IN THE SUPREME COURT OF FLORIDA

DAVID CHARLES CARPENTER,

Appellant,

vs. **CASE NO. 90,349**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

At the time of Ann Powell's murder, Appellant David Carpenter was 32 years old, six feet, four inches tall, and weighed about 210 pounds (V30/T662; V34/T1117). His codefendant, Neilan Pailing, was seventeen years old, about five feet, ten inches to six feet tall, weighing about 120 pounds, and Powell was 62 years old, about 5'8" and 130 pounds (V29/T434; V30/T603, 644, 662, 663).

The appellant's apartment was a small, one-room efficiency (V30/T619). The front door opened into an area with a couch, a bed, bookshelf, desk, and other furniture (V30/T619). There was a kitchen/bath combination behind a partition (V30/T619). When the appellant was showing the police around his apartment, he brought his "nongun" out of a desk drawer; it was a replica of an automatic pistol with a scope, which he displayed proudly (V30/T623-24). When describing the offense to Det. Steffens, the appellant stated that after Pailing left with Powell's body, Carpenter cleaned up, including putting the toy gun back in the drawer (V30/T648-49).

Powell's injuries, as noted at the autopsy, included the following: a bruise to the left eye, consistent with having been struck with a blunt object; a laceration to the gum inside the lip; bruises to the tongue due to biting, prior to death; left cheek was discolored; a cyst or canker sore was noted under the tongue, possibly caused by the bindings; bruise behind the left ear;

indentations and scrapes on the neck, from bindings; several bruises to side of head; small scrape on forearm; bruise and scrape on elbow; bruise on right leg; small contusions and laceration to anal and vaginal area; four subgaleal bruises (between skull and scalp) and another bruise under right ear cartilage (V33/T1005-1014). Many, if not all, of these injuries occurred prior to death (V33/T1014-15). The medical examiner also testified that it would take at least fifteen seconds of continuous, complete vein occlusion to render Powell unconscious, and then another several minutes of continuous pressure for death to occur (V33/T1018-19). The victim's face would turn purple (V33/T1019). There were no defensive wounds noted on Powell (V33/T1032).

SUMMARY OF THE ARGUMENT

I. The State presented substantial, competent evidence to support the jury's verdict of guilt. A review of the record discloses sufficient evidence to establish that Carpenter was properly convicted under both the premeditated and felony murder theories urged below.

II. The appellant's claim of error as to the jury instruction on first degree felony murder has not been preserved for appellate review. Even if considered, the trial court's deviation from the standard jury instruction in order to encompass the principal theory submitted by the State was not error and does not entitle Carpenter to a new trial.

III. No error has been established with regard to the trial court's exclusion of the proffered defense witnesses that allegedly could have implicated the codefendant, Neilan Pailing, in this murder. The trial court's conclusion that this evidence was inadmissible hearsay, lacking the necessary reliability and corroboration, is supported by the record.

IV. The trial court properly found and considered the aggravating factor of prior violent felony conviction. The offense for which the appellant was convicted in Nevada was not a misdemeanor in Nevada and would have been a felony if committed in Florida. The appellant's claims that the victim of the prior

felony should not have recited facts for which he was not convicted and that the testimony was inadmissible as more prejudicial than probative have not been preserved for appellate review; however, no error has been demonstrated with regard to this testimony at any rate. Any possible error in this issue would be harmless.

V. A review of the record in this case clearly establishes that Carpenter's death sentence is proportionally warranted. This Court has repeatedly acknowledged that a death sentence is not rendered disproportionate when a less culpable codefendant receives a sentence less than death. The trial court's finding that the appellant was the primary perpetrator is supported by the evidence and demonstrates the propriety of the death sentence imposed below.

ARGUMENT

ISSUE I

WHETHER THE APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Appellant Carpenter initially challenges the sufficiency of the evidence to support the jury's guilty verdict. He alleges that the State failed to prove that he was a principal in Ann Powell's death, or that her murder was either premeditated or first degree felony murder. However, a review of the evidence presented clearly demonstrates that sufficient evidence was adduced below to support the jury verdict rendered in this case.

This Court has made it clear that the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is to be decided by the jury. Barwick v. State, 660 So.2d 685, 694-695 (Fla. 1995), cert. denied, 516 U.S. 1097 (1996); Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 117 S.Ct. 742 (1997). On appeal, the only question to be resolved is whether, taken in a light most favorable to the State, there is competent substantial evidence to support the verdict. See also, Crump v. State, 622 So.2d 963, 971 (Fla. 1993) (question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal);

Tibbs v. State, 397 So.2d 1120 (Fla. 1981), aff'd., 457 U.S. 31 (1982) (concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment).

As to the claim that Neilan Pailing was solely responsible for Ann Powell's murder, Carpenter's brief ignores the testimony of Steven Dakowitz. Dakowitz testified that Carpenter, after initially telling Dakowitz that Pailing had been the one to kill Powell and that Carpenter was only minimally involved, admitted after Pailing was found and arrested that, actually, the opposite was true (V32/T966-972). Dakowitz said that Carpenter repeatedly stated, "It's all over now. He knows exactly what happened and I'm going to fry" (V32/T975). Carpenter dismisses this testimony in his brief with one sentence, suggesting that Dakowitz was too "ambiguous" to provide competent evidence. However, reading Dakowitz' testimony in its entirety leads to the inescapable conclusion that Carpenter admitted to Dakowitz that Carpenter was the primary perpetrator in Powell's murder.

Carpenter also contends that his innocence was demonstrated by his actions in contacting the police, while Pailing fled the state right after the murder. Carpenter's actions are not so exculpatory, however, considering that he only contacted police

after hearing on the news that Powell's car had been discovered, and had not been destroyed as Carpenter had hoped. Carpenter believed that his fingerprints would be found on the car, so he fabricated an explanation for the police as to the presence of his fingerprints on Powell's car. The fact that he did not contact police until after learning that they had evidence which incriminated him belies his assertion of innocence.

In fact, it is significant that after he contacted the police, Carpenter gave several different accounts of how the murder occurred. Carpenter's differing and inconsistent statements justify the trial court's denial of the motion for judgment of acquittal. In Bedford v. State, 589 So.2d 245 (Fla. 1991), cert. denied, 503 U.S. 1009 (1992), the defendant gave several varied and inconsistent accounts to the police relating to a murder investigation. As in the instant case, Bedford initially stated that he had nothing to do with the crime, and later suggested that he had only watched while his codefendant committed the murder. This Court noted that, "[b]ecause each of Bedford's several versions of events was inconsistent with the others, the jury reasonably could have concluded that each of these accounts was untrue." 589 So.2d at 250-251. See also, Holton v. State, 573 So.2d 284, 290 (Fla. 1990) (jury could have concluded defendant's version was untrue based on conflicting evidence presented by

State), cert. denied, 500 U.S. 960 (1991). Thus, Carpenter's culpability was clearly proven beyond any doubt.

Carpenter next asserts that even if the evidence established that he was a perpetrator in this offense, his conviction cannot stand because the State failed to prove that Powell's murder was premeditated or that it was committed during the course of a sexual battery. However, the evidence presented below clearly established a prima facie case of premeditation, as well as felony murder, and the trial court properly denied the judgment of acquittal sought 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), cert. denied, 118 S.Ct. 213 (1997); Asay v. State, 580 So.2d 610, 612 (Fla.), cert. denied, 502 U.S. 895 (1991); Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986); Preston v. State, 444 So.2d 939, 944 (Fla. 1984), cert. denied, 507 U.S. 999 (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." Songer v. State, 322 So.2d 481, 483 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (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. Sochor v. State, 619 So.2d 285 (Fla.), cert. denied, 510 U.S. 1025 (1993); Bedford, 589 So.2d at 250; Penn v. State, 574 So.2d 1079, 1081-1082 (Fla. 1991); Asay, 580 So.2d at 612; Cochran v. State, 547 So.2d 928, 930 (Fla. 1989); 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 premeditation was proven beyond a reasonable doubt.

This Court has acknowledged a finding of premeditation in cases involving similar circumstances. For example, in Hitchcock v. State, 413 So.2d 741, 745 (Fla. 1982), this Court rejected a similar claim as that presented herein on comparable facts. Hitchcock had choked and beaten a girl, allegedly to make her be quiet, during an episode of what Hitchcock claimed to be consensual sex. This Court noted the facts provided substantial evidence to

support a finding of premeditation, and also that the jury could have easily found the contention of consensual sex to be unreasonable.

Similarly, in Holton, 573 So.2d at 289-90, this Court found that the jury could have properly inferred premeditation on the facts presented. The victim in Holton was strangled, and Holton had told a friend that the killing was an accident. Holton also claimed that his victim had consented to their sexual encounter. Also, as in the instant case, Holton tried to conceal the crime by setting a house on fire.

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 nature of Powell's injuries, including being severely beaten about the head with a metal, toy gun that had been kept in a desk drawer and being strangled, requiring continuous pressure around her neck for two or three minutes following her loss of consciousness, provide a substantial basis for the finding of premeditation (V30/T623-24; V33/T1018-19).

Carpenter admitted to having watched Powell's last breath creep out of her as her face turned purple (SR/T18, 26-27). Furthermore, his story that Powell was killed in a rage when she belittled Pailing for having ejaculated prematurely is inconsistent with the evidence that, although Pailing did not wear a condom, no evidence of semen was found in the swabs taken from Powell (V32/T922-23, 925). After the homicide, the appellant attempted to conceal evidence. A jury may infer premeditation from a defendant's actions after the crime. Dupree v. State, 615 So.2d 713, 715 (Fla. 1st DCA), rev. denied, 623 So.2d 495 (1993); Smith v. State, 568 So.2d 965, 967-68 (Fla. 1st DCA 1990); Fratello v. State, 496 So.2d 903, 908 (Fla. 4th DCA 1986).

The cases cited by the appellant do not compel a contrary result. In Green v. State, 715 So.2d 940 (Fla. 1998), this Court found that, *in light of the strong evidence militating against premeditation,* the jury's verdict of a premeditated murder could not be sustained. The evidence against premeditation included the fact that on the night of her murder, the victim had been arrested and charged with disorderly intoxication and resisting arrest based on her being intoxicated and engaged in a heated argument with her former boyfriend, a man named Gulledge. She was angry and still intoxicated when she was released from custody. Green admitted to having killed the victim after she "got crazy" when he and a friend

picked her up in front of the jail. In the instant case, no reasonable evidence militating against premeditation was presented. Carpenter's contradictory, uncorroborated, and self-serving statements asserting that Ann Powell provoked her attackers by belittling Pailing's sexual abilities are against the greater weight of the evidence, and are a far cry from the evidence contrary to premeditation noted in Green.

In Hoefert v. State, 617 So.2d 1046 (Fla. 1993), the defendant had a pattern of strangling, but not killing, women while he sexually assaulted them. The victim's body in that case had decomposed, and no physical evidence of a sexual assault was found, although cocaine was found in the victim's system. Thus, in cases involving victims that were strangled, a failure to prove premeditation has only been noted where strong evidence affirmatively demonstrates a lack of premeditation.

The other cases noted by the appellant do not involve victims that were strangled. In Kirkland v. State, 684 So.2d 732 (Fla. 1996), prior friction between the defendant (who had an IQ in the sixties) and the victim apparently led to the attack, where the victim suffered blunt trauma and a severe neck wound. Similarly, in Mungin v. State, 689 So.2d 1026 (Fla. 1996), cert. denied, 118 S.Ct. 102 (1997), 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 herein did not kill a stranger during a robbery, he beat and strangled a woman that did not share his desire for sexual activity. See also, Norton v. State, 709 So.2d 87 (Fla. 1997) (defendant shot girlfriend in head under unknown circumstances).

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. Furthermore, any deficiency in the evidence of premeditation would be inconsequential, due to the clear proof of a sexual battery to support the conviction as first degree felony murder. Testimony established that Ann Powell was a sixty-two year old, church going woman, who had not had sex with her last boyfriend, even though the boyfriend had spent several weekends at her apartment and they slept in the same bed, because she was "funny" about sex (V29/T434, 440; V30/T612). She accepted an invitation for dinner and dancing from Carpenter, although he admitted that he had invited her over so that his young friend, Neil Pailing, could gain sexual experience (V30/T591, 633; V31/T673; SR/T9-10). Powell suffered several distinct injuries to her anal and vaginal regions which, although "not necessarily"

inconsistent with consensual sex, at least demonstrated that forceful penetration occurred (V33/T1035). During the course of this sexual encounter, Powell's bra was used as a gag, wrapped around her neck multiple times, down her back, and under her arm so tight that it caused blisters on her skin (V30/T592; V33/T999, 1000, 1024-25). She also sustained numerous bruises and scrapes on her face, skull, and extremities (V30/T591; V33/T1005-1014).

Furthermore, Carpenter's assertion that the evidence suggested that Powell had been sexually active based on the finding of semen on the comforter recovered from her car is a misunderstanding of the record. In fact, the comforter in her car was only there because it was wrapped around her body, having been taken from Carpenter's residence at the time of the murder (V30/T646; V32/T915-16). Thus, the semen found on the blanket does not reasonably suggest that Powell was sexually active.

In Rhodes v. State, 638 So.2d 920 (Fla.), cert. denied, 513 U.S. 1046 (1994), this Court upheld the finding of a sexual battery on similar facts. The victim in Rhodes was discovered in construction debris; she had been manually strangled. The only clothing on her body was a bra wrapped around her neck, and there was no physical evidence of a sexual battery. Rhodes had given various statements, most of which suggested that some form of sexual activity had taken place during his encounter with the

victim. This Court held that the evidence supported the trial court's finding that the murder occurred during the course of a sexual battery or attempted sexual battery.

In order to obtain a conviction against Carpenter as a principal in a crime physically committed by Pailing, the State had to prove that he intended the crime to be committed and actively assisted Pailing in actually committing the crime. Terry v. State, 668 So.2d 954, 964-65 (Fla. 1996). This was clearly established by the evidence presented below. Carpenter instigated the party by inviting Powell over for dinner and dancing, when his true intention was to use her so that Pailing could gain sexual experience (V30/T627, 633; V31/T673). Powell was killed with Carpenter's gun while being raped in Carpenter's residence (V30/T642, 644). Carpenter was older and bigger than Pailing, and provided the rope and blanket that were used to tie her up and dispose of her body (V30/T644, 645, 646, 662). He instructed Pailing on how to tie her up, and carried the body out to the car (V30/T647, 658, 660). His statements that he did not know what was going on until it was too late, and then he just "freaked out," are unreasonable in light of the other evidence.

On these facts, the appellant has failed to demonstrate any error in the jury verdict rendered against him. Therefore, he is

not entitled to have his conviction reduced to second degree murder.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE MURDER.

Carpenter next challenges the trial court's granting of the State's request to modify the jury instruction on first degree felony murder. He summarily asserts that the deviation from the standard jury instruction in order to encompass the law on principals improperly reduced the State's burden of proof, denied his constitutional right to due process, and violated his right to a fair trial. The first question this Court must address is whether this issue was adequately preserved for appellate review.

At the charge conference, defense counsel objected to the State's proposed jury instruction on first degree felony murder, which added language which specified that a conviction for this offense was proper if Carpenter *or his principal* was engaged in the commission of a sexual battery or attempted sexual battery; and that *if Powell was killed by a person other than Carpenter,* a conviction was proper *if the killer and Carpenter were principals in the commission of sexual battery* (V34/T1143-1148). After the trial judge overruled the defense objection to the modification to the instruction, the defense requested that a special defense instruction on accessory after the fact and independent acts be given each time the court modified the standard instructions to add a reference to principals (V34/T1168-1177). The court granted this request, and no further objection was ever made to the modified

instructions, either at the charge conference or when the jury was thereafter instructed (V34/T1134-1186; T1251-1278). Prior to the court instructing to the jury, the defense affirmatively acknowledged it had no objection to the final instructions (V34/T1251). On these facts, Carpenter's claim of jury instruction error is not properly before this Court. Castor v. State, 365 So.2d 701 (Fla. 1978). The trial judge was never placed on notice that the defense did not agree with the modifications giving reference to the law of principals, and reasonably would assume that the initial defense concern was alleviated by the giving of the special defense instructions as requested.

Even if this claim is considered, no error has been demonstrated. It is significant that Carpenter does not challenge the accuracy or the propriety of the principal instruction given in this case. Nor does he challenge the legitimacy of the law of principals which is codified in Section 777.011, Florida Statues. Although he frames the issue to suggest the instruction eased the State's burden of proof, and he states at one point that the added language "made it easier for the State to obtain a conviction," (Appellant's Initial Brief, p. 33), he does not identify any error in the instruction or explain how incorporating the principal language unfairly prejudiced him where the State was presenting the principal theory as an alternative basis for a conviction. He merely contends that the fact that the trial court modified the standard instruction requires that this Court order a new trial.

This argument is without merit. The State clearly still had to prove beyond a reasonable doubt that Carpenter was a principal to the sexual battery, in that he intended and actually assisted in the commission of the offense.

There is no requirement that a trial judge give solely those instructions contained in the Florida Standard Jury Instructions. As this Court has recognized, the standard instructions are intended to be "a guideline to be modified or amplified depending upon the fact of each case." Cruse v. State, 588 So.2d 983, 989 (Fla. 1991), cert. denied, 504 U.S. 976 (1992), quoting Yohn v. State, 476 So.2d 123, 127 (Fla. 1985). See also, Smith v. Mogelvang, 432 So.2d 119, 125 (Fla. 2d DCA 1983) (standard instructions never intended to rigidly bind trial courts in all circumstances). Furthermore, any deviation from a standard instruction is not harmful error unless it would mislead or confuse the jury. Id., at 125.

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 giving or 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. State, 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 law of principals and the required elements for first degree murder (V34/T1251-1273).

The mere fact of deviation from the standard instructions cannot constitute error since the instructions themselves provide discretion to a trial judge to "modify or amend the form or give such other instruction as the trial judge shall determine to be necessary to accurately and sufficiently instruct the jury in the circumstances of the case." Fla.R.Crim.P. 3.985. Although that rule provides that the judge should state the reason for the modification on the record, in the instant case the reason for the additional language on principals is clear from the discussion at the charge conference and the facts of this case. Since the State was proceeding under an alternative theory that Carpenter was a principal to a sexual battery committed by Pailing, the standard first degree murder instruction would be inadequate to address this theory. At any rate, as long as the modification itself is proper, a trial judge's failure to articulate the reasons for the modification is not, in itself, a basis to disturb a conviction. State v. Hamilton, 660 So.2d 1038, 1046, n. 13 (Fla. 1995).

This Court has recognized that "[w]hat is important is that sufficient instructions -- not necessarily academically perfect ones -- be given as adequate guidance to enable a jury to arrive at a verdict based upon the law as applied to the evidence before them." State v. Bryan, 287 So.2d 73, 75 (Fla. 1973), cert. denied,

417 U.S. 912 (1974). The appellant in this case has not identified any academic imperfection in the instructions as given, let alone demonstrate that the jury instructions as a whole did not adequately guide the jury to reach their verdict. On these facts, no reversible error has been demonstrated with regard to the jury instructions given in this case, and no new trial is warranted by this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN EXCLUDING OUT OF COURT STATEMENTS MADE BY THE APPELLANT'S CO-DEFENDANT, NEILAN PAILING.

Carpenter's third issue attacks the trial court's ruling to exclude testimony proffered by the defense. However, a review of the record demonstrates that the trial court properly excluded this testimony and, furthermore, that any possible error would be harmless beyond a reasonable doubt.

At the beginning of the defense guilt phase case, two witnesses were proffered to relate statements which Neilan Pailing had allegedly made regarding Powell's murder. William Shay and Carlos Mendoza were both inmates with the appellant and Pailing while they were incarcerated in the Pinellas county jail prior to trial (V34/T1079, 1089). Shay stated that Pailing told him that he "did it;" that Carpenter had set him up with the woman, they were at Carpenter's house, Pailing was in the bedroom with her, Carpenter heard a lot of noise, came in, and the woman was dead (V34/T1079-80). Pailing allegedly told Shay that Carpenter helped him get the body out of the house and then Carpenter and Pailing tried to torch the car (V34/T1080). Shay said that after advising Det. Steffens of this conversation, he remembered that Pailing had also said "I killed her, I raped her, I burned her up," and he told this to Steffens later (V34/T1081). Shay admitted on cross examination that he was friends with Carpenter, and although he did not dislike Pailing, that just before Pailing made these statements

Shay had made him angry by calling him a rapist (V34/T1082). He denied having said that Pailing told him that Powell was killed after Carpenter came into the room (V34/T1087).

Mendoza stated that he had known Pailing in jail for about a month when one day, while Mendoza was sitting in his cell with his roommate, Pailing walked in and spontaneously said he killed her, he raped her, he put her in the trunk of the car and burned her (V34/T1089-90). According to Mendoza, Pailing never mentioned Carpenter in his statement (V34/T1093). On cross examination, he admitted that he was a friend of Carpenter's, but did not get along with Pailing; in fact, they almost had a physical confrontation at one point that resulted in him being relocated out of the pod (V34/T1091-92).

The State then proffered testimony by Det. Steffens that Steffens had spoken with Shay and Mendoza in March, 1995, after Carpenter's attorney had notified the State Attorney's Office that Pailing had made statements to them (V34/T1094). Shay told Steffens that Pailing had told Shay that Pailing and Powell were in the bedroom and something happened, at which time Pailing hit Powell over the head, called Carpenter into the room, and Powell was killed (V34/T1095). Steffens stated that he asked Shay repeatedly, but Shay indicated that this was all the information he had (V34/T1095). Shay then contacted jail officials a few days later because he had forgotten a specific quote Pailing had made (V34/T1095).

After the proffers were presented, the trial judge reviewed Section 90.804(2)(c), Florida Statutes, to determine the admissibility of the statements. He found Pailing's alleged "confessions" to be inherently unreliable and untrustworthy (V34/T1110-1113). The judge noted an inherent difficulty with the proffered testimony was the lack of corroboration of any essential fact, and also found the statements unreliable since both witnesses stated that they were friends of Carpenter's and did not like Pailing (V34/T1111). The lack of corroboration and inherent unworthiness made the statements inadmissible under Section 90.804(2)(c), Florida Statutes. Finally, the judge noted that the proffered statements did not exculpate Carpenter, since no one had stated that Carpenter was not involved in the murder (V34/T1111). The judge stated, however, that the testimony would clearly be admissible in any penalty phase (V34/T1114).

The exclusion of testimony such as that proffered by the defense in this case has routinely been upheld in many appellate decisions. Third party inculpatory statements, especially when presented to fellow inmates, are typically found to be unreliable by trial judges, and the exclusion of hearsay accounts of such statements are unanimously upheld as an appropriate exercise of the trial judge's discretion. Although the appellant's brief cites a number of cases, they do not present the situation at bar -- hearsay statements of third party confessors to the crime for which the defendant is being tried. On the other hand, there are a

number of appellate decisions which specifically uphold the exclusion of such testimony.

In Jones v. State, 678 So.2d 309, 314 (Fla. 1996), cert. denied, 117 S.Ct. 1088 (1997), this Court reviewed the propriety of excluding similar evidence during a postconviction evidentiary hearing where the statements were the basis of a claim of newly discovered evidence. After initially determining that the statements could not be admitted pursuant to Section 90.804(2)(c), since the defendant had failed to establish that the declarant was unavailable, this Court stated:

> Even if Jones had established that Schofield was unavailable for purposes of section 90.804(2)(c), Jones also had the burden of establishing that Schofield's alleged confessions were statements against penal interest within the meaning of section 90.804(2)(c). *Rivera v. State,* 510 So.2d 340, 341 (Fla. 3rd DCA 1987); see also *United States v. Seabolt,* 958 F.2d 231, 233 (8th Cir. 1992), *cert. denied,* 507 U.S. 971, 113 S.Ct. 1411, 122 L.Ed.2d 782 (1993) (concluding that "a statement by one criminal to another criminal ... is more apt to be jailhouse braggadocio than a statement against his criminal interest"). Moreover, Jones had the burden of presenting corroborating circumstances demonstrating the trustworthiness of Schofield's alleged confessions. *Rivera,* 510 So.2d at 341.

678 So.2d at 314.

Notably, a later appeal in the Jones case reaffirmed this holding, even after additional inmates came forward claiming to have also heard confessions by Schofield. In Jones v. State, 709 So.2d 512, 525 (Fla. 1998), this Court noted that "[t]he fact that

more inmates have come forward does not necessarily render the confessions trustworthy." This Court reiterated that statements which might generally be considered to be against penal interests in other situations may be viewed differently in a prison environment. 709 So.2d at 526.

The unreliability of such statements when made to other inmates is also recognized in Voorhees v. State, 699 So.2d 602 (Fla. 1997). Voorhees was similar to the instant case in that it was the codefendant, Robert Sager, that had allegedly made statements indicating that he was the one that actually cut the victim's throat. Sager's inculpatory statements to both Mississippi and Florida law enforcement officers, as well as to fellow inmates in Florida, were excluded by the trial judge. Although this Court held that the trial judge should have permitted the statements to the police officers (but finding the error in excluding the statements to be harmless), the exclusion of the statements to the fellow inmates was upheld as within the trial court's discretion, since "the statements did not have sufficient corroborating circumstances." 699 So.2d at 613, n. 11.

Similarly, in Pittman v. State, 646 So.2d 167 (Fla. 1994), cert. denied, 514 U.S. 1119 (1995), this Court rejected a claim similar to the one presented herein. In that case, the trial court excluded hearsay testimony from an inmate who alleged that someone else had implicated himself in the murders. This Court agreed that the proffered testimony was hearsay, not admissible under any

exception to the hearsay rule. See also, Czubak v. State, 644 So.2d 93, 95 (Fla. 2d DCA 1994) (third party's purported confession to several witnesses properly excluded as unreliable), rev. denied, 652 So.2d 816 (Fla. 1995); Denny v. State, 617 So.2d 323, 324-25 (Fla. 4th DCA 1993) (inculpatory pretrial statements of codefendants properly excluded, where trial court found there was not sufficient corroboration).

The only corroboration identified in the appellant's brief are (1) that the statements were made by two inmates, not just one, and (2) that there was other evidence implicating Pailing in this murder. This is similar in nature, although less in quantity, to the corroboration noted but found insufficient in Jones and Voorhees, respectively. Thus, Carpenter did not satisfy his burden of presenting sufficient corroboration to require the admission of this testimony, and no abuse of discretion has been shown herein.

The cases cited by Carpenter fail to support his argument. For example, in Chambers v. Mississippi, 410 U.S. 284 (1973), the Court recognized that an accused seeking to exercise his right to present witnesses in his own defense must comply with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." 410 U.S. at 302. Chambers specifically noted that "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300. As

this Court has noted, Chambers must be "limited to its facts due to the peculiarities of Mississippi evidence law which did not recognize a hearsay exception for declarations against penal interest." Gudinas v. State, 693 So.2d 953, 965 (Fla.), cert. denied, 118 S.Ct. 345 (1997). Since no reliability was found in the instant case, Carpenter's reliance on Chambers is misplaced.

Similarly, in Maugeri v. State, 460 So.2d 975 (Fla. 3d DCA 1984), substantial reliability was demonstrated prior to the admission of the hearsay at issue. In that case, the State was permitted to present hearsay testimony that the deceased victim had admitted stealing cocaine from the defendant, and the theft was the motive for the subsequent murder for which the defendant was being tried. The appellant's reliance on Brinson v. State, 382 So.2d 322 (Fla. 2d DCA 1979), is clearly misplaced since that decision acknowledges that the requirement of corroboration in Section 90.804(2)(c) was not applicable, since that statute was not in effect at the time of Brinson's trial. 382 So.2d at 324, n. 1.[1]

Furthermore, to the extent that Carpenter suggests that error occurred because his sentencing jury was not permitted to consider this testimony, his claim is clearly without merit. The trial

[1]The appellant asserts, in a footnote, that since the element of corroboration is not required for admission of such hearsay in a civil trial, it cannot be required for admission in his case without violating the equal protection doctrine. Obviously, there are many differences between criminal and civil proceedings, and the State is permitted to provide reasonable restrictions on the use of evidence which vary with how the evidence may be used. No equal protection violation has been demonstrated.

court never excluded this evidence from the penalty phase; to the contrary, the judge specifically noted that the testimony would be admissible in the penalty proceeding (V34/T1114). There was no attempt to admit the testimony in the initial sentencing proceeding. By the time of the second sentencing proceeding, Pailing had entered his plea and was no longer "unavailable," as required by the statute. Jones, 678 So.2d at 314. Defense counsel had secured Mendoza's presence but made no request to even try to show that Mendoza should be permitted to testify. Thus, Carpenter is asserting error where the only time the judge was asked to consider the question, he ruled with the defense.

Finally, when the alleged "confessions" are considered in context, it is clear that the exclusion of same was harmless beyond a reasonable doubt. Pailing's statements, made in response to angry words of accusation, only implicated himself in this murder; as noted by the judge, Pailing never exculpated Carpenter. Moreover, the jury was clearly aware of Pailing's complicity in this offense. See, LeCroy v. State, 533 So.2d 750, 754 (Fla. 1988) (any possible error in excluding codefendant's statements of involvement could not have affected verdict, since evidence that codefendant had been charged and had some role in the crime or in concealing the crime was given to jury), cert. denied, 492 U.S. 925 (1989). As such, any possible error in the failure to admit this testimony was harmless beyond a reasonable doubt. No new trial is warranted on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PENALTY PHASE TESTIMONY OF CARPENTER'S PRIOR VICTIM, ANN DEMERS, AND IN FINDING AND WEIGHING THE "PRIOR VIOLENT FELONY CONVICTION" AGGRAVATING FACTOR.

Carpenter next claims that the trial court erred by permitting testimony by Ann Demers during the penalty phase of his trial. He also asserts that the judge should not have found and weighed the aggravating factor of "prior violent felony conviction." He claims that his prior offense was a misdemeanor, insufficient to support this aggravating factor, and further, that Demers was permitted to testify about crimes for which he was not convicted. However, a review of the record demonstrates that no error has been presented.

It is important at the outset of this issue to determine the scope of the argument preserved for appellate review. The propriety of Ann Demers' testimony was considered several times during the course of the proceedings below. Prior to the second penalty phase, the parties filed memoranda addressing whether Carpenter's prior Nevada conviction for "battery causing substantial bodily injury" could legally qualify for the aggravating factor of prior violent felony conviction pursuant to Section 921.141(5)(b), Florida Statutes (V10/R1755-1765; 1797-1842). At the beginning of the proceeding, the judge ruled that he agreed with the State that the out of state conviction could be considered for this purpose (V36/T1405).

Thereafter, during the testimony of Det. James Steffens, the

defense objected when Steffens noted that Carpenter had admitted that he had previously been arrested for beating a prostitute (V39/T1988). At the ensuing bench conference, defense counsel requested a continuing objection to any testimony about the Nevada incident, based on the defense position that the conviction was only a misdemeanor. Counsel added, "[w]e would also indicate that the part they're going under, as I understand, the portion being the conviction, the previous conviction of the felony, does not allow for the introduction of the facts and circumstances, but only, in fact, the conviction itself" (V39/T1989). Counsel noted that, since they were not seeking the statutory mitigator of no significant criminal history, "the Court has consistently held that as far as the conviction goes of a felony the introduction of the certified copy of the conviction is the way it's done, not going into the details itself of the crime" (V39/T1989). The court permitted the defense to have a continuing objection to the matters stated in the prehearing memo, and took a recess to review "Judge Schaeffer's seminar material on penalty phase proceedings" (V39/T1990, 1992). Following the recess, the judge questioned the State as to the nature of the evidence it intended to present, and then asked the defense to respond (V39/T1993-1994). Defense counsel reiterated his position, "the previous conviction of a felony involving violence would be placed before the Court by a certified copy of that conviction showing what he was convicted of. Going into the details of that would be improper. That was the

nature of our objection" (V39/T1994-95). The judge then overruled the objection, citing and quoting from Waterhouse v. State, 596 So.2d 1008, 1016 (Fla.), cert. denied, 506 U.S. 957 (1992), Lockhart v. State, 655 So.2d 69 (Fla.), cert. denied, 516 U.S. 896 (1995), and Duncan v. State, 619 So.2d 279, 282 (Fla.), cert. denied, 510 U.S. 969 (1993) (V39/T1995-97).

The significance of the procedural history of this issue is that the defense never presented the arguments below that Demers should not have been permitted to testify about a sexual battery for which Carpenter was not convicted or that her testimony was inadmissible because the probative value was outweighed by the prejudice, although these claims are submitted on appeal (Appellant's Initial Brief, pp. 45-47). Since these claims were never presented to the trial court, they cannot be considered on appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

As to the issue which is properly before this Court, the ruling that Carpenter's Nevada conviction legally qualified as a prior violent felony for purposes of the aggravating factor, the court below was correct. Carpenter's prior conviction was based on a violation of Nevada Revised Statute Section 200.481. At one time, that statute provided for three classes of punishment for battery: (1) if not committed with a deadly weapon and no physical injury resulted to the victim, the battery was a misdemeanor; (2) if not committed with a deadly weapon but serious physical injury resulted, the battery was a gross misdemeanor; and (3) if committed

with a deadly weapon, the battery was felony to be punished by imprisonment in the state prison for two to ten years. See, Andrason v. Sheriff, Washoe County, 503 P.2d 15, 16 (Nev. 1972). At the time of Carpenter's conviction in 1986, the statute had been modified so that a battery that was not committed with a deadly weapon but resulted in substantial bodily harm could be punished as a gross misdemeanor or a felony, in the discretion of the court. In 1995, the statute was amended to remove the discretion of the court in such instances, requiring punishment as a Class C felony.

The offense for which Carpenter was convicted is most comparable to an aggravated battery in Florida. Both Nevada and Florida offenses are committed when a battery causes great or substantial bodily harm. In Florida, the offense is a second degree felony. See, § 784.045, Fla. Stat. The injuries suffered by Ann Demers would clearly support a conviction for the felony of aggravated battery in Florida. See, Coronado v. State, 654 So.2d 1267 (Fla. 2d DCA 1995) (facial fracture, numbness, great deal of pain around eye and face); E.A. v. State, 599 So.2d 251 (Fla. 3d DCA 1992) (victim repeatedly hit and kicked, suffered swollen eye, swollen jaw, scar under eye, and loss of consciousness).

The trial judge below analyzed the applicable law and determined that the Nevada adjudication for "battery causing substantial bodily harm" under Nevada Revised Statute 200.481 was a felony "by elemental, factual, and punishment" definition (V11/R1932). Clearly, this offense would have been a felony if

committed in Florida, and therefore the aggravating factor properly applies.

To the extent that the appellant alleges that the admission of Demers' testimony 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, 412 So.2d at 338.

Furthermore, no error has been shown. 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. Finney v. State, 660 So.2d 674, 683-684 (Fla. 1995), cert. denied, 516 U.S. 1096 (1996); Lockhart, 655 So.2d at 72-73; Waterhouse, 596 So.2d at 1016; Stewart v. State, 558 So.2d 416 (Fla. 1990), cert. denied, 510 U.S. 980 (1993); Rhodes v. State, 547 So.2d 1201 (Fla. 1989), cert. denied, 513 U.S. 1046 (1994); 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 propensity to commit violent crimes, in order to determine the propriety of imposing the death sentence. Id. at 1001. In this case, Demers' testimony clearly provided relevant information about Carpenter's 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 Demers' testimony 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.

In addition, any possible error in the presentation of this testimony would clearly be harmless beyond any reasonable doubt. The appellant's attack on Demers was an outrageous offense, even without regard to the forced sex. In Freeman v. State, 563 So.2d 73, 75-76 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991), 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, 619 So.2d at 282, 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.) (to extent mother

described her child, the victim of Coney's prior convictions, in inflammatory terms, error was harmless), cert. denied, 516 U.S. 921 (1995); Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994), cert. denied, 515 U.S. 1148 (1995). These cases demonstrate that any possible error in the admission of the challenged testimony would clearly be harmless beyond any reasonable doubt.

It is important to remember that a prior death sentence was imposed on Carpenter which did not rely on this aggravating factor. Although Carpenter's second sentencing jury recommended death by a greater margin after hearing Demers' testify, his initial sentencing jury did not even know about the existence of this aggravating factor. On these facts, the appellant has failed to demonstrate any error in the admission of this testimony or in the finding of this factor. Therefore, he is not entitled to a new sentencing hearing on this issue.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH.

Carpenter's final issue disputes the propriety of his death sentence. He asserts that his sentence is precluded by the fact that his codefendant, Neil Pailing, was permitted to enter a plea to second degree murder and arson and receive a lesser sentence. However, for the reasons that follow, the codefendant's sentence does not preclude the imposition of the death penalty on the appellant in this case.

The trial judge expressly considered the significance of the sentence received by the codefendant in this case, and his sentencing order thoroughly addresses the issue:

> 1) ***The accomplice in the murder of Ann Powell was allowed to enter a guilty plea to second degree murder and receive a sentence of twenty five years in the state prison. That accomplice was also allowed to enter a guilty plea to Arson for a sentence of 15 years in the State Prison, which sentence was to run concurrent with the sentence for Second Degree Murder.***
>
> It is true that the accomplice in the murder of Ann Powell was allowed to enter a guilty plea to second degree murder and receive a sentence of twenty five years in the state prison and was also allowed to enter a guilty plea to Arson for a sentence of 15 years in the State Prison, which sentence was to run concurrent with the sentence for Second Degree Murder. These facts were presented to the jury during the penalty phase.
>
> The accomplice, Neilan Pailing, was a seventeen year old minor at the time of the crime. The evidence, as detailed in this order, established beyond a reasonable doubt that the defendant, David Charles Carpenter

> was primarily responsible for the killing of Ann Powell. The court has given this mitigating circumstance little weight in his consideration of defendant's sentence.

(V11/R1940-41). The judge also addressed the respective roles of Carpenter and Pailing when he rejected the statutory mitigator that Carpenter's participation was relatively minor:

> 1. ***The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.***
>
> The defendant, David Charles Carpenter, was a major participant in the murder of Ann Powell. Even if the murder occurred exactly as suggested by the defendant in his taped statement, and the evidence is clear beyond a reasonable doubt that it did not, the defendant's conduct shows a reckless indifference to human life. The defendant instigated the "party" to which Ann Powell was invited. He felt the minor, Neilan Pailing needed to divert his interest from young girls to adult women. Pailing was leaving to live with family in Alaska and the defendant, David Charles Carpenter planned this going away party which would include an adult woman with whom to have sex. The defendant selected his new acquaintance, the sixty two year old Ann Powell as the woman for the party. She lived alone and was partial to dinner and dancing. The defendant invited Ms. Powell to "dinner and dance" on Tuesday evening, November 22, 1994, the day prior to her murder. She could not come because of a church group meeting. The defendant then invited her for the next evening, Wednesday, November 23, 1994, the day before Thanksgiving. The evidence is clear that Ann Powell did not know of the defendant's intention for her to have sex with him and the seventeen year old minor, Neilan Pailing. Ann Powell did not even know Neilan Pailing. On that evening, the defendant met Ann Powell at the laundromat, directed her to his apartment and entertained her in an attempt to "warm her up" for sex with him and Neilan Pailing. When she struggled and

refused to have sex with the defendant and Pailing, she was beaten, gaged [sic] and raped, eventually strangled and hog-tied. The defendant, David Charles Carpenter stated in his taped confession that Pailing beat Ann Powell with defendant's metal toy automatic pistol, after the defendant went to the bathroom to clean up after having consensual sex with Ann Powell. When the defendant was showing the police through his small apartment, he showed them this toy metal pistol which was in a drawer. The toy pistol belonged to the defendant. How would Pailing have known to get it out of a drawer or have had time to get it out of a drawer? If the murder occurred as suggested by the defendant, why didn't he intervene? The defendant says nothing about trying to help Ann Powell, before, during or after the beating he says Neilan Pailing administered. The apartment is very small, he could never have been more than a few feet away from Ann Powell. He is much older, heavier and stronger than the seventeen year old Pailing. The evidence shows that Ann Powell put up a violent struggle, she was struck four times on the head, she had scratches on her arm and blood on her hands, her vaginal area had substantial injuries, she was gagged by her own brassiere and then hog-tied. All of this violence in such a small apartment surely created quite a disturbance that took time and physical force. In such a violent, mortal struggle one person could not have both held Ann Powell down and at the same time tied her brassiere as a gag. The defendant's statement that he missed this entire life and death struggle because he walked a few feet to the bathroom to clean up, is wholly inconsistent with the evidence. The evidence shows beyond a reasonable doubt that the beating, rape, choking and murder of Ann Powell could not have happened without the full and active participation of the defendant. The defendant, David Charles Carpenter admitted in his taped confession that it was his idea to "tie her up like a critter... an animal." David Charles Carpenter then supplied the rope and the technique. David Charles Carpenter placed Ann

> Powell's body on a blanket and wrapped it up. When Pailing could only drag her body towards the car, David Charles Carpenter picked her up, carried her over to the car, and put her in the trunk, to be disposed of. He told Pailing to set fire to the car. He then remained at home to thoroughly clean his apartment, including covering the blood-stains on the carpet with spray paint.
>
> The court finds that this mitigating circumstance has not been reasonably established by the evidence.

(V11/R1935-38). The lower court's analysis was correct. The facts at trial demonstrated that Carpenter was the primary perpetrator and most culpable for Powell's murder. In addition to the circumstances themselves pointing to the appellant as the instigator, Steven Dakowitz testified that although Carpenter initially told him that Pailing was responsible and Carpenter's role was very limited, Carpenter later admitted that in fact the opposite was true (V32/T969, 971, 972). Furthermore, in penalty phase, Det. Steffens testified that Pailing told Steffens that Pailing had witnessed the murder, but it had been committed by Carpenter, and Carpenter had instructed Pailing how to dispose of the car (V40/T2114).

This Court has repeatedly acknowledged that a death sentence may be imposed on the actual killer when a non-killing codefendant receives a life sentence. See, Bush v. State, 682 So.2d 85 (Fla. 1996); Cardona v. State, 641 So.2d 361 (Fla. 1994), cert. denied, 513 U.S. 1160 (1995); Hannon v. State, 638 So.2d 39, 44 (Fla. 1994), cert. denied, 513 U.S. 1158 (1995); Colina v. State, 634

So.2d 1077 (Fla.), cert. denied, 513 U.S. 934 (1994); Mordenti v. State, 630 So.2d 1080 (Fla.), cert. denied, 512 U.S. 1227 (1994); Sims v. State, 602 So.2d 1253, 1257 (Fla. 1992), cert. denied, 506 U.S. 1065 (1993); Cook v. State, 581 So.2d 141 (Fla.), cert. denied, 502 U.S. 890 (1991); Hayes v. State, 581 So.2d 121, 127 (Fla.), cert. denied, 502 U.S. 972 (1991).

In the instant case, the jury and judge were able to assess the relative culpability between Carpenter, who was older, more substantially involved, and instigated the "party" culminating in Powell's murder, and his younger codefendant. Since the basis for a death sentence is well supported by the record and is considerably more aggravated and less mitigated than the non-death sentenced codefendant, the sentence is not disproportional and resentencing is not warranted. The court below found three aggravating circumstances: 1) during the commission of a sexual battery, 2) prior violent felony conviction, and 3) heinous, atrocious or cruel. The court gave little weight to the statutory mitigator of substantial impairment, and gave little weight to the nonstatutory mitigation of the codefendant's sentence and Carpenter's cooperation with law enforcement (V11/R1925-42). Accordingly, the appellant's death sentence is not disproportional and this Court must affirm the instant sentence.

The appellant's reliance on Slater v. State, 316 So.2d 539 (Fla. 1975), to demonstrate a lack of proportionality in the instant case is misplaced. The codefendants in Slater were equally

culpable participants. The evidence presented below shows that the instant case does not involve equally culpable participants. When codefendants are not equally culpable, the death sentence of the more culpable codefendant is not unequal justice when another codefendant receives a life sentence. Steinhorst v. Singletary, 638 So.2d 33, 35 (Fla. 1994), citing Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986).

The codefendant's plea and lesser sentence were properly weighed by the trial judge as mitigating evidence. See, Heath v. State, 648 So.2d 660, 665-666 (Fla. 1994), cert. denied, 115 S.Ct. 2618 (1995). However, they do not require that this Court reduce Carpenter's sentence. This Court has repeatedly upheld death sentences when codefendants that participated in the crime but did not actually kill were sentenced to less than death. See, Raleigh v. State, 705 So.2d 1324 (Fla. 1997); Johnson v. State, 696 So.2d 317, 326 (Fla. 1997), cert. denied, 118 S.Ct. 1062 (1998); Armstrong v. State, 642 So.2d 730, 738 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Hannon, 638 So.2d at 44; Hall v. State, 614 So.2d 473, 479 (Fla. 1993), cert. denied, 510 U.S. 834 (1993); Coleman v. State, 610 So.2d 1283, 1287-88 (Fla. 1992), cert. denied, 510 U.S. 921 (1993); Robinson v. State, 610 So.2d 1288 (Fla. 1992), cert. denied, 510 U.S. 1170 (1994); Downs v. State, 572 So.2d 895, 901 (Fla. 1990), cert. denied, 502 U.S. 829 (1991); Williamson v. State, 511 So.2d 289, 292-293 (Fla. 1987), cert. denied, 485 U.S. 929 (1988); Craig v. State, 510 So.2d 857, 870

(Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986), cert. denied, 511 U.S. 1100 (1994); Woods v. State, 490 So.2d 24, 27 (Fla.), cert. denied, 479 U.S. 954 (1986); Deaton v. State, 480 So.2d 1279, 1283 (Fla. 1985), cert. denied, 513 U.S. 902 (1994); Brown v. State, 473 So.2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985); Troedel v. State, 462 So.2d 392, 397 (Fla. 1984); Bassett v. State, 449 So.2d 803, 808-809 (Fla. 1984). In all of the above cases, the codefendants were present during the crimes, participated at least to the extent that Pailing did in this case, and were convicted of first degree murder but sentenced to less than death.

Most of the cases cited in the appellant's brief to support his statement that this Court has "reversed death sentences where an equally culpable codefendant received lesser punishment," involve a jury override. See, Slater, 316 So.2d at 539; Pentecost v. State, 545 So.2d 861 (Fla. 1989); Spivey v. State, 529 So.2d 1088 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); Malloy v. State, 382 So.2d 1190 (Fla. 1979). This is an important distinction since the focus in those cases was on whether evidence implicating a codefendant with a lesser sentence could have provided a reasonable basis for the life recommendations. Similar arguments to those made in the above cases have been rejected where the jury has recommended death. Compare, Hoffman v.

State, 474 So.2d 1178 (Fla. 1985), and Brookings. Override cases are not applicable to a proportionality analysis, since different principles are involved. Burns v. State, 699 So.2d 646, 649, n. 5 (Fla. 1997), cert. denied, 118 S.Ct. 1063 (1998).

Even when the jury has recommended a life sentence, this Court has upheld death sentences where codefendants received lesser sentences. Thompson v. State, 553 So.2d 153 (Fla. 1989), cert. denied, 495 U.S. 940 (1990); Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). In Thompson, this Court reaffirmed the comment in Eutzy that every time this Court has upheld the reasonableness of a jury life recommendation possibly based, to some degree, on the treatment of a codefendant or accomplice, the jury "had before it, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself." 553 So.2d at 158; 458 So.2d at 759. Clearly, no such evidence is present in the instant case.

The one case cited by Carpenter which involved a death recommendation is Puccio v. State, 701 So.2d 858 (Fla. 1997). In that case, however, this Court reversed a trial court's determination that Puccio was more culpable than his codefendants. The facts in that case demonstrated that the codefendants played a larger role in the planning and killing of the victim, physically stabbing and beating the victim along with Puccio. Since the evidence below supports the trial court's finding that the appellant was the primary perpetrator in this case, Puccio is

clearly distinguishable.

Thus, the fact that the State ultimately permitted Pailing to enter a plea for a lesser sentence does not establish that the appellant is entitled to a life sentence. This Court has previously recognized that "[p]rosecutorial discretion in plea bargaining with accomplices is not unconstitutionally impermissible and does not violate the principle of proportionality." Garcia, 492 So.2d at 368; see, Diaz v. State, 513 So.2d 1045, 1049 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The appellant in this case was older and larger than Pailing, and it was the appellant that provided the plan, the victim, the murder weapon, and physical acts culminating in the murder. The appellant then provided the rope, the blanket, and the instructions to get rid of the body, and carried the body to the trunk of the car.

On these facts, the appellant's sentence is clearly proportional. Speculation that Pailing was the actual killer, specifically rejected by the court below, does not establish that the appellant's sentence must be reduced. Since the evidence clearly demonstrates that the appellant was the dominant force behind this homicide, his sentence is warranted.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

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. Regular Mail to Robert Moeller, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33831, this _____ day of January, 1999.

COUNSEL FOR APPELLEE