McCullough testified that, when the appellant's car was delivered to FDLE for processing, the passenger's side window was in the "down" position (T. 470). McCullough reiterated this testimony on cross examination (T. 486-487). There is apparently no dispute that McCullough's testimony in this regard was mistaken; he later testified that he had reviewed his file, including the photographs notes, and could find no indication whatsoever that the window was down (T. 763-765). Pictures taken at the time the car was delivered clearly reflected that the window was up (T. 765-767). When the prosecutor attempted to have one such picture identified, the defense objected, stating that the photo had never been provided to the defense (T. 765). Defense counsel noted, however, that the prosecutor thought McCullough had

brought the proof sheet for the picture to his deposition, but since the deposition was conducted by a prior defense attorney, 'I would have to go back and look prior to our involvement in the case." The prosecutor stated that the witness believed that he had given a copy to the defense, but the prosecutor also had not been at the deposition (T. 766). The court determined that, since the picture appeared to correct an error in the testimony, he would allow it to be introduced (T. 766).

No Richardson violation has been demonstrated on these facts. It was never affirmatively alleged that McCullough's picture was not given to the defense; both attorneys acknowledged that a proof was believed to have been disclosed at the time of McCullough's deposition. There was no other information about the circumstances of the possible disclosure or nondisclosure that could have been provided by either party had a more thorough or formalized Richardson hearing been held. And as to prejudice, the trial judge implicitly found there would be no procedural prejudice to the defense should the photo be admitted, since the photo was only being offered to correct an error in prior testimony.

It is clear that any violation which could have occurred on these facts would not have prevented the defense from properly preparing for trial, since defense counsel would not have prepared for the state having to correct one of its own witnesses. The appellant claims that the harmfulness of this alleged error is

suggesting by three factors: that the evidence of blood was crucial to the state's case; that defense counsel would not have cross examined McCullough about the window being up or down if he had seen the photo; and that having a possible defense argument that the window was down might cast doubt on Det. Childers' testimony about having seen the blood on the window while the car was at the appellant's house and at the drive-in.

None of these factors imply the procedural prejudice required to exclude evidence due to a discovery violation. Certainly the blood evidence was crucial to the state; the picture showing the window was up, corroborating McCullough's testimony on that point, did not add anything to the crucial blood evidence. Testimony about the blood having been seen, collected, tested, and matched to the victim through DNA analysis would have come in, and did come in, without admission of the photo. The appellant's cross examination of McCullough did not prejudice him; McCullough merely repeated what he had already stated on direct examination, that the window was down at the time the car was delivered. And as to the argument that the defense would have liked to have cast doubt on Childers' testimony about having seen the blood, even if the window had been down at FDLE, the window could have been up when seen by Childers four days earlier.[2] At any rate, the fact that the

[2]A picture that was taken of the car at the drive-in, showing the blood on the raised window, had been admitted into evidence without objection during Childers' testimony (T. 701).

defense is deprived of a windfall mistake in a state witness' testimony is not any "procedural prejudice" that Richardson seeks to prevent.

On these facts, the appellant is not entitled to a new trial due to the alleged lack of a Richardson hearing prior to the admission of the photograph of his car as received by FDLE. As the appellant notes, any failure to conduct a sufficient hearing into an alleged discovery violation is subject to harmless error. State v. Hopp, 653 So. 2d 1060 (Fla. 1995). The state submits that the trial judge's actions after defense counsel expressed concern about the photograph were consistent with the requirements of Richardson, but even if deemed insufficient, no harm could have possibly accrued to the defense on these facts. Therefore, no new trial is warranted on this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO FLORIDA'S STANDARD JURY INSTRUCTION ON PREMEDITATED MURDER AND REFUSING TO GIVE THE INSTRUCTION PROPOUNDED BY APPELLANT.

The appellant's next issue challenges the trial court's actions in denying his requested jury instruction on premeditation. The appellant contends that the standard first degree murder jury instruction does not sufficiently define the element of premeditation in accordance with McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957). This Court has expressly upheld the standard jury instruction, finding that it 'addresses all of the points discussed in McCutchen, and thus properly instructs the jury about the element of premeditated design." Spencer, 645 So. 2d at 382. See also, Kilsore v. State, 688 So. 2d 895, 897-898 (Fla. 1996). Although the appellant suggests that the differences between the definition of premeditation set forth in McCutcheon and that in the standard instruction are significant, the additional language he proposes would not affect the substance of the instruction and does not establish that the standard instruction is erroneous or misleading.

It is well settled that the correctness of a jury charge should be determined by the consideration of the whole charge. Barkley v. State, 152 Fla. 147, 10 so. 2d 922 (Fla. 1942); Anderson v. State, 133 Fla. 63, 182 So. 643 (Fla. 1938). The

denial of a requested jury instruction cannot be deemed error where the substance of the charge was adequately covered by the instructions as a whole, and the charges as given are clear, comprehensive, and correct. Bolin v. Stats, 297 So. 2d 317, 319 (Fla. 3d DCA), cert. denied, 304 So. 2d 452 (1974); Roker v. State, 284 So. 2d 454, 455 (Fla. 3d DCA 1973). In this case, the jury was completely and thoroughly instructed on the definition of premeditation (T. 1012-1013). Therefore, there was no abuse of discretion committed when the trial court refused to give the special instruction on premeditation requested in this case.

The appellant's claim that the definition from McCutcheon was required because it is more thorough and sets forth a higher standard for premeditation than the standard instruction was rejected in Spencer. In addition, this is not a relevant consideration in reviewing the denial of a requested instruction, Every instruction could be expounded upon, but the focus must be on whether the instruction, as given, was sufficient to advise the jury of the law. Case decisions may offer additional definitions or explanations of the law, but a trial judge is not required to embody such decisions into his charge to the jury. This Court has recognized that not every judicial construction must be incorporated into a jury instruction. Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994).

The giving of a requested instruction is within the trial court's discretion. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The appellant has failed to establish any abuse of discretion in this case, and he is not entitled to a new trial on this issue.

ISSUE VII

WHETHER THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL REGARDING THE ROSA WARMACK INCIDENT THAT WAS IRRELEVANT AND PREJUDICIAL.

The appellant's first penalty phase issue disputes the admissibility of evidence relating to one of his prior violent felony convictions. Specifically, the appellant asserts that testimony about the brutal assault which he committed on Rosa Warmack should not have been permitted, alleging that it was irrelevant and prejudicial. However, a review of the record demonstrates that no error has been presented.

It is important at the outset to understand the scope of this issue. The appellant does not, and cannot, challenge the admissibility of the testimony regarding the facts of the prior conviction. The only issue raised is whether the state exceeded the proper bounds of such testimony because witnesses noted that the victim of the prior conviction was retarded, had been sexually battered, and appeared after the attack to have been mangled by lions.

The appellant had been granted a standing objection, on relevancy grounds, to any reference to Rosa Mae being "retarded" and to any reference to the fact he was originally arrested and

charged with sexual battery[3] (T. 1058-1060). There ♦♋♦ no standing or contemporaneous objection requested to Rosa's father's description of her appearing to have been mangled by lions (T. 1058-1060, 1080). To the extent that the appellant alleges that the admission of this evidence was improper because the probative value was outweighed by unfair prejudice and because this testimony became a feature of the trial, these particular arguments were never presented to the court below. Thus, much of the appellant's argument as to this issue is not cognizable in this appeal. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982).

This Court has consistently upheld the state's right to admit and argue evidence relating to the facts of a capital defendant's prior violent felony convictions. Finnev v. State, 660 So. 2d 674, 683-684 (Fla. 1995); Lockhart v. State, 655 So. 2d 69, 72-73 (Fla. 1995); Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1992); Stewart v. St-ate, 558 So. 2d 416 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Stano v. State, 473 So. 2d 1282 (Fla. 1985), cert. denied, 474 U.S. 1093 (1986); Elledge v. State, 346 So. 2d 998 (Fla. 1977). Such testimony assists the jury and judge in analyzing a defendant's character, including any

[3]No testimony was adduced below as to the nature of the charges filed against the appellant or the basis of his arrest. There was no objection made before or during trial to Detective Alarcon's testimony reciting Rosa's description of the crime, including the comment that the appellant had forced Rosa to have sex before beating her unconscious (T. 1088).

propensity to commit violent crimes, in order to determine the propriety of imposing the death sentence. Id. at 1001. In this case, the testimony that the victim had mental limitations that would have been apparent to the appellant shows something about his character.

The appellant relies on Garron v. State, 528 So. 2d 353 (Fla. 1988), for the proposition that any reference to the claim of forced sex in Rosa's statement to Alarcon was error because it was conduct for which no conviction has been returned. This reliance is misplaced. In Garron, this Court rejected the prosecutor's attempt to cross examine the defendant's sister about the defendant having allegedly killed someone in another country, where no arrest or conviction had been made based on that allegation. The instant case does not identify a criminal episode for which the appellant was not convicted, it simply permits a detail of a prior conviction that shows the egregious nature of the conviction.

The appellant complains that this evidence "served no purpose other than to cast Appellant in an unfavorable light" (Appellant's Initial Brief, p. 77). Yet the appellant does not identify what other purpose this aggravating factor is to serve. Determining how "favorable" the light is that the defendant is standing in the whole purpose of a penalty phase proceeding, Surely testimony about the appellant's conduct is not subject to exclusion because it doesn't make him look good.

Furthermore, any possible error in the presentation of this testimony would clearly be harmless beyond any reasonable doubt. The appellant's attack on Rosa was an outrageous offense in itself; the fact that Rosa was "sort of on a retarded level," did not add appreciably to the horrendous nature of the crime. In Freeman v. State, 563 So. 2d 73, 75-76 (Fla. 1990), this Court found that the spouse of a prior homicide victim should not have been allowed to testify about the prior conviction, but the error was not so prejudicial as to warrant reversal of the sentencing proceeding. Similarly, in Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, 510 U.S. 969 (1993), this Court found harmless error in the admission of a gruesome photograph of a victim of Duncan's prior violent felony conviction, since a certified copy of the judgment and extensive, detailed testimony about the circumstances involved and injuries sustained in Duncan's previous murder had also been admitted. See also, Coney v. State, 653 So. 2d 1009, 1014-1015 (Fla. 1995) (to extent mother described her child, the victim of Coney's prior convictions, in inflammatory terms, error was harmless); Henry v. State, 649 So. 2d 1366, 1369 (Fla. 1994). These cases demonstrate that any possible error in the admission of the challenged testimony would clearly be harmless beyond any reasonable doubt.

On these facts, the appellant has failed to demonstrate any error in the admission of this testimony. Therefore, he is not entitled to a new sentencing hearing on this issue.

ISSUE VIII

WHETHER THE COURT BELOW ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The appellant's final issue challenges the propriety of his death sentence. The appellant claims that this sentence is disproportionate because the state only established that one aggravating factor was applicable. The fact that only one aggravating factor was found below does not mandate reversal of the death sentence imposed in this case. The appellant's only comment about the aggravating factor is that the case is "not among the most aggravated murder cases in Florida" (Appellant's Initial Brief, p. 80). The state disagrees. Lillie Thornton was unmercifully executed by a man with five prior violent felony convictions, including a second degree murder that had also been committed with a firearm. In support of this factor, the trial court noted:

> The defendant was previously convicted of a felony involving the use or threat of violence to some person. The record reflects that the defendant was convicted of the crimes of Resisting an Officer with Violence (Tampa Police Department Officer J. Parham) and Battery on a Law Enforcement Officer (Officer Parham) in case number 81-7358; Aggravated Battery on one James West in case number 83-13643; and Aggravated Battery on one Rosa Mae Warmack in case number 85-3436. Most significantly, the defendant has apparently killed before. The record reflects that he

> pled guilty to and was convicted of Second Degree Murder of one Juan Marques in case number 82-2734. These aggravating circumstances were proved beyond a reasonable doubt.

(T. 398-99) .

The appellant contends that the weight of this aggravating factor is reduced because the prior convictions were not factually similar to the instant offense, and because the prior convictions are too remote in time. However, there are striking similarities between the instant case and his prior convictions beyond the use of a firearm. As to the conviction for aggravated battery of Rosa Warmack, testimony demonstrated that the appellant viciously attacked a woman that lived in a neighborhood he frequented while they were in his car and he dumped her, unconscious, in a vacant field, leaving her for dead. This offense is quite similar to Lillie's murder, except that the appellant used a deadlier weapon and was more efficient in getting rid of Lillie. Furthermore, the length of time that the appellant was out of prison following Rosa's attack before killing Lillie is not established in the record, but since the appellant was sentenced to ten years on April 25, 1986, and Lillie was killed in November, 1994, he could not have been out of prison for more than a few years (Vol. XIV, pp. 82-85) . On these facts, his alleged crime-free life after Rosa's attack does not mitigate his criminal history.

The court **also** considered and outlined the evidence which had been presented in mitigation:

> Two of the defendant's sisters testified that when the defendant was **a** child the family lived in a rather small house; that there were as many as twelve children living together in that house; that the older half of the children were sired by one father and the younger half by another and that the defendant was the eldest of the younger half; that his elder siblings "picked on him" and his father treated him "differently" and, in fact, punished him once by shaving his head. The sisters testified that they love their brother/half-brother and would visit him in prison were he to be sentenced to life in prison.
>
> The mother of the defendant testified that the defendant seemed to be "picked on" by other children and that all but one of his male siblings has been to prison. She testified that she loves her son and would visit him in prison were he to be sentenced to life in prison.
>
> Dr. Harry Krop, a Clinical Psychologist, testified that he interviewed the defendant twice, interviewed the defendant's family, reviewed depositions, school record and prior incarceration records; that he has determined the defendant's I.Q., at about 85, to be average to **above** average for prison inmates; that, in his opinion, the defendant would "institutionalize well" and increasingly adapt to prison life as he **ages** should he be sentenced to life in prison.
>
> Attorney Terrence Moore testified that he represented the defendant in **case** number 82-2734, First Degree Murder, and that the defendant pled guilty when the plea negotiations with the state (a reduced charge of Second Degree Murder with twenty months imprisonment concurrent with a twenty-month sentence for violation of probation) became sufficiently attractive.

(R. 399-400). The judge noted that the mitigating evidence was unrefuted; however, he found nothing substantial or extraordinary about the mitigation to warrant the finding of any statutory or nonstatutory mitigating factors (R. 400). He concluded that the one aggravating circumstance outweighed the mitigating circumstances, and imposed the sentence of death (R. 400-01).

The mitigating evidence presented to the jury and judge was mundane and inconsequential. The appellant faults the trial judge for failing to expressly identify and weigh nonstatutory mitigation factors including low intelligence, family background, ability to adapt to prison life, gainful employment, and that the homicide occurred due to a domestic quarrel. However, none of these specific factors were ever identified for or argued to the trial judge. Since the appellant did not meet his burden of identifying the nonstatutory mitigating factors relied on, there is no error in the trial court's failure to single these factors out for express findings. Consalvo v. State, 21 Fla. L. Weekly S423 (Fla. Oct. 3, 1996); Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990).

In addition, the trial court did not formulate any new standards in determining whether any mitigating factors had been established. In concluding that the appellant had not offered anything "substantial or extraordinary," the judge was indicating that he had not found anything about the facts presented which ameliorated the appellant's guilt or reduced his culpability.

Since no mitigating factors were found, there was nothing for the trial court to weigh.

A case which is truly comparable to the one at bar for proportionality purposes is Ferrell v. State, 680 So. 2d 390 (Fla. 1996). Ferrell was convicted of shooting his girlfriend in the head. The only aggravating factor was one prior violent felony conviction, for second degree murder, and nonstatutory mitigation included the appellant's impairment, mental disturbances, alcohol use at the time of the offense, and the appellant being a remorseful, good worker and good prisoner. This Court dismissed the proportionality claim, noting 'Although we have reversed the death penalty in single-aggravator cases where substantial mitigation was present, we have affirmed the penalty despite mitigation in other cases where the lone aggravator was especially weighty." 680 so. 2d at 391. See also, Duncan, 619 So. 2d at 284 (single factor of prior violent felony convictions supported death sentence, despite existence of numerous nonstatutory mitigating factors); Lemon v. State, 456 So. 2d 885 (Fla. 1984); Kins v. State, 436 So. 2d 50 (Fla. 1983).

The trial court was not required to find that mitigating factors existed merely because the evidence submitted was unrefuted. For example, although family background can certainly be mitigating when the facts demonstrate an unusually difficult or extraordinary background, the mere fact that the appellant had a

family background is not mitigating. Testimony about the appellant's growing up with a lot of siblings in a small house, where the other siblings "picked on" the appellant, does not reduce his moral culpability for this crime. The appellant's failure to offer the minimal quantum of proof required to establish the mitigating nature of the facts he produced justified the trial court's rejection of this mitigation.

A proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993) ; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Other death sentences have been affirmed, even when supported by only one aggravating factor. See, Windom v. State, 656 So. 2d 432 (Fla. 1995) (as to murders of two of the victims, the only aggravating factor was prior violent felony conviction, based on contemporaneous crimes; in mitigation, trial court found no significant criminal history, extreme mental disturbance, substantial domination of another person, helped in community, was good father, saved sister from drowning, saved another person from being shot over $20); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (mitigation included extreme emotional disturbance, daily use of cocaine and substantial impairment therefrom, raped as a child, did not meet father until she was 12); Duncan, 619 So. 2d at 284;

Arango v. State, 411 So. 2d 172 (Fla. 1982) (defendant had no prior criminal history); Armstrong v. State, 399 So. 2d 953 (Fla. 1981) (defendant **was** 23 years old); LeDuc v. State, 365 So. 2d 149 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Douglas v. State, 328 So. 2d 18 (Fla. 1976); Gardner v. State, 313 So. 2d 675 (Fla. 1975).

The cases cited by the appellant do not establish a lack of proportionality in this case. In both Sinclair v. State, 657 So. 2d 1138 (Fla. 1995), and Thompson v. State, 647 So. 2d 824 (Fla. 1994), the only aggravating factor applicable was that the murder was committed during the course of a robbery. The multiple prior violent felony convictions present in this case establish much more aggravation than the fact that a felony murder **was** committed during a felony.

Finally, the appellant asserts in footnotes (1) that exhibits relating to the appellant's prior convictions should not have been admitted because they were not sufficiently tied to the appellant and (2) the trial court's treatment of aggravating and mitigating factors was improper; and that these issues provide independent bases for vacating the appellant's sentence (Appellant's Initial Brief, pp. 81, 87). If the appellant is seriously attempting to raise these as independent arguments for this court's consideration, they should not be relegated to footnotes. There was no allegation below that the state's exhibits did not prove prior convictions; and any deficiency in the trial court's

treatment of the aggravating and mitigating factors would clearly be harmless beyond any reasonable doubt. See, Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), cert. denied, U.S. ___, 120 L. Ed. 2d 878 (1992); Cook v. State, 581 So. 2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991). No reason for disturbing the sentence imposed herein has been provided.

A review of the aggravating and mitigating circumstances established in this case clearly demonstrates the proportionality of the death sentence imposed. The execution of Lillie Thornton by a man with a violent past was outrageous, and the mitigation in this case was negligible at best. Therefore, this Court should affirm the death sentence imposed below.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert F. Moeller, Assistant Public Defender, Polk County Courthouse, P. 0. Box 9000--Drawer PD, Bartow, Florida 33830, this 4th day of June, 1997.

Carol Dittmar

COUNSEL FOR APPELLEE