IN THE SUPREME COURT OF FLORIDA

TERRY LEE WOODS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

Case No. 90,833
L.T. Case No. 96-965
Lake County

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellant, TERRY LEE WOODS, was the defendant in the trial court below and will be referred to herein as "appellant" or "defendant." Appellee, the State of Florida, was the prosecution in the trial court below and will be referred to herein as "appellee" or "the State."

The following symbols will be used:

IB = Appellant's Initial Brief

R = Pleadings portion of the record on appeal

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

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's Statement of Facts in so far as it represents an accurate, objective and nonargumentative recital of the facts of this case, subject to the following additions and changes.

Mrs. Langford testified that in March of 1996, appellant indicated that he wanted to buy her husband's car (TV 13, 1342-43). Her husband sold it to appellant for $1,000 on an installment basis (TV 13, 1348-49). In April of 1996 (TV 13, 1355/18 - 1356/3) appellant had paid approximately $900 and asked to take the car home to work on it (TV 13, 1353/8). Her husband allowed appellant to do so but kept the key and told appellant that he was not to drive the car until he changed the name on the title (TV 13, 1357/1). On May 10, 1996 (Friday), appellant was issued a citation for driving this vehicle (TV 14, 1522-23). The police called the Langfords and asked them to pick up the vehicle (TV 13, 1358/11). After they took the car home, appellant later showed up demanding the car and threatening Mr. Langford (TV 13, 1366-67). Mrs. Langford called the police (TV 13, 1367/20). The following Monday (May 13) Mr. Langford refunded appellant's money (TV 13, 1372/14). A couple of weeks later, appellant called and said that he still wanted to buy the car (TV 13, 1375/25, 1376/3).

Sometime between May 14 and June 8, 1996 (TV 15, 1689/2-17), appellant called the Leesburg Police Department and spoke with

Officer Kimberly Green. Appellant called at least twice that day and was very upset; he indicated that he was paying for a car and wanted to pick it up but needed permission to drive it although it did not have a tag and he did not have a license (TV 15, 1685/13 - 1687/25). Officer Green did not give him permission to do so (TV 15, 1688/5). At the end of May, appellant obtained a Bill of Sale for the Langford vehicle from Jamie Tsai and her father Wesley (TV 15, 1651/21 - 1652/6, 1663/17). Appellant forged Clarence Langford's signature to this Bill of Sale and signed his name (TV 14, 1434/19 - 1435/10; TV 15, 1657, 1671/18, 1672/15, 1781/17, 1782/6). While appellant was with Jamie and Wesley Tsai, he showed them a small automatic handgun (TV 15, 1654, 1655/3, 1670/2-7, 1674/11-17). On May 30, 1996 (TV 15, 1680/15), appellant went to Anthony Archabay and his brother Albert and asked Albert to notarize a Bill of Sale (TV 15, 1681/9) that had already been signed; Albert refused (TV 15, 1679/20 - 1680/8). On or about June 6, 1996, appellant again called the Leesburg Police Department and spoke with Officer Sheila Russell; he was very angry and wanted her to make Mr. Langford give him the car that he was purchasing (TV 15, 1698/11 - 1703/24). Two or three days before the shooting (TV 15, 1721/3-10), appellant (TV 15, 1721/21) was at Fiero Concepts asking Greg Markland if anyone wanted to buy his .25 automatic pistol which he had with him (TV 15, 1719/16-25, 1720/8-14). Sammy James worked at Fiero Concepts and also saw appellant (TV 15,

1744/16) holding a small caliber (TV 15, 1741/21) automatic (TV 15, 1743/2). Mrs. Langford testified that it was appellant who shot her and her husband on June 12, 1996[1] (TV 14, 1461). They were shot with a .25 caliber weapon (TV 13, 1273). Willie Adkins testified that he saw appellant on the day of the homicide with a small gun and a clip (TV 15, 1751/10 - 1752/20).

Appellant indicates that Dr. Janet Pillow testified that it is more likely that the shooter is right handed (IB 6). However, Dr. Pillow testified that there is no way of telling whether the shooter was left or right handed (TV 11, 968/8-10). The testimony referenced by appellant is:

> Q The shorter the lady, the taller the headrest, the bullets coming in from the right side, more likely it's a gun in the right hand; isn't it?
>
> A Excuse me? Are you saying the gun being held in a right hand?
>
> Q Yes, yes. The taller the headrest, the shorter the lady, the more likely it is the person is shooting with the right hand?
>
> A Again, no, I really can't bear an opinion on that because whoever has the gun, whether it's being in the right hand, left hand, or being held with both, has the mobility of his or her body and hands to move.
>
> Q Sure. But the taller the headrest and the shorter the lady, the more the person with the left hand has to be shooting the gun from

[1] Mrs. Langford testified as an eyewitness that appellant was in the backseat of their vehicle when he fired the gunshots into her and her husband's heads.

this direction?

A That is correct.

(TV 11, 966/11-967/1). Furthermore, Sammy James testified that when he saw appellant at Fiero Concepts with a small caliber automatic, appellant was holding it in his right hand (TV 15, 1741/6).

Appellant indicated that the crime scene technician, Deputy Terry Allen, testified that the shots were fired from the backseat of the vehicle (IB 6). However, Deputy Allen more specifically testified that the shots were fired from the back right seat (TV 12, 1027/8-11)

Appellant states as a fact that there was a female Negroid hair found in the backseat of the Langford car, which did not belong to appellant or his family (IB 6). However, the record which reflects this alleged fact, R 234, memorializes a pretrial hearing about possible stipulations between the parties. This was never a fact stipulated to during the trial.

Captain Jerry Gehlbach testified that on the night of the shooting, Mrs. Langford had indicated that the person who shot her and her husband was the Terry who was buying their car (TV 12, 1163/15-1164/3).

Captain Gehlbach testified that appellant admitted that he was the person who was buying the car from Mr. Langford (TV 12, 1168/13). On rebuttal, appellant's mother testified that she was

aware that appellant was buying a car from the Langfords[2] (TV 17, 2159-60); appellant told her that he was paying $1,000 for it (TV 17, 2161).

Captain Gehlbach testified that he spoke with appellant at about 2:00 p.m. the day following the homicide (TV 12, 1166/1). During this conversation, appellant said that he was home the entire previous day, except at 9:00 a.m., when he went to the store, and around 9:00 p.m., when he made a fifteen-minute call to his sister Georgia Thompson (TV 12, 1167/8-22). They had no phone in the house, so he had to go to Pine Street to use a pay phone (TV 12, 1168/2-6). Georgia Thompson testified that she received no phone calls from appellant the night of the homicide (TV 13, 1318/5). Appellant's mother, Della Swan Harris, testified that she did not see appellant leave the house that evening, and that if he left he could not have been gone for more than five minutes to use the phone because she would have missed him (TV 17, 2097/3, 2098/6). On rebuttal, however, Officer Roger Bell of the Leesburg Police Department testified that on June 13th, he overheard appellant's mother mention that the night before appellant had left the house to make a phone call (TV 17, 2182).

Captain Gehlbach testified that on August 21, 1996, appellant asked that he come see him, which he did, during which he and

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[2] The transcript shows that Mrs. Harris kept calling the Langfords by the name Lanquin, but the context of the testimony makes it very clear that she is referring to the Langfords.

Detective Nall took appellant's taped statement (TV 12, 1171/17, 1184/14). The tape, which was played to the jury, reflected the following comments by appellant:

1. About a week and a half before another homicide in Winter Garden (TV 12, 1207/6) and before this homicide (TV 12, 1207/13), he was with Tim Bryant when they stopped at Bryant's Father's[3] house (TV 12, 1185/21-1186/13). Tim asked his father for a gun, indicating that somebody had "tried" him (TV 12, 1187/4, 1190/23). Tim's father reached in his pocket and pulled out "two" guns and gave "it" to him (TV 12, 1187/5). Nonetheless, he indicated that he later saw Tim with both guns (TV 12, 1189/5). One gun was the .38 that was used in the Winter Garden homicide, and the other gun was a little silver handgun (TV 12, 1189/5-11). The other gun was a small caliber automatic weapon, like a .22 (TV 12, 1190/13; TV 13, 1210).

2. He met Mr. Langford at Publix and asked him if he wanted to sell his car (TV 13, 1218/8-20).

3. Tim (Bryant) told him that he shot Mr. Langford, because he owed him for dope (TV 13, 1219/8, 1219/19-1220/1, 1222/12-16).

Captain Gehlbach testified that even before Mrs. Langford identified appellant in the photo lineup, be believed that

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[3] Captain Gehlbach testified that Tim Bryant's father is named Charles Banks (TV 13, 1235/13)

appellant was the shooter, because around 12:30 a.m. on the evening of the shooting Detective Dave Marden told him about the traffic ticket he gave appellant on May 10th (TV 13, 1261/21-1262/17). Officer Brent Hales with the Leesburg Police Department testified that on May 10, 1996, he issued a citation to appellant for driving Mr. Langford's older white car (TV 14, 1522-23). This citation was found during the search of appellant's mother's home (TV 12, 1110-17).

Captain Gehlbach testified that .25 caliber ammunition was used to shoot Mr. and Mrs. Langford (TV 13, 1273).

Deputy Jim Binkley testified that he went with Captain Gehlbach to search the Charles Banks' property, and that in regard to his comment that there were signs that things had been dug up recently, he testified that it appeared as though someone had dug a trench in the back of the house for pipes or something (TV 13, 1324/5). Charles Banks testified that the digging was for a drainage ditch, because his mother's septic tank had clogged (TV 15, 1614/24).

State's Exhibit 24 is the Bill of Sale that Jamie Tsai prepared for appellant (TV 15, 1657, 1659/20-1660/4). Miss Tsai testified that she recognized that both the name Clarence and Chevrolet were misspelled on the Bill of Sale, but that she just typed it the way that appellant had it on the paper (TV 15, 1659/1-5).

Mrs. Langford testified that she has no doubt that the Terry who had been to her home and negotiated to buy the car was the same person who shot her (TV 14, 1457/4).[4] She also testified that there is no doubt in her mind that it was appellant who shot her and her husband (TV 14, 1461). Tim Bryant was brought into the courtroom without being identified, and Mrs. Langford testified that he was not the person who shot her and her husband and that she had never seen him before that day (TV 14, 1460-61, 1511/11).

Mrs. Langford testified that prior to being shot she knew that the last name of the individual who shot her and her husband was Woods, but when she was being questioned by the police she had trouble recalling his last name (TV 14, 1429). She was very confused and tired during this interview, and she was also under medication (TV 14, 1456). She also testified if she had indicated during this interview that in the past she had only seen appellant from a distance that was a mistake, because she had seen him quite close up (TV 14, 1486/23-1487/2).

Finally, Mrs. Langford testified that the signature on the Bill of Sale (State's Exhibit 24) that Sergeant Giles found in the closet at appellant's mother's home, which was purportedly that of her husband, was not authentic (TV 14, 1434/19-1435/10).

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[4] Her son, Kevin Langford also identified appellant as the man named Terry who tried to buy the car from his father (TV 14, 1504). Kevin testified that he knew Terry's last name as Woods (TV 14, 1507/9).

Officer Kimberly Green of the Leesburg Police Department testified that one day between May 14 and June 8 (1996), appellant called the department at least twice, asking for permission to pick up and drive a car that he was buying, although the car did not have a tag and he did not have a license (TV 15, 1685-89). Appellant was very upset that she did not give him permission (TV 15, 1688).

Sheila Russell with the Leesburg Police Department testified that on or about June 6 (1996) appellant called her complaining about a car transaction between he and Mr. Langford and wanting her to force Mr. Langford to give him the car (TV 15, 1698-1704)

Greg Markland testified that it was only two or three days before this shooting that appellant showed him a .25 caliber automatic (TV 15, 1721/3-10).

Dewayne Jones testified that he is a two-time convicted felon (TV 16, 1873/17) and that he previously stood up for appellant at the Lake County jail when appellant was accused of misconduct (TV 16, 1874/22-25). Although Mr. Jones testified that he overheard Tim Bryant tell appellant that he would not worry because they were not going to <u>find</u> the two-five (TV 16, 1870), during his proffer he testified that Bryant said that he would not worry because they were not going to <u>give</u> the two-five (TV 16, 1852/6).

Antoine Jones testified that he has been appellant's best friend for a long time (TV 16, 1887/21, 1889/8). Appellant

indicates that Mr. Jones denied telling the police that he had told them that appellant had told him that he was going to kill somebody (IB 20). This is inaccurate. Mr. Jones testified that he did not recall giving a statement to the police, which he was being confronted with, during which he indicated that appellant told him and Willie that he was going to go and kill somebody (TV 16, 1891/4-12). Further, Mr. Jones subsequently testified that when appellant told him that he was going to shoot someone, appellant did not say who he was going to shoot (TV 16, 1891/21-24). Mr. Jones did recall telling the police that when appellant said this he was not joking and had a serious look on his face (TV 16, 1891/25-1892/8). Appellant indicates that Antoine Jones also testified that he told police that appellant's brother James had told him Tim Bryant did the shooting (IB 20); however, what Jones said was that appellant's brother James told him to tell the police that he (Antoine Jones) saw Tim Bryant do the shooting (TV 16, 1899/1-17). Antoine Jones also testified that he knows Peaches, Alicia and Erica Welcome and that he did not see any of them on the night of the shooting (TV 16, 1906/13-25)

Alicia Hill testified that she, Erica and Peaches were together the night of the shooting (TV 16,1935/3). They had been at K-Mart (TV 16, 1927/4, 9). She was looking for Erica around the railroad tracks (TV 16, 1926/17-1927/9), because a K-Mart security guard had been chasing her in that direction (TV 16, 1942/14). She

testified that she saw Antoine Jones hiding in the bushes at his grandmother's home (TV 16, 1935, 1943/7-11) and asked him why he was hiding, but Antoine said nothing (TV 16, 1936/2-6). When she, Erica and Peaches walked back to the crime scene (TV 16, 1935/3) she gave a statement to the police but gave them a fictitious name and date of birth (TV 16, 1939/25, 1940/1-9), because there was a warrant out for her arrest (TV 16, 1950/16). Although she testified that Antoine Jones told her about the killing, after which she saw appellant's brother -- James Tooley -- and told him what Antoine had said, the prosecutor impeached this testimony with her deposition where she had indicated that James Tooley had dropped Antoine off ten to fifteen minutes earlier (TV 16, 1947/21-1948/10). She admitted that she had dated James Tooley (Tv 16, 1938/21), that they had a close relationship and had slept together (TV 16, 1940/20-25). She also admitted that Antoine Jones has given many different stories about this incident (TV 16, 1945/24), and that his most recent story was that appellant was involved in the shooting (TV 16, 1946/5). She also testified that a week earlier Antoine had told her that he found the murder weapon (TV 16, 1946/22). She indicated that it is hard to determine when Antoine is being truthful, and that people can easily get Antoine to say anything (TV 16, 1946/16, 19).

On rebuttal, Captain Gehlbach testified that he had taken a statement under oath from Antoine Jones prior to July 3, when

appellant's mother brought Antoine Jones to the station, and Antoine's story that he witnessed Tim Bryant shoot the Langfords was brand new (TV 17, 2177/10-2178/2, 2182/18). Consequently, Captain Gehlbach took Antoine into his office and told him that it was important to tell the truth (TV 17, 2178/3-22, 2182/19). Antoine then went back and forth from telling one version of the facts to another version (TV 17, 2178/9). Two days later, on Friday July 5, Antoine Jones called Captain Gehlbach and apologized for having lied to him (TV 17, 2179/2-5).

Appellant's brother Jerry Ellis testified that when he got off the phone with Mr. Mulholland he went home, and that appellant was in the room with his daughter, Quanteri (TV 16, 1956/17-24). His mother and his two little sisters, Arnetha and Deeanna were also home (TV 16, 1956/13). He took a bath when he got home (TV 16, 1962/23), and he indicated that appellant was teasing him while he took his bath (TV 16, 1966/25-1967/5). He testified that there was a basketball game on TV followed by a bulletin of a detour on Griffin Road (the crime scene)(TV 16, 1957/5). He testified that the first bulletin came on TV around 8:30-9:00 (TV 16, 1964/12). He testified that his little sister went to bed in the third quarter of the game[5] (TV 16, 16, 1960/14), that Quanteri went to bed before her (TV 16, 1960/18), and that his mother went to bed a shortly thereafter (TV 16, 1961/10-16). On cross-examination,

[5] His younger sister is Arnetha (TV 16, 2016).

however, he testified that his sisters and Quanteri did not go to sleep until 11:30 (TV 16, 1964/8).

Appellant's sister, Arnetha Swan, testified that she watched the entire basketball game and the news after the game (TV 17, 2024/22-25, 2025/3-9). Appellant's other sister, Deeanna Swan, also testified that she watched the entire game and the news after the game (TV 17, 2033/13-17). Appellant's mother testified that she watched all of the game and a little of the news (TV 17, 2096). She also testified that they went to bed at 11:30 (TV 17, 2076/6-10).

Jesse Hardrick testified that he did not see appellant at his mother's place on the evening of the shooting (TV 17, 2037/9). Although appellant indicates in his brief that Mr. Hardrick testified that he also heard appellant's voice that night (IB 22), in fact Mr. Hardrick testified that he never heard appellant say anything (TV 17, 2041/19).

Appellant's mother testified that she did not doze off during the basketball game (TV 17, 2084/19). She admitted that she had a headache all that day (TV 17, 2098/8-11), but insisted that she never put her head down to rest her eyes (TV 17, 2098/12-16). When asked if she told police the day after appellant was arrested that she had put her head down to rest her eyes, she indicated that she did not (TV 17, 2098/20). Finally, the following dialogue took place regarding this matter on cross-examination:

> Q And do you recall telling Mr. Nall on that occasion, ma'am, at the very bottom of page 4, counsel, page 476 of discovery, that you had a terrible headache, you know, to be quiet, you were telling the children, in other words, those things, "and then anyway, he got up on the bed and laid down, you know, that's what they was back there, so I kind of dozed off a little bit, you know, to kind of ease my head." Do you remember telling the police that?
>
> A I couldn't have told him that.
>
> Q And then later on one of your daughters, you didn't specify, one of the little girls come in and said, "Momma, the game is on." Do you remember telling the police that after you dozed off?
>
> I did not doze off, it was Deeanna said that the game was coming on and they turned the television on.

(TV 17, 2104/7-22).

Mrs. Harris indicated that when she returned to the house after speaking with Mr. Mulholland at about 8:15 (TV 17, 2070/21), she told appellant to give Quanteri a bath and put her to bed (TV 17, 2074/22). When he did, appellant laid down in bed with Quanteri (TV 17, 2102/23-2103/6). Appellant's mother testified that she did not recall[6] telling the police that when she started watching the basketball game, appellant remained in the back room (TV 17, 2105/8-16). Mrs. Harris also testified that she did not recall[7] telling the police that she had been watching the game with her son, Jerry, when the game ended and the news began (TV 17,

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[6] From the middle of page 5 of discovery.

[7] From the bottom third of page 5, 477 of discovery.

2106/3).

In rebuttal, Detective Chuck Nall testified that appellant's mother told him that on the evening of the shooting she had a terrible headache, and that when appellant laid down with his daughter she dozed off for a little bit to ease her head (TV 17, 2166).

SUMMARY OF ARGUMENT

POINT I

If this case were wholly circumstantial, the sole function of the trial court in regard to a motion for a judgment of acquittal would have been to determine whether there is a prima facie inconsistency between the evidence viewed in a light most favorable to the State and the defense theory. However, this case is not wholly circumstantial; therefore, the motion for judgment of acquittal should not have been granted unless there was no view of the evidence which the jury might have taken favorably to the State that could be sustained under the law. The trial court properly denied appellant motion for judgment of acquittal, because Mrs. Langford testified that appellant was sitting in the back seat of the vehicle and shot both her and her husband. Her husband died as a result of those wounds. The evidence also clearly links appellant to the Langfords, because appellant was attempting to purchase their old Chevrolet. Appellant admitted to this transaction and called the Leesburg Police Department several times complaining about the transaction and seeking their assistance in taking possession of the vehicle. The evidence shows that appellant was very upset about this transaction. He finally forged a Bill of Sale transferring ownership from Mr. Langford to himself. The evidence also shows that appellant lured the Langfords to a remote area under the guise of having a Bill of Sale signed and

notarized. The evidence shows that two or three days before this homicide appellant was in possession of a .25 automatic handgun and that the Langfords were shot with a .25 caliber weapon. Certainly the jury might have taken this evidence favorably to the State and found appellant guilty of this offense. Further, there is a prima facie inconsistency between appellant's theory of misidentification and Mrs. Langford's testimony that she had no doubt that it was appellant who shot her and her husband (TV 14, 1457/4, 1458/8, 1461).

POINT II

Appellant's sentence is proportionately warranted due to the underlying circumstances and a comparison of the aggravating and mitigating circumstances. The facts show that appellant lured an elderly couple to a desolate area and shot them in a cold-blooded fashion multiple times at close range in the back of their heads. Although Mrs. Langford survived, there is no question that appellant intended to kill her. The facts also show that appellant planned this homicide for at least two weeks. Over this period appellant obtained the murder weapon and forged a Bill of Sale. The trial court found the existence of the prior violent felony and the CCP circumstances and gave them great weight. The trial court found the existence of age as a mitigating circumstance but only gave it moderate weight. Appellant was twenty-four at the time of the offense but had low intelligence and was socially immature.

The trial court also found the existence of seven non-statutory mitigating circumstances but only gave them little, some or moderate weight. The facts show that appellant had no serious emotional disturbance and was not under the influence of drugs or alcohol at the time of the homicide. Although appellant's father left home when appellant was young, the facts show that appellant believes that he had a "great family upbringing." There was no evidence of any abuse. The trial court found that mitigating evidence did not outweigh the aggravating factors. The record shows that there was no abuse of discretion in this weighing process.

POINT III

Appellant's motion for new trial was based on newly discovered evidence, that being an eyewitness named Cynquette Bryan. After an evidentiary hearing, the trial court concluded that Ms. Bryan was not credible and therefore her testimony would not have likely produced an acquittal on retrial. Ms. Bryan testified that she heard three shots but subsequently indicated that she only heard two shots. She testified that the lady was shot two times, but this was after she testified that she had not looked into the car. She then testified that she knew it was a lady because she heard the lady scream, but Mrs. Langford testified that she did not scream. Ms. Bryan testified that she saw the Langford vehicle in a ditch, but the evidence shows that it was not in a ditch. She

testified that she saw the shooter exit the vehicle from the back driver's side, but the evidence shows that he exited the back passenger side. Although she testified that the shooter was Tim Bryant, she admitted that she previously told police that the shooter was named Kevin. She also told the police that she did not even know the name Tim Bryant until appellant's defense counsel mentioned the name. She also testified that she only saw the back of the shooter's head. She testified that after the shooting, she went to McCobe's Apartments and from there took a Central Taxi cab to her mother's place at 815 Washington Street; however, the records of Central Taxi show no such pick-up or drop-off. There is overwhelming record evidence to support the trial court's conclusion, so there is no abuse of discretion.

POINT IV

The trial court did not abuse its discretion in giving great weight to the prior violent felony circumstance, although it was based on the contemporaneous conviction relating to the attempted murder of Mrs. Langford. Appellant shot Mrs. Langford -- without warning -- two times at close range into the back of her head. Miraculously, the bullets exited through her cheek and mouth and she survived. Mrs. Langford testified that she felt a big explosion in her head and began bleeding profusely (TV 14, 1409/8). She thought, "Oh dear God he's shot me and I'm going to die" (TV 14, 1409/12). She testified that it was the most horrifying

sickening feeling one could imagine (TV 14, 1409/14).

The record also supports the trial court's finding that the heightened premeditation and careful plan or design elements of the CCP circumstance existed. The evidence shows that appellant procured the murder weapon in advance and carried out the homicide as a matter of course. He lured the Langfords to a desolate area where he shot them -- without warning -- execution-style at close range to the back of the head. Mack Harris testified that prior to the shooting, appellant was inquiring about where he could buy a pistol. The evidence shows that appellant obtained a Bill of Sale, forged Mr. Langford's signature to it and attempted to then have it notarized on May 30, 1996. On May 30, appellant had a .25 caliber pistol in his possession. A .25 caliber weapon killed Mr. Langford and wounded Mrs. Langford. The day before the homicide appellant made a concerted effort to carry out the exact same scenario -- to convince the Langfords to meet him at the library in the evening to purportedly get his girlfriend to witness his signature on the Bill of Sale and to get it notarized.

Appellant has not shown that the trial court abused its discretion in assigning weight to the mitigating circumstances.

POINT V

The trial court properly gave the pecuniary gain instruction to the jury, because evidence was presented supporting its existence. The entire relationship between the Langfords and

appellant revolved around the acquisition of their vehicle and appellant's problems related thereto. Appellant became very upset, when the Langfords repossessed the vehicle after he drove it without permission or proper authority. Appellant thereafter forged a Bill of Sale which transferred ownership in the vehicle to him. Shortly thereafter, appellant shot the Langfords.

POINT VI

The record supports the trial court's finding the existence of the heightened premeditation element of the CCP circumstance. This issue however was discussed under Point IV.

POINT VII

The trial court did not abuse its discretion by allowing Mrs. Langford to testify that (after appellant renewed his desire to purchase their vehicle) her husband indicated that he told appellant to let him know when he had all the money. This out-of-court statement does qualify under the state of mind exception to hearsay, in that Mr. Langford's state of mind was a factual issue in this matter. His intention to only sell the vehicle when appellant had all the money explains why the Langfords went on their death journey with appellant. It explains why two elderly people would meet a near stranger after dark and drive him to a dirt road. Nonetheless even if error it would be harmless. Evidence independent of this testimony was sufficient evidence of appellant's guilt, and there was a multitude of other evidence

showing that appellant was attempting to purchase the Langford vehicle; that the deal fell through but was revitalized; and that appellant had all the money to purchase the vehicle when he called to arrange the meeting at the library.

POINT VIII

This Court has previously ruled that a death sentence based on an advisory recommendation, which in turn was based on an 8 to 4 majority vote, is not unconstitutional. This Court has also ruled that Florida's death statute is not unconstitutional because it does not require unanimity or a substantial majority to find the existence of an aggravating circumstance. Appellant has given this Court no adequate reason to recede from those previous rulings.

ARGUMENT

POINT I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Appellant was charged with and convicted of first degree premeditated murder pursuant to § 782.04(1)(a)1, Fla. Stat. (1996)(R 5, 986). The elements of this crime are (1) the unlawful killing of a human being; and (2) when perpetrated from a premeditated design to effect the death of the person killed or any human being. Appellant argues that the trial court erred in denying his motion for judgment of acquittal, because the state failed to prove premeditation.

Appellant, however, has failed to preserve this issue for appellate review. A motion for judgment of acquittal must fully set forth the grounds on which it is based. Fla. R. Crim. P. 3.380 (b). Further, for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for objection, exception, or motion below. *Terry v. State*, 668 So. 2d 954 (Fla. 1996); *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), *cert. denied*, 114 S.Ct. 99 (1993). Similarly, §924.051(3), Fla. Stat. (1996) now mandates that an appeal may not be taken from a judgment or order, unless prejudicial error is alleged and properly preserved, unless the error would constitute fundamental error. Preserved means that the issue or legal argument presented on

appeal was raised before and ruled on by the trial court. §924.051(1)(b), Fla. Stat. (1996).

In this matter, at the close of the State's case, defense counsel merely stated:

> Your Honor, in the presence of my client, Terry Woods, at this time I would argue at the end of the state's case the Court should grant a Motion for Judgment of Acquittal in that the evidence taken in the light most favorable to the state does not prove a prima facie case of guilt against Terry Woods as to Counts One or as to Count Two, your Honor.

(TV 16, 1829/21 - 1830/3, 1836/19-23).

At the close of the Defense case, defense counsel renewed this motion by stating:

> Your Honor, at this time I would make my Motion for Judgment of Acquittal that I made at the end of the state's case. The same argument, your Honor.

(TV 17, 2113/6-10).

At the end of rebuttal, defense counsel again renewed his motion by stating:

> Your Honor, I would renew my previously made Motion for Judgment of Acquittal. The state has not proved a prima facie case of guilt, taking the evidence in a light most favorable to the state.

(TV 18, 2255/3-7)

None of these motions made the specific legal argument now presented on appeal, namely that there was insufficient evidence to prove the element of premeditation. These motions were merely

"barebones" motions which are insufficient to preserve this issue for appeal. Granted, pursuant to Fla. R. App. P. 9.140 (h) this Court has an obligation to review the sufficiency of the evidence to determine if the interest of justice requires a new trial; however, this Court should nonetheless not be guided by argument on an issue not properly preserved.

Appellant also argues that the evidence of premeditation has not been proven, because the evidence presented as to this element was circumstantial and failed to exclude every reasonable hypothesis of innocence. However, this special standard of review of the sufficiency of the evidence only applies where a conviction is based wholly on circumstantial evidence. *State v. Law*, 559 So. 2d 187, 188 (Fla. 1989); *Orme v. State*, 677 So. 2d 258, 261 (Fla. 1996), *cert. denied*, 117 S.Ct. 742 (1997). Therefore, any analysis must begin by first determining whether the case against appellant was wholly circumstantial. *Id.* In regard to the first element of this homicide -- that there was an unlawful killing of a human being -- Mrs. Langford testified that appellant shot her and her husband from the backseat of their vehicle. Dr. Janet Pillow, who performed the autopsy, testified that Mr. Langford was shot three times in the back right of his head (TV 11, 935/14-936/5), two of which caused his death (TV 11, 951/18-952/5). Direct evidence is that to which a witness testifies of his or her own knowledge as to the facts at issue. *Id.* Therefore, the testimony of both Mrs.

Langford and Dr. Pillow is direct evidence of the first element of this homicide; appellant's conviction is not based wholly on circumstantial evidence; and this standard of review is not applicable. However, if it were, the sole function of the trial court on the motion for judgment of acquittal would have been to determine whether there is a prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories. *Id* at 262. If there is such an inconsistency, then the question is for the finder of fact to resolve. *Id.* It should be noted, however, that in this case appellant did not articulate a hypothesis of innocence in regard to premeditation. The evidence presented and argument made by appellant(TV 18, 2341/22-TV 19, 2424/2) merely presented defense theories of alibi, misidentification and an allegation that Tim Bryant was the shooter. Appellant's primary theory of defense was misidentification (TV 18, 2369/4-7).

Because this case was not based wholly on circumstantial evidence, the motion for judgment of acquittal should not have been granted unless there was no view of the evidence which the jury might have taken favorably to the State that could be sustained under the law. *Gudinas v. State*, 693 So. 2d 953, 962 (Fla.), *cert. denied*, 118 S.Ct. 345 (1997); *Rogers v. State*, 660 So. 2d 237, (Fla. 1995). A judgment of acquittal is properly denied when the evidence is reasonably susceptible to two views, for example that

defendant's action either was premeditated or in the "heat of passion." *See Lynch v. State*, 293 So. 2d 44 (Fla. 1974). Further, the party moving for a judgment of acquittal admits all the facts adduced in evidence and every conclusion favorable to the state which is fairly and reasonably inferable therefrom. *Spinkellink v. State*, 313 So. 2d 666, 670 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976); *Lynch v. State*, 293 So. 2d 44 (Fla. 1974). Where the state has produced competent evidence to support every element of the crime, a judgment of acquittal is not proper. *Gay v. State*, 607 So. 2d 454, 457 (Fla. 1st DCA 1992), *rev. denied*, 620 So. 2d 760 (Fla. 1993).

Further, any conflicts in the evidence and the credibility of witnesses are properly resolved by the jury; therefore, the granting of a motion for judgment of acquittal cannot be based on an evidentiary conflict or witness credibility. *Lynch v. State*, 293 So. 2d 44 (Fla. 1974); *Hitchcock v. State*, 413 So. 2d 741, 745 (Fla. 1982). The testimony of a single witness, even if uncorroborated and contradicted by other State's witnesses, is sufficient to sustain a conviction. *I.R. v. State*, 385 So. 2d 686 (Fla. 3d DCA 1980).

Premeditation is a fully formed conscious purpose to kill that 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. *Kirkland v.*

State, 684 So. 2d 732 (Fla. 1996). Premeditation may be established by circumstantial evidence, including the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. *Kearse v. State*, 662 So. 2d 677 (Fla. 1995); *Spencer v. State*, 645 So. 2d 377 (Fla. 1994).

In this case, the evidence shows that appellant had a disagreement with the Langfords concerning the purchase of a vehicle. Appellant indicates that they settled their differences (IB 28); however, the reasonable inferences from the facts adduced do not reflect this. What the evidence shows is that appellant was very upset that he lost possession of the vehicle, and that he was calling the authorities in an effort to force the Langfords to return the vehicle. When they refused to return the vehicle until they received the title from the Department of Motor Vehicles, appellant demanded and received his money back, less approximately two hundred dollars to cover damage done to the vehicle (TV 13, 1374/4-12). Subsequently, appellant called the Langfords indicating that he had all the money necessary to purchase the vehicle, and that he wanted to give it to them to avoid spending it on his girlfriend; in return he asked that they sign a Bill of Sale. However, during that same period, appellant was obtaining a forged Bill of Sale on the subject vehicle. If his differences had

been settled with the Langfords, appellant would not have been forging Mr. Langford's signature on a bogus Bill of Sale.

The facts show that appellant subsequently lured the Langfords to a desolate dirt road, ostensibly to pick up his girlfriend so she could witness the execution of the Bill of Sale. The manner in which appellant laid this trap to kill the Langfords supports a finding of premeditation.

Finally, when Mr. Langford stopped the car, the facts show that appellant shot Mr. and Mrs. Langford at close range from the back right seat of their vehicle. He shot Mrs. Langford twice in the head and then shot Mr. Langford three times in the head. The facts also show that appellant shot the Langfords with a .25 caliber automatic that was his weapon that he brought to the murder scene. A homicide involving multiple shots at close range execution style supports a finding of premeditation and heightened premeditation. *Occhicone v. State*, 570 So. 2d 902, 905 (Fla. 1990), *cert. denied*, 111 S.Ct. 2067 (1991); *Swafford v. State*, 533 So. 2d 270 (Fla. 1988); *Burr v. State*, 466 So. 2d 1051, 1054 (Fla. 1985); *Griffin v. State*, 474 So. 2d 777, 780 (Fla. 1985), *cert. denied*, 474 U.S. 1094 (1986). Similarly, multiple stab wounds supports a finding of premeditation. *Jimenez v. State*, 22 Fla. L. Weekly S685 (Fla. Oct. 30, 1997); *Preston v. State*, 444 So. 2d 939, 944 (Fla. 1984). On this record, there was sufficient evidence from which a jury could have concluded that prior to shooting the

Langfords appellant was conscious of the fact that he was going to shoot them and that they would likely die as a result. *See Asay v. State*, 580 So. 2d 610 (Fla. 1991).

Appellant implies that this could have been a "heat of passion" killing, but no evidence suggests this. In order for provocation to negate a finding of premeditation, a defendant's actions must have been provoked by a sudden impulse. *Haddock v. State*, 129 Fla. 701, 176 So. 782 (1937). There is insufficient provocation where there is adequate time between the provocation and the act of killing for defendant's passion to cool. *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986). In this matter, the facts show that a provocation occurred when appellant was required to return the car. It was a couple of weeks after this event that appellant called Mr. Langford and indicated that he still wanted to buy the car (TV 13, 1375/25-1376/6) and a couple of weeks more before appellant indicated that he had the cash in exchange for the Bill of Sale (TV 13, 1377/2-1378/4).

Each of the cases cited by appellant can be distinguished from the facts of this case. In *Forehand v. State*, 126 Fla. 464, 171 So. 241 (1936) and *Tien Wang v. State*, 426 So. 2d 1004 (Fla. 3d DCA 1983), a violent altercation preceded the homicide. In *Rogers v. State*, 660 So. 2d 237 (Fla. 1995) and *Jackson v. State*, 575 So. 2d 181 (Fla. 1991), a struggle and resistance preceded the homicide. In *Clay v. State*, 424 So. 2d 139 (Fla. 3d DCA 1982), the defendant

was under a dominating passion and fear of the victim. In *Smith v. State*, 568 So. 2d 965 (Fla. 1st DCA 1990), the State was unable to prove the manner in which the homicide was committed, what occurred immediately prior to the homicide, the nature of the weapon, or the nature of any wounds. Additionally, there was no evidence of the presence or absence of provocation and very little evidence of previous difficulties between the defendant and the victim.

In this case, on the other hand, the facts show no altercation, struggle or resistance preceded the homicide. To the contrary, the evidence shows that the Langfords cooperated throughout the ordeal. They met appellant at the library, as he requested, and drove according to his directions to the dirt road where they were killed. There was also no evidence that appellant was under any dominating passion or fear of the Langfords. Further, the use of a weapon previously acquired by appellant and brought to the murder scene indicates both a familiarity with the weapon and a plan to use it to kill the Langfords.

Certainly the facts that show (1) an absence of adequate provocation; (2) that there were previous difficulties between appellant and the Langfords in regard to the vehicle transaction; (3) that the manner in which the homicide was committed was to lure the Langfords to a desolate area where appellant could kill them; and (4) that appellant shot Mrs. Langford twice in the back of the head and then continued to shoot Mr. Langford three times in the

head all support a finding of premeditation, and therefore the motion for judgment of acquittal was properly denied. Moreover, even if this were a wholly circumstantial case and appellant's theory of defense had been that premeditation had not been proven, the evidence viewed in the light most favorable to the State reveals a prima facie inconsistency with this theory requiring that this issue be given to the jury.

POINT II

WHETHER APPELLANT'S SENTENCE IS PROPORTIONATELY WARRANTED.

The trial court found the existence of the prior violent felony and CCP aggravating circumstances to which he assigned great weight (R 979-80). He also found the existence of one statutory mitigating circumstance, age, to which he assigned moderate weight (R 981), and seven non-statutory mitigating circumstances, to which he assigned little, some or moderate weight (R 981-82). Appellant does not challenge that the trial court found the existence of the prior violent felony and CCP aggravating circumstances. Nor does he challenge the trial court's findings or assigned weight in regard to the mitigating circumstances. Appellant's sole argument is that death is not warranted, because this case is not one that is the most aggravated and least mitigated as required under *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974) and *Terry v. State*, 668 So. 2d 954 (Fla. 1996).

As appellant correctly pointed out, proportionality is not a comparison between the number of aggravating and mitigating circumstances but a consideration of the totality of circumstances in a case and a comparison of these circumstances with other capital cases. *Id* at 965. It requires a reasoned judgment as to what factual situations require imposition of the death penalty. *Floyd v. State*, 569 So. 2d 1225, 1233 (Fla. 1990), *cert. denied*,

111 S.Ct. 2912 (1991). Nonetheless, appellant's argument focuses on the number of aggravators and mitigators in cases which are otherwise distinguishable from the present case.

Appellant cites to *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988), where the record was replete with evidence of the defendant's substantially impaired capacity, extreme emotional disturbance and low emotional age. One medical expert characterized Fitzpatrick as being "crazy as a loon." This Court found that the Fitzpatrick's actions were those of a seriously emotionally disturbed man-child not those of a cold-blooded, heartless killer. Furthermore, this Court noted that the HAC and CCP aggravators were conspicuously absent.

In this case, on the other hand, the evidence does not show that appellant has a serious emotional disturbance. Dr. Estill's summary of appellant was that he shows excessive optimism regarding his future. He can show insecurity and low self-esteem. He can show anxiety and inadequacy. He may be gruff, stubborn and rigid with acting-out tendencies.[8] He can show a feeling of constriction and a lack of independence as well as a loss of autonomy of his environment. He may show a desire to withdraw. He may feel socially inadequate and indecisive. However, he has a strong need

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[8] Acting out includes tantrums, yelling and screaming and possible aggressive conduct; however, Dr. Estill stressed that aggressive behavior does not mean violent behavior (TV 20, 2638/25, 2672/13-18). She also testified that there was no evidence of violence in appellant's acting out (TV 20, 2639/9).

to maintain acceptable society relationships (TV 20, 2652/11-20). Dr. Estill also testified that appellant (1) is not mentally retarded (TV 20, 2630/9); (2) is capable of premeditated conduct (TV 20, 2642/1); (3) knows the difference between right and wrong (TV 20, 2646/3); and (4) can appreciate the consequences of his actions (TV 20, 2646/6). Dr. Estill testified that appellant is not insane (TV 20, 2631/16), nor is he a psychopath or a sociopath (TV 20, 2637). Her final diagnosis was that appellant had a temporary adjustment disorder caused by his incarceration (TV 20, 2657/5-15). Nothing in the record suggests that appellant had any serious emotional disturbance at the time of the offense. Furthermore, appellant lured this elderly couple to a desolate area and shot these defenseless people multiple times at close range in the back of their heads. On this basis, the trial court found the existence of the weighty CCP aggravator. *See Maxwell v. State*, 603 So. 2d 490, 494 n.4 (Fla. 1992) ("By any standards, the factors of heinous, atrocious, or cruel, and cold, calculated premeditation are of the most serious order."). Unlike *Fitzpatrick*, the evidence in this case does show that appellant is a cold-blooded, heartless killer.

Appellant also cites to *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988) and again compares the number of aggravators and mitigators found therein to the number assigned in this case. However, again neither of the weighty aggravators (CCP and HAC)

were present in *Livingston*. Furthermore, Livingston was only seventeen at the time of the offense, while appellant was twenty-four. In *Livingston* the nonstatutory mitigator, an unfortunate home life, was based in part on severe childhood beatings and neglect, which resulted in the defendant's intellectual functioning being marginal at best. Finally, Livingston used cocaine and marijuana extensively, and this Court used this addiction in its proportionality analysis. In this matter appellant told Dr. Estill that his parents were good supportive people (TV 20, 2635/15-17) and that he saw himself as having a good relationship with his family (TV 20, 2642/23). He also told Dr. Estill that he had a great family upbringing (TV 20, 2646/20). Dr. Estill testified that there was no evidence of appellant being abused as a child (TV 20, 2646/7-19). Further, although Dr. Estill testified that appellant has an IQ which places him in the borderline range of intellectual functioning, she also testified that this intellectual level does not prohibit appellant from premeditating his conduct (TV 20, 2641/1). Finally, unlike *Livingston*, there was no evidence in this case of appellant using cocaine or marijuana.

Appellant cites to *Proffitt v. State*, 510 So. 2d 896 (Fla. 1987), which is one of a line of cases that hold that where a defendant has no prior record of criminal or violent behavior, a homicide committed during a burglary unaccompanied by any additional act of abuse or torture does not justify the death

penalty. In *Proffitt*, there was no evidence that the defendant possessed the murder weapon when he entered the premises, and Proffitt made no attempt to harm the victim's spouse. In this case, the evidence showed that appellant took a weapon with him when he lured the victims to that dirt road, which indicates that appellant had every intent to kill the victims from the beginning. This was not just another burglary gone bad. This case also did not involve a single homicide with no additional act of abuse. This was a cold-blooded killing evidenced by the fact that appellant shot two victims, one after the other, in the back of the head at close range.

Appellant also cites to *Huckaby v. State*, 343 So. 2d 29 (Fla.), *cert. denied*, 434 U.S. 920 (1977), but in *Huckaby* this Court found that the two weighty statutory mental mitigators existed and that they outweighed the two aggravating circumstances, one of which was HAC. *Huckaby* involved the rape of defendant's three daughters, and the evidence showed that Huckaby was mentally ill and that all events centered around defendant's sexual aberrations. In this case, neither mental mitigator was argued or found. Moreover, Dr. Estill testified that appellant could differentiate between right and wrong and appreciated the consequences of his actions.

Appellant also cites to other cases such as *Songer v. State*, 544 So. 2d 1010 (Fla. 1989), where only one aggravating

circumstance was found, but clearly these cases are distinguishable from the instant case, where two aggravators were found and given great weight. In regard to this line of cases, appellant cites to *Penn v. State*, 574 So. 2d 1079 (Fla. 1991), which is further distinguishable in that the court found in mitigation the existence of an extreme mental disturbance and heavy drug use, neither of which were found to exist in this matter.

Appellant also cites to *Terry v. State*, 668 So. 2d 954 (Fla. 1996), *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995), and *Thompson v. State*, 647 So. 2d 824 (Fla. 1994) to support his argument that there is a substantial lack of evidence concerning the facts and circumstances of this murder, that this Court's ability to perform its proportionality review is thereby impaired, and therefore this Court should reverse his death sentence. First and foremost, the circumstances surrounding this homicide are not unclear. Mrs. Langford testified that appellant lured her and her husband to a deserted dirt road, where he shot them both, without provocation or any other resistance, to the back of the head. Additionally, in *Terry*, there were two aggravating circumstances, felony murder and a contemporaneous conviction as a principal to a co-defendant's aggravated assault with an inoperable gun. In this case, on the other hand, the weighty CCP circumstance was found to exist as one of the two aggravators, which further distinguishes this case from *Terry*. *Sinclair* and *Thompson* are further distinguishable, because

they are also single aggravator cases, where the aggravator was the felony murder circumstance.

The sentence of death in this case is proportional for several reasons. In regard to the mitigation, this case does not involve any statutory mental mitigators, which when properly supported are given great weight. *Burns v. State*, 699 So. 2d 646 (Fla. 1977). Further, the only statutory mitigator, age, was correctly given only moderate weight by the trial court. Age is mitigating in nature only when it is relevant to mental and emotional maturity and to defendant's ability to take responsibility for his own acts and to appreciate the consequences flowing from them. *Eutzy v. State*, 458 So. 2d 755 (Fla. 1984); *cert. denied*, 471 U.S. 1045, (1985). Further, a trial court must also evaluate whether the facts relating to mitigation extenuate or reduce the degree of moral culpability for the crime committed and to what extent. *Rogers v. State* 511 So. 2d 526 (Fla. 1987). Although Dr. Estill testified that appellant had an IQ of 77 (TV 20, 2629/24) and was socially immature (TV 20, 2634/23), she also testified that appellant knew the difference between right and wrong and could appreciate the consequences of his actions (TV 20, 2646/1-6). There was no evidence adduced that shows how appellant's maturity or intelligence level is relevant to justify a lower level of moral culpability. The facts show that appellant knew precisely what he was doing when he lured the Langfords to that dirt road, and he

knew what he did was wrong.

In regard to the non-statutory mitigation, the trial court found seven circumstances; however as this Court pointed out in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), a number of these were more appropriately grouped together. At the least, appellant's learning disabilities and low I.Q. should have been grouped together; and his difficult childhood, being a good sibling and a good parent should have been grouped together.

Other circumstances that make this case proportionate are the helpless elderly victims[9], the multiple gunshot wounds which were made execution style at close range, and how appellant lured the victims to the dirt road where he shot them in a cold-blooded fashion. In *Occhicone v. State*, 570 So. 2d 902, 905 (Fla. 1990), *cert. denied*, 111 S.Ct. 2067 (1991), death was proportionate where the defendant shot a defenseless victim four times execution style at close range. In *Wickham v. State*, 593 So. 2d 191 (Fla. 1991), *cert. denied*, 505 U.S. 1209 (1992) death was found proportionate where the defendant lured the victim into a roadside ambush. In *Walls v. State*, 641 So. 2d 381 (Fla. 1994), *cert. denied*, 115 S.Ct. 943 (1995) death was proportionate where a helpless woman was killed execution style. In *Jones v. State*, 652 So. 2d 346 (Fla. 1991), *cert. denied*, 116 S.Ct. 202 (1995) death was proportionate

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[9] Mr. Langford was sixty-five when he was killed (TV 13, 1336/23).

where the defendant killed an elderly couple over a disagreement he had with them about money. In *Koon v. State*, 513 So. 2d 1253 (Fla. 1987), *cert. denied*, 108 S.Ct. 1124 (1988), death was found proportionate where the defendant lured the victim from his home on a pretext and to a deserted road where he killed him execution style with a shot to the head. In *Ferrell v. State*, 686 So. 2d 1324 (Fla. 1996), *cert. denied*, 117 S.Ct. 1443 (1997), death was proportionate where although the defendant was not the shooter he was an integral part of the episode and lured the victim to a field where he was shot five times, four of which were to the head.

Jones v. State, 690 So. 2d 568 (Fla. 1996), *cert. denied*, 118 S.Ct. 205 (1997) is factually similar to this case in that the defendant committed homicide over the possession of a vehicle. Jones also used a .25 caliber pistol intending to kill two victims with shots to their heads. However, as in this case one victim lived. As in this case, Jones argued that the mitigating circumstances were overwhelming, but this Court found death proportional due in part to the existence of the CCP circumstance and the lack of mental mitigation. This case similarly was committed in a cold, calculated and premeditated manner, and there was a complete absence of mental mitigation.

Granted there were more aggravators than mitigators found to exist in most of the above cases, but the factual circumstances are very comparable, which is the essence of proportionality. This is

demonstrated in *Hunter v. State*, 660 So. 2d 244 (Fla. 1995), which also involved a cold-blooded killing such as this. There the trial court found two aggravators, prior violent felony conviction and felony murder, and ten non-statutory mitigating factors. In *Hunter*, as in this case, appellant cited to *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988), where the trial court also found two aggravators and only two mitigators but found death to be disproportionate. However, in *Hunter* this Court nonetheless found death proportionate noting that it could find no abuse of discretion by the trial court in concluding that the aggravating circumstances outweighed the mitigating circumstances due to the underlying circumstances and a comparison of the aggravators and mitigators.

Similar to *Hunter*, in this case the trial court also found two aggravators, one of which was also for a prior violent felony conviction, but the other was the weighty CCP circumstance. In mitigation, the trial court in this case found one statutory mitigator, age, which he gave moderate weight, but only seven non-statutory mitigators. Granted, the prior violent felony aggravator in *Hunter* was based on four prior and eight contemporaneous convictions, whereas in this case this aggravator was based only on one contemporaneous conviction. However, the second aggravator in this case, CCP deserves far greater weight that the felony murder aggravator in *Hunter*.

The eight mitigators in this case were (1) age; (2) learning disabilities; (3) low I.Q.; (4) accepted parental responsibilities; (5) attempt to be a good sibling; (6) difficult childhood without the influence of his father during his formative years; (7) no convictions for violent offenses prior to these offenses; and (8) assisted law enforcement in another homicide. The ten mitigators in *Hunter* were fetal alcohol syndrome; (2) separation from siblings; (3) lack of motherly nurturing and bonding; (4) physical abuse; (5) emotional abuse and neglect; (6) unstable environment; (7) violent environment; (8) lack of positive role models; (9) death of adoptive mother; and (10) narcissistic personality disorder. A comparison of these two sets of mitigating circumstances reflects a great similarity with arguably stronger mitigation in *Hunter*. There was no evidence of physical or emotional abuse in this case. Furthermore, there was no evidence of any mental mitigation in this case comparable to Hunter's fetal alcohol syndrome and narcissistic personality disorder.

The death penalty is appropriate if, as here, the jury has recommended and the judge imposes the death sentence, finding that the mitigating evidence did not outweigh the aggravating factors. *Brown v. State*, 565 So. 2d 304 (Fla.), *cert. denied*, 111 S.Ct. 537 (1990); *Freeman v. State*, 563 So. 2d 73 (Fla. 1990), *cert. denied*, 111 S.Ct. 2910 (1991); *White v. State*, 403 So. 2d 331 (Fla. 1981). In this case, the record shows that the trial court conscientiously

weighed the aggravating circumstances against the mitigating evidence and concluded that death was appropriate (R 979-982). In sum, when comparing these two sets of circumstances and the underlying factual circumstances, this Court should find no abuse of discretion by the trial court in concluding that the aggravating circumstances outweigh the mitigating circumstances.

POINT III

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

Although the trial court found an "incredible lack of credibility" in Cynquette Bryan (TV 22, 3020/21), appellant argues that the trial court abused his discretion in denying his motion for new trial. As appellant has indicated, for a defendant to obtain a new trial based on newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. Fla. R. Crim. P. 3.600(a)(3); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991). Moreover, a motion for new trial is addressed to the sound discretion of the trial court, and unless appellant can show a clear abuse of the trial court's broad discretion, the trial court's action will not be disturbed on appeal. *State v. Hamilton*, 574 So. 2d 124 (Fla. 1991); *State v. Hart*, 632 So. 2d 134 (Fla. 4th DCA 1994).

Notwithstanding appellant's acknowledgment of *Parker v. State*, 641 So. 2d 369 (Fla. 1994), where this Court ruled that the trial court did not abuse its discretion in denying a motion for new trial on the basis that the new evidence was not credible, appellant nonetheless argues that *Jackson v. State*, 646 So. 2d 792 (Fla. 2d DCA 1994) espouses a broader holding than *Parker*, because the *Jackson* opinion includes language that requires a trial court

to evaluate the weight of both the newly discovered evidence and the evidence adduced at trial when evaluating the merits of a motion for new trial based on newly discovered evidence. However, both *Jackson* and *Parker* cite to *Jones v. State*, 591 So. 2d 911 (Fla. 1991), where this very language was previously used by this Court. The *Jones* opinion changed the standard for setting aside a conviction based on newly discovered evidence from a conclusive to a probable likelihood of producing an acquittal. In remanding the *Jones* matter back to the trial court for an evidentiary hearing to determine what evidence qualified as newly discovered evidence and whether such evidence probably would have resulted in an acquittal, this Court merely indicated that in reaching such a conclusion the trial court would of necessity have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial. Therefore, *Jackson* provides no additional rule of law but merely reiterates that if there is new evidence this evidence needs to be blended with the evidence adduced at trial to determine whether its addition would have probably resulted in an acquittal.

Furthermore, *Parker* also cites to *Stone v. State*, 616 So. 2d 1041 (Fla. 4th DCA 1993), which holds that it is the trial court's responsibility to first determine whether a witness at an evidentiary hearing on a motion for new trial is testifying truthfully. If the trial court finds that the new evidence is not credible, then it adds nothing to the evidence adduced at trial and

the trial court would necessarily have to conclude that its addition would likely not have resulted in an acquittal. As was pointed out in *Glendening v. State*, 604 So. 2d 839, 840 (Fla. 2d DCA 1992), only after the trial court makes a determination that the witness is testifying truthfully does the trial court then compare this testimony with the other evidence adduced at trial to determine whether this additional testimony would probably result in a different verdict. In *Jones v. State*, 23 Fla. L. Weekly S137, 141 (Fla. Mar. 17, 1988), this Court found no error in the trial court's denial of defendant's motion for post-conviction relief based on newly discovered evidence based in part on the trial court's observation that the testimony of one of the new witnesses, Roy Williams, was riddled with inconsistencies, contradictions, and statements that could not be true. Similarly, in this case the trial judge indicated that Ms. Bryan's testimony would in no way have changed the verdict (TV 22, 3021/23), because it was full of personal self-contradictions and contradictions with all of the evidence at trial (TV 22, 3021/4).

The newly discovered evidence in this case was a witness named Cynquette Bryan. Ms. Bryan testified that on the night of the shooting she was walking west along Griffin Road to McCobe's Apartments, and as she approached the path near the railroad tracks she saw a parked car and heard three shots (TV 21, 2842-43). She subsequently testified that when she "came up" she heard two shots

(TV 21, 2844/8), and on cross-examination she testified that she had told the police that she only heard two shots (TV 2863/16, 2864/3).

Ms. Bryan also testified that she recalled telling the police that she saw the vehicle parked in a ditch (TV 21, 2856/19). Detective Nall testified that when she gave her sworn statement she told them that she saw the victim's vehicle parked in a ditch (TV 21, 2979/24-2980/1). However, Captain Gehlbach testified that he was at the crime scene and the Langford vehicle was not in a ditch (TV 21, 2984/5).

Ms. Bryan testified that she ran but stopped half-way across the tracks, when she saw a tall dark-skinned bald Afro-American man (TV 21, 2843). The man got out of the car, ran, stopped when she stopped and then ran again toward Griffin Manor (TV 12, 2843/2-3, 2844/4-5, 2867/6-15). Ms. Bryan testified that the man got out of the driver's side of the car (TV 21, 2865/21-2866/1). However, Mrs. Langford testified that appellant was in the back seat behind her when he shot her (TV 14, 1441/5-11), and Officer George Whittaker with the Leesburg Police Department testified that he was the first officer on the scene and the only door of the vehicle that was closed was the passenger door on the driver's side (TV 11, 890/11, 891/20). He also testified that the used cartridge casings were found outside the right rear passenger door, which had also been damaged (TV 11, 892/19-893/6).

Ms. Bryan initially testified that she did not recognize the person who got out of the car (TV 2845/24) but knew that it was not appellant (TV 21, 2846/1). Then she was asked whether there was any name that she "could put to that person," and she responded, "Tim Bryant"[10] (TV 21, 2846/2-4). However, she admitted that when she had spoken to defense counsel on March 12th and subsequently to Leesburg police officers, she had told them that the shooter's name was Kevin (TV 21, 2846/5-15). Officer Anthony Brown of the Leesburg Police Department testified that she told him and Detective Nall that she saw the shooting and that the shooter was named Kevin (TV 21, 2973-74). Detective Nall testified that on March 14th (TV 21, 2978/21) he was with Officer Brown when Ms. Bryan indicated that the shooter was an individual named Kevin who she knew from the Bluebird Bar in Leesburg (TV 21, 2979). Captain Gehlbach also testified that Ms. Bryan had at first indicated that the shooter was a person named Kevin whom she knew from the Bluebird Bar (TV 21, 2985/20).

Ms. Bryan's only explanation for this contradiction was that she was confused and scared (TV 2846/16-25). Furthermore, on cross-examination she testified that it was defense counsel who first brought up the subject of Tim Bryant, repeatedly asking if she was sure that it was not Tim Bryant and telling her that Tim

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[10] She testified that she knew Tim Bryant from seeing him down "Piss alley" (TV 21, 2848/5-10).

Bryant looks just like appellant (TV 21, 2855). She testified that she did not recall how many times defense counsel told her it was Tim Bryant before she started thinking that it was not Kevin (TV 21, 2856/5-7). Captain Gehlbach testified that on March 17th, when he took Ms. Bryan's taped sworn statement, she indicated that she did not personally know Tim Bryant and did not know of the name Tim Bryant until it was brought up by defense counsel, Mr. Pfister (TV 21, 2985/2-8). She also admitted that when she was subpoenaed by the State to give a deposition on the 26th, she came and left before giving it but did not know why she had done so (TV 21, 2849-50).

Ms. Bryan testified that the man she saw was dark-skinned, while appellant is light-skinned (TV 21, 2844/17-25). However, on cross-examination, she testified that she was not trying to look at the person who got out of the car (TV 21, 2863/13). Although she testified that she could tell what clothing this person was wearing (TV 21, 2857/18), she admitted that she told the police that it was too dark to discern the color of his clothing (TV 21, 2857/24). She also testified that she only saw the person from behind, and although he stopped he did not look at her (TV 21, 2866/715). Captain Gehlbach testified that when she gave her statement she indicated that she did not know who the man was because she only saw the back of his head (TV 21, 2988/2-9), and that she could not tell the color of the car because it was too dark (TV 21, 2988/1).

Although Ms. Bryan admitted that she only saw the back of the shooter's head and that she told the police that she did not know who the shooter was and that she did not know Tim Bryant, she indicated that she is now testifying that the shooter was Tim Bryant (TV 21, 2868/1-11).

Ms. Bryan first testified that she did not tell the police that the lady got shot two times (TV 21, 2864/2). Then she testified that she did recall telling the police that she knew that the lady had been shot twice, but she did not know how many times the man had been shot (TV 21, 2864/8-13). However, she had already testified that she did not look to see who was in the car (TV 21, 2863/25). So when the prosecutor asked how she knew that a lady had been shot twice, Ms. Bryan responded that she heard a lady scream (TV 21, 2864/17). She also testified that she had told the police that she heard the lady scream (TV 21, 2865/6). When confronted by the prosecutor, who indicated that he could find no such comment in her statement, Ms. Bryan admitted that she did not remember telling the police this (TV 21, 2865/18). Furthermore, Mrs. Langford testified that she did not scream that evening; she saw no one standing around the vehicle other than appellant as he ran away; and no one came to her aid in response to her blowing the car horn (TV 21, 2990/1-9).

Ms. Bryan testified that the first person she saw after the shooting was Dantay, who was at McCobe's, but she did not tell him

about the shooting (TV 21, 2870/1-16). She initially testified at trial that she had told no one that she had seen the shooting (TV 21, 2847/3) but quickly recanted and testified that she had told her girlfriend Tasha Freeman (TV 21, 2847/5-7); however, she did not recall whether she told Tasha on the night of the shooting or even a month later (TV 21, 2847/15-21).

She also testified that later that evening she took a Central Taxi cab from McCobe's to her mother's place at 815 Washington Street (TV 21, 2870/20-2871/15). However, the State introduced into evidence records from Central Taxi, which show that there were no pick-ups at McCobe's Apartments and no drop-offs at 815 Washington Street during the relevant time frame on the evening of June 12th (TV 21, 2988/15-2989/7).

Ms. Bryan testified that she was told to leave town by a police officer named Amp Brown (TV 21, 2871/16-24). However, Anthony (Amp) Brown, an investigator with the Leesburg Police Department, testified that he never told her to lay low or leave town (TV 21, 2972/10, 22).

Ms. Bryan also testified that she knew appellant and his family (TV 21, 2845/5-8), and that when defense counsel found her he (defense counsel) was with Jerry Ellis (appellant's brother) (TV 2853/14-25). Later that day, she saw appellant's mother who was crying and telling her that she was the only chance her son had to avoid the chair (TV 21, 2854/1-15).

Finally, she testified that she does not know her current address and does not have a phone number (TV 21, 2873/13-18).

Tasha Freeman testified that the day after the shooting, Ms. Bryan told her that she witnessed the shooting and gave her the name of Tim Bryant (TV 21, 2885-87). She also testified that at the time she had only known Ms. Bryan a couple of weeks and did not even know her last name, but she (Tasha Freeman) was seeing appellant's brother (TV 21, 2892).

Like in *Parker*, the trial court in this case found that the newly discovered witness was unworthy of belief (TV 22, 3020/21). In fact, the trial court indicated that Ms. Bryan was totally full of personal self-contradictions and contradictions with the evidence adduced at trial, and that no competent defense attorney would have put her on the stand (TV 22, 3021/1-7). The trial court therefore also found that had Ms. Bryan testified at trial her testimony would in no way have changed the verdict (TV 22, 3021/22). As was previously mentioned, the standard of review is whether the trial court abused his discretion in making this ruling. Where there is record evidence to support a trial court's conclusion that the newly discovered evidence is not sufficiently reliable, there is no abuse of discretion. *Zolache v. State*, 657 So. 2d 25 (Fla. 4th DCA 1995). Also, discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no

reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985).

Ms. Bryan indicated that she heard two or three shots, when the record clearly shows that there were at least five. She testified that she saw the Langford vehicle in a ditch, when it was not. She testified that she saw the shooter get out of the driver's side of the car, but the other evidence clearly indicates that the shooter got out the rear passenger door. She told the police that she saw the shooter and his name was Kevin, but at the hearing she initially testified that she did not recognize the shooter. Subsequently however, she testified that the shooter was Tim Bryant. Although she testified that she had previously seen Tim Bryant in "Piss Alley," she told Captain Gehlbach that she did not know him personally and did not know his name until it was mentioned by defense counsel. However, Tasha Freeman testified that she told her the shooter was Tim Bryant the day after the shooting. Obviously, Ms. Bryan could not have mentioned the name Tim Bryant then, because she did not know it. Ms. Bryan testified that defense counsel repeatedly prompted her to believe that the person she saw was Tim Bryant. She also testified that the shooter was dark-skinned, while appellant is light skinned; however, she

told the police that it was too dark to discern the color of the vehicle or the color of the shooter's clothing. Therefore, it was likely too dark to determine the shade of an Afro-American male. It is also unlikely that she could identify someone that she did not know, when she only saw the back of the shooter's head. She got caught in her lie, when she testified that the lady was shot twice, but she had previously testified that she did not look into the vehicle. Her only out was to testify that she knew this because a lady screamed, but Mrs. Langford testified that she did not scream. Finally, Ms. Bryan admitted her lie. Ms. Bryan also testified that she took a Central cab to her mother's home that night, but the evidence shows that she did not.

Clearly, there is record evidence to support the trial court's reasonable conclusion; therefore, there was no abuse of discretion in the trial court's ruling.

POINT IV

WHETHER THE JURY'S ADVISORY RECOMMENDATION WAS TAINTED AND WHETHER THE TRIAL COURT ERRED IN FINDING THE EXISTENCE OF AND IN WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES (RESTATED).

Appellant first argues that the jury's advisory recommendation may have been tainted by photographs of the deceased that they took into deliberations and by the prosecutor's argument that appellant's forgery of the Bill of Sale and possession of the firearm showed a common plan, scheme or design, and "dangerousness" to commit this murder (IB 47).

The subject photographs were admitted by the trial court prior to the beginning of guilt phase trial as State's 2 Composite, after defense counsel indicated that these three photographs were the most innocuous of all the photographs in the possession of the Leesburg Police Department, that they each depicted an entrance or exit wound which would be the subject of testimony by the Medical Examiner, and that he had no objection to their admission (TV 8, 230-231). Subsequently during trial Dr. Janet Pillow, who performed the autopsy on Mr. Langford (TV 11, 934/20), used these photographs to help explain the nature of Mr. Langford's wounds (TV 11, 939). Defense counsel again made no objection to the use of these photographs or the line of questioning. Since appellant failed to interpose a contemporaneous objection to the admission of these photographs, he has not preserved this issue for appellate

review. §924.051, Fla. Stat. (1996); *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Furthermore, there was no error in their admission into evidence. The test of admissibility of photographs is relevance, and they are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted and the cause of death. *King v. State*, 623 So. 2d 486 (Fla. 1993); *Burns v. State*, 609 So. 2d 600 (Fla. 1992). The fact that a photograph is gruesome also does not bar its admissibility, so long as it is relevant to any fact at issue. *Preston v. State*, 607 So. 2d 404, 410 (Fla. 1992), *cert. denied*, 113 S.Ct. 1619 (1993). Again, it is relevant if it illustrates the testimony of a witness or assists the jury in understanding the testimony or if it bears on issues of the nature and extent of the injuries, nature and force of the violence used, premeditation or intent. *Id; Henderson v. State*, 463 So. 2d 196, 200 (Fla.), *cert. denied*, 473 U.S. 916 (1985). In addition to assisting the testimony of Dr. Pillow, these photographs were also relevant to show premeditation. Even if admission of these photographs were error, however, any error would have been harmless and not grounds for a reversal. §924.051, Fla. Stat. (1996). Defense counsel himself agreed that they were the most innocuous of the photographs. Certainly they were not sufficiently outrageous to taint the validity of the jury's recommendation. *Bertolotti v. State*, 476 So. 2d 130 (Fla. 1985).

In regard to appellant's assertion that the prosecutor improperly argued that appellant's forgery of the Bill of Sale and possession of a firearm showed a common plan, scheme or design, and "dangerousness" to commit this murder, certainly these facts are inextricably intertwined to the crime charged and are therefore not Williams Rule evidence. *Coolen v. State*, 696 So. 2d 738 (Fla. 1997). Moreover, as was pointed out by this Court in *Bertolotti v. State*, 476 So. 2d 130 (Fla. 1985), (1) the proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence; and (2) a prosecutor's comments must be egregious to taint the jury's advisory sentence and warrant a reversal of the sentence. Clearly any comment by the prosecutor regarding reasonable inferences that could be drawn from these facts is proper and would not improperly taint a jury's recommendation. However, a review of the record shows that the prosecutor made no such statement in either guilt or penalty phase closing arguments[11]. Furthermore, defense counsel

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[11] During the guilt phase, the prosecutor mentioned that Sergeant Giles found a Bill of Sale for the Langford's Bel Aire when he searched appellant's home (TV 18, 2316/1-5); that Mrs. Langford testified appellant had called indicating that he wanted to give them all the money in return for their signature on a Bill of Sale that he had (TV 18, 2331/20); that Wesley and Jamie Tsai testified that they printed up the Bill of Sale for appellant (TV 18, 2336/7); and he also argued that the shooter must have had knowledge of the content of conversations between appellant and Mrs. Langford, such as that they were to meet at the Library, that there was a Bill of Sale and that there was an arrangement for a notary to sign the Bill of Sale (TV 18, 2339/19-2340/4). In rebuttal closing argument the prosecutor reminded the jury that Jamie Tsai testified that there was only one Bill of Sale (TV 19, 2429/16); that defense counsel's argument, that using a Bill of Sale would be foolish when the intent is to kill the seller, was not logical, because it is highly unlikely that the defendant would

made no objection in either of the closing arguments by the State. Therefore, this issue has also not been preserved for appellate review. *James v. State*, 695 So. 2d 1229 (Fla.), *cert. denied*, 118 S.Ct. 569 (1997).

As to both of the above alleged errors, appellant has the burden of demonstrating that resulting prejudicial error occurred. §924.051, Fla. Stat. (1996). He has failed in that burden.

AGGRAVATING CIRCUMSTANCES

Appellant concedes that the prior violent felony conviction aggravator was proven but argues that the trial court gave it too much weight[12] because it was for a contemporaneous conviction. The weight assigned to an aggravating circumstance is within the trial court's discretion and subject to an abuse of discretion standard. *See Blanco v. State*, 702 So. 2d 1250 (Fla. 1997). If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1985).

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have had any idea that the vehicle would be tied up in probate (TV 19, 2440/18); and that appellant might well have taken the Bill of Sale to the Langford's son a couple of weeks after the homicide and asked that he be given the title (TV 19, 2456/19-2457/8). During the penalty phase, the prosecutor only argued that this criminal enterprise was not an attempt to force the Langfords to sign the Bill of Sale, because appellant already had a forged one (TV 20, 27117-11).

[12] The trial court assigned this circumstance great weight (R 980).

Appellant has the burden of demonstrating prejudicial error, §924.051, Fla. Stat. (1996), but his only argument is essentially that any prior violent felony that is based on a contemporaneous conviction should be given little weight. This obviously is not the law. In this case, in addition to killing Mr. Langford, appellant put two bullets into the back of Mrs. Langford's head. There can be no question that appellant fully intended to kill both. As the trial court stated in his sentencing order, "The attempted murder involved the firing of two shots at the back of her head from point blank range at the same time as the Defendant shot and killed Clarence Langford" (R 979). There can be no question that Mrs. Langford suffered enormous pain and suffering. There can be no question that this prior violent felony was as close as it gets to being another homicide. The trial court did not abuse his discretion by assigning great weight to this circumstance.

Appellant also argues that the trial court erred by finding the existence of the CCP circumstance. Appellant bases his argument on his assertion that there is no record evidence to support a finding of heightened premeditation or a careful plan or design (IB 49). When a trial judge, mindful of the applicable standard of proof, finds that an aggravating circumstance has been established, the finding should not be overturned unless there is a lack of competent substantial evidence to support it. *Raleigh v.*

State, 705 So. 2d 1324 (Fla. 1997); *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988). In support of his finding, the trial court stated:

> The murder was committed in a cold, calculating and premeditated manner, without any pretense of moral or legal justification. The facts show that in May 1996 the Defendant approached MacArthur Harris on the street seeking a gun. Six witnesses testified to seeing the Defendant in the two weeks before the murder carrying a weapon similar to a .25 automatic. One June 11, 1996, the day before the victim was murdered and his wife shot, the Defendant called the Langfords to arrange for the meeting. The Defendant insisted that Mrs. Langford accompany her husband although there was no legitimate business reason for her presence. He arranged their meeting to occur at night, and for the Langfords to pick him up at the library. He could just have easily arranged to meet them at their home. The choice of the library ensured that no neighbors or relatives would see him together with the Langfords. He told them that they were going to meet a notary public and directed them to a secluded spot. He then shot both Mr. and Mrs. Langford from close range. He fired six shots, aimed at their heads. Two bullets struck Mrs. Langford and three hit Mr. Langford in the head, neck and cheek, causing his death. The shooting was the culmination of a pre-arranged plan to lure the victims to a deserted place and to shoot them without witnesses present. The killing was the product of cool and calm reflection resulting from a careful plan to commit the murder before the incident. The Defendant exhibited heightened premeditation, and the Defendant had no pretense of moral or legal justification.

(R 980).

Advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing being carried out as a matter of course all support a finding of heightened premeditation. *Swafford v. State*, 533 So. 2d 270 (Fla. 1988). Further, a homicide that is committed execution style supports this circumstance. *Jones v. State*, 690 So. 2d 568 (Fla. 1996), *cert.*

denied, 118 S.Ct. 205 (1997); *Archer v. State*, 673 So. 2d 17, 19 (Fla. 1996), *cert. denied*, 117 S. Ct. 197 (1996); *Burr v. State*, 466 So. 2d 1051, 1054 (Fla. 1985). In *Koon v. State*, 513 So. 2d 1253 (Fla. 1987), *cert. denied*, 108 S.Ct. 1124 (1988), this circumstance was upheld where the defendant had procured a weapon in advance, lured the victim from his home, and killed the victim execution style with a shot to the head. Bringing the murder weapon to the scene also supports a finding of heightened premeditation. *Huff v. State*, 495 So. 2d 145 (Fla. 1986); *Lamb v. State*, 532 So. 2d 1051 (Fla. 1988).

In this matter, the evidence shows that appellant procured a weapon in advance and brought it to the murder scene. As the trial court pointed out, Mack Harris testified that about a week before the homicide appellant was asking him where he could buy a pistol (TV 15, 1635-36). Jamie and Wesley Tsai testified that prior to the homicide appellant showed them a gun in his possession that looked like the demonstrative .25 caliber automatic (TV 15, 1654, 1655, 1661, 1670, 1674). Greg Markland, the manager of Fiero Concepts (TV 15, 1718/20), testified that two or three days before this homicide (TV 15, 1721/3-10) appellant showed him a weapon that appellant indicated was a .25 automatic (TV 15, 1720/8-14) and asked him if anyone wanted to buy it (TV 15, 1719/16-25). Sammy James, who works at Fiero Concepts (TV 15, 1737/17), testified that he also saw appellant with this small caliber automatic (TV 1740-

1743). The evidence shows that both Mr. and Mrs. Langford were shot by appellant execution style at close range in the back of the head with a .25 caliber weapon that appellant brought with him. The evidence also shows that appellant lured the Langfords to a secluded area under the guise of getting the Bill of Sale signed and notarized. The evidence shows that the Langfords did not provoke this shooting but that appellant shot without warning as a matter of course of appellant's plan. The trial record clearly supports the trial court's conclusion that this circumstance and more specifically heightened premeditation exists.

The record also supports the trial court's finding that the homicide was the result of a careful plan or prearranged design. In order to support this circumstance, the evidence must show that the defendant planned the murder in advance. *Mendyk v. State*, 545 So. 2d 846 (Fla.), *cert. denied*, 110 S.Ct. 520 (1989); *Remeta v. State*, 522 So. 2d 825 (Fla.), *cert. denied*, 488 U.S. 871 (1988). In *Reese v. State*, 694 So. 2d 678 (Fla. 1997), this court found that waiting for hours for a victim to come home was sufficient to support a careful plan or prearranged design. In *Ferrell v. State*, this court found that the evidence supported a finding of a careful plan or prearranged design where the defendant procured a gun in advance, took the victim to a remote area and shot the victim execution style. This case is similar to *Ferrell* in that the evidence shows that appellant procured a gun in advance, took the

Langfords to a remote area and shot them execution style. The facts of this case also show that appellant planned the homicide in advance[13] and for more than just hours. As the trial court noted in his sentencing order, the facts show that appellant made a concerted effort to have the Langfords meet him at the library on June 11, 1996, the day before the homicide. Appellant indicated that he had the money to purchase the vehicle but wanted a Bill of Sale signed and notarized. He told Mrs. Langford that he needed both her and her husband to sign the Bill of Sale and that he had a notary lined up. These facts show that the plan to murder the Langfords was complete at least twenty-four hours prior to the homicide.

However, the facts also reasonably show that appellant had planned this homicide weeks in advance. This plan was made and put into motion when appellant went to Jamie and Wesley Tsai to obtain a Bill of Sale on the Langford vehicle, onto which he immediately forged Mr. Langford's signature (TV 15, 1672/15). This occurred at the end of May (TV 15, 1663/17). It was on May 30 (TV 15, 1680/15), when appellant went to Fiero Concepts looking for a notary (TV 15, 1678/12-22). A necessary part of appellant's plan to forge a Bill of Sale was the death of Mr. and Mrs. Langford.

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[13] There is no question that this was not a planned robbery, during which a homicide took place. Captain Gehlbach testified that Mr. Langford's wallet still had cash and credit cards in it (TV 14, 1639). Further, the Langfords were shot without warning and without provocation.

Otherwise his plan could not work. The record evidence supports the trial court's conclusion that this homicide was the result of a careful plan or prearranged design.

MITIGATING CIRCUMSTANCES

Appellant also argues that the trial court should have given the mitigation in this case significant weight (IB 51). The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to an abuse of discretion standard. *Blanco v. State*, 702 So. 2d 1250 (Fla. 1997). However, appellant has not fulfilled his burden of demonstrating why the trial court abused his discretion in assigning the weight given. § 924.051, Fla. Stat. (1996). He merely cited to numerous cases which for the most part have no application in this case. For example, Dr. Karen Estill testified that appellant is not retarded (TV 20, 2630/9, 2645/25). There was no evidence that appellant has any organic brain damage[14], nor was there any evidence that appellant is an alcoholic or was under the influence at the time of the homicide. There was no evidence that appellant was an abused or battered child. Dr. Estill testified to this (TV 20, 2646/9).

Finally, there was limited evidence that appellant had a deprived childhood or a poor upbringing. Appellant's father left home when appellant was seven or eight (TV 20, 2685/18-21), and

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[14] Furthermore, appellant's mother testified that appellant never suffered any head injuries (TV 20, 2687/3)

appellant's mother sometimes had trouble providing food and clothing for her eight children (TV 20, 2679/16). However, Dr. Estill testified that appellant saw his family as supportive and good people (TV 20, 2635/16). Appellant told her that he has a good family and has had a good relationship with them (TV 20, 2642/23). Appellant also told Dr. Estill that he had a great family upbringing (TV 20, 2646/22). Appellant's mother testified that appellant continued to live with her even into adulthood; that she taught him right from wrong; and that she took him to church (TV 20, 2686).

When addressing mitigating circumstances, a sentencing court must expressly evaluate in the written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature; the court must find as a mitigating circumstance each proposed factor that is mitigating in nature that has been reasonably established by the greater weight of the evidence; the court next must weigh aggravating circumstances against the mitigating and must expressly consider in its written order each established mitigating circumstance. *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to an abuse of discretion standard. *Blanco v. State*, 702 So. 2d 1250 (Fla. 1997). So long as the sentencing court

recognizes and considers a mitigating factor, the weight which it is given will generally not be disturbed. *Quince v. State*, 414 So. 2d 185 (Fla. 1982). The trial court's final decision in the weighing process will be sustained if supported by sufficient competent evidence in the record. *Campbell v. State*, 571 So. 2d 415 (Fla. 1990). In this matter, the trial court followed the requirements of *Campbell;* reasonable persons would agree with the weight assigned the mitigating circumstances; and the record supports the final weighing decision made by the trial court. There was therefore no abuse of discretion and the final weighing process should be sustained.

POINT V

WHETHER THE TRIAL COURT ERRED IN GIVING THE PECUNIARY GAIN STANDARD INSTRUCTION.

Appellant argues that the trial court erred by instructing the jury that they could consider as an aggravating circumstance that the murder was committed for pecuniary gain. The jury may be instructed only on those circumstances for which evidence has been presented. *Stewart v. State*, 549 So. 2d 171 (Fla. 1989), *cert. denied*, 497 U.S. 1032 (1990); Fla. Std. Jury Instr. (Crim.) 75 (1992). However, appellant does not argue that there was no such evidence presented but instead cites to *Omelus v. State*, 584 So. 2d 563 (Fla. 1991) as being analogous to this case, because the trial court gave the jury an instruction on an aggravating circumstance that the trial court later found had not been proven to exist. In *Omelus* this Court did not indicate that it is error to instruct on a circumstance that the court later determines was not proven to exist. This Court held that it was error to instruct on the HAC circumstance, because the record did not establish that the defendant knew how another would carry out the murder or that it would be done in an HAC fashion.[15] In other words, this Court found that there was no evidence presented to support giving this instruction. Further, this Court specifically addressed this issue

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[15] Alternatively stated, if a defendant is not present at the crime scene, he or she cannot generally be held liable for how the homicide was committed.

in *Bowden v. State*, 588 So. 2d 225 (Fla. 1991), *cert. denied*, 112 S.Ct. 1596 (1992) stating:

> The fact that the state did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of a robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required.

Id. at 231.

In this case there was a plethora of evidence presented to support that this homicide was committed for pecuniary gain. The only relationship or link between appellant and the Langfords was the automobile. Appellant wanted it but had trouble getting it. Appellant called the police for assistance in getting the vehicle from the Langfords. When this did not work, appellant resorted to self help. He forged a Bill of Sale in his favor in regard to that vehicle. Clearly this was done to make Mr. Langford unnecessary to the transaction and expendable. The only reason for the last meeting between the Langfords and appellant related to this vehicle. Appellant insisted that Mrs. Langford come to this meeting supposedly to witness her husband's signature, but a reasonable inference is that appellant had already planned how he would get title to the vehicle and that the plan would not work with Mrs. Langford still alive. Appellant's strong desire to possess this vehicle and his efforts to do so without Mr. Langford's involvement support giving the pecuniary gain instruction. Although the trial court ultimately found that this

aggravator had not been proved beyond a reasonable doubt, there was competent and credible evidence presented to support it; therefore, it was not error to give an instruction for it. *Banks v. State*, 700 So. 2d 363 (Fla. 1997).

Even if it were error to instruct the jury on this aggravating circumstance, it would be harmless in light of the other two aggravating factors. Although appellant argues that "[t]here can be no conclusion other than that the jury applied the pecuniary gain factor in recommending imposition of the death penalty," the United States Supreme Court had held that when a trial court instructs a jury on two different legal theories, one supported by the evidence and the other not, it cannot be presumed that the resulting verdict was based on the infirm ground. *Sochor v. Florida*, 504 U.S. 527, 538 (1992). The Court's rationale is that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by the evidence. *Id.*

POINT VI

WHETHER THE TRIAL COURT ERRED IN FINDING THE EXISTENCE OF THE CCP CIRCUMSTANCE.

Appellant argues that the trial court erred in finding this circumstance, because the record does not support a finding of the heightened premeditation element of this circumstance. This issue was addressed in Point IV above, which is incorporated herein. To briefly summarize, there is competent substantial record evidence to support the heightened premeditation requirement. This not only includes the fact that appellant procured the murder weapon prior to the homicide but also that appellant lured the victims from their home to a secluded area where he shot them execution-style multiple times to the back of their heads; and the murder was committed without provocation or resistance as a matter of course and plan. Again, a reasonable inference from the evidence is that this plan was contrived over a period of at least fourteen days (May 30-June 12).

POINT VII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING ALLEGED HEARSAY TESTIMONY.

The testimony at issue followed Mrs. Langford's explanation of how appellant wanted to purchase her husband's car; how he had paid most of the purchase price over time and had taken custody of the vehicle; how her husband had taken the vehicle back and refunded appellant after the police had stopped appellant for illegally driving the vehicle; and how appellant reasserted his desire to purchase the vehicle. The following pertinent colloquy then took place:

> Q This time around, was it your husband's intention to receive installments again?
>
> Mr. Graves: Your Honor, at this time I would object to that, as to whether this witness can testify in regards to her husband's intentions.
>
> Mr. Gross: I believe that that would be an exception to the hearsay rule, pertaining to state of mind.
>
> The Court: I agree. Overruled. You can answer, ma'am.

(TV 13, 1376/7-16).

Mrs. Langford responded that her husband told appellant to let him know when he had all the money (TV 13, 1376/22).

Appellant argues that the trial court erred in allowing this testimony because it does not qualify as a state of mind exception to hearsay in that the victim's state of mind was not an issue in the action as required under § 90.803(3) Fla. Stat. (1979).

However, this issue has not been preserved for appellate review. Although the prosecutor concluded that the objection at trial was based on hearsay, the basis of appellant's objection was lack of personal knowledge pursuant to § 90.604 Fla. Stat. (1995). In order to preserve an issue for appellate review, a specific legal argument or ground upon which it is based must be presented to the trial court. § 924.051 Fla. Stat. (1996); *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), *cert. denied*, 114 S.Ct. 99 (1993). When objections are not made with sufficient specificity to apprise the trial court of the alleged error, they do not preserve the objection for appellate review. *Johnston v. State*, 497 So. 2d 863 (Fla. 1986). In this matter, defense counsel objected on the basis that no foundation had been laid that Mrs. Langford had personal knowledge of her husband's intentions. The issue now presented is not the specific issue raised at trial and has therefore not been preserved.

Nonetheless, Mr. Langford's state of mind/statement of intent was an issue in this action. An issue of fact embraces the disputes between the State and the defendant as to what actually existed or occurred at the particular time and place in question. *Simmons v. State*, 36 So. 2d 207 (Fla. 1948). The fact -- that after Mr. Langford repossessed the vehicle and refunded appellant he only wanted to sell the vehicle when appellant had all the money -- is material to show the sequence of events that occurred just

prior to this homicide and why the Langfords went to the library and picked him up. They were there because appellant said that he had all the money and wanted a Bill of Sale until the title arrived. Contrary to appellant's assertion that a murder victim's hearsay statements are admissible under the state of mind exception only when a defendant claims self-defense, suicide or accident (IB 61), this is only a general rule applicable to situations where the victim's statement shows that the victim was afraid of the defendant. *See Peterka v. State*, 640 So. 2d 59 (Fla. 1994), *cert. denied*, 115 S.Ct. 940 (1995).

If this Court does not agree, the State contends any error was harmless pursuant to Fla. Stat. §59.041, Fla. Stat. (1995), § 924.051, Fla. Stat. (1996) and the holding of *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986). This testimony merely explained the context of the crime. Mrs. Langford's eyewitness testimony; appellant's admission that he was the one buying the car from Mr. Langford; the manner in which the homicide was committed; and the nature of the wounds proved the elements of the crimes and the CCP circumstance. Further, this testimony was harmless, because it was essentially the same as or merely corroborative of other properly considered testimony at trial. *Erickson v. State*, 565 So. 2d 328, 335 (Fla. 4th DCA 1990); *Salter v. State*, 500 So. 2d 184 (Fla. 1st DCA 1986). Before Mrs. Langford testified, a good Samaritan Benjamin Allicock testified that at the crime scene before the

ambulance arrived Mrs. Langford told him that Terry had called and asked them to meet him; that it involved a car deal, and that after there was some discussion about money Terry shot her and her husband (TV11, 882/20-883/8). Also before Mrs. Langford's testimony, Captain Gehlbach testified that prior to giving his taped sworn statement appellant admitted to him that he was the person that was buying the car from Mr. Langford (TV 12, 1168/13). During his taped statement, appellant indicated that he met Mr. Langford at Publix and asked him if he wanted to sell his car (TV 13, 1218/8-20). After Mrs. Langford's testimony, the Langford's son Kevin testified that it was appellant who came by their home a number of times, because he wanted to buy his father's car (TV 14, 1499-1507). Leesburg police officer Kimberly Green also testified that appellant called the station trying to get permission to drive a car that he was paying for (TV 15, 1685/13-1687/25). She recalled speaking with appellant twice that day and that appellant was very upset (TV 15, 1688/18-23). Officer Sheila Russell testified that about a week before the homicide she received a call from appellant indicating that he was having a hard time with a vehicle he was purchasing on time from Mr. Langford and wanted her to make Mr. Langford give him the car (TV 15, 1698/11-1703/24, 1704/4-10).

Prior to the subject objection, Mrs. Langford testified without objection that in March of 1996 (TV 13, 1342/12) appellant

(TV 14, 1461/11) came to her home because he wanted to buy the car (TV 13, 1343/2). Her husband agreed to sell the car to appellant over time for one thousand dollars (TV 1349/19-1350/19). She testified that in the latter half of April, her husband entrusted the car to appellant with the condition that he not drive it until the title was changed into appellant's name (TV 13, 1355/18-1357/5). Appellant had the vehicle for a couple of weeks (TV 13, 1356/22), when she and her husband received a call from the police (TV 13, 1357/9). They had stopped appellant in the car and asked that the Langfords go and pick up the car (TV 13, 1358/11-1361/17). After they took the car back to their home, appellant arrived in a very angry mood demanding his money back and saying to Mr. Langford, "I'll get you, old man" (TV 13, 1366-67). She became frightened and called the police (TV 13, 1367/19-21). Appellant came by the house again the next Monday (TV 13, 1369/24), to get his money; he was very apologetic (TV 13, 1370/1-1374/2). A couple of weeks later, her husband indicated that appellant wanted to buy the car and that the deal was still on (TV 13, 1375/23-1376/6).

After the subject objection, Mrs. Langford testified that she and her husband continued to receive phone calls from appellant (TV 13, 1377/5). The day before the shooting, appellant called several times (TV 13, 1377/21) indicating that he had the money and did not want to keep it for fear that he might spend it, so he wanted to give them the money in exchange for a Bill of Sale until the title

was received (TV 13, 1377/23-1378/4). He wanted them to meet him that night at the library so they could go to the notary, but by the time he called to confirm it was too late (TV 13, 1378/9-1380/7). They agreed to meet appellant the next evening (TV 13, 1382/20). After appellant got into their car and was directing Mr. Langford to the dirt road where he intended to kill both Langfords, appellant mentioned that eleven hundred dollars was a lot of money and asked what the Langfords intended to do with it (TV 13, 1389/9). These facts, independent of the objectionable testimony, clearly establish that the first installment transaction fell through; that there was a subsequent agreement to purchase the vehicle; and that appellant was to pay the sales price in full, which is essentially the same testimony as and cumulative to Mrs. Langford's testimony now at issue.

POINT VIII

WHETHER A DEATH SENTENCE RESULTING FROM AN ADVISORY RECOMMENDATION BASED ON AN 8 TO 4 MAJORITY VOTE IS UNCONSTITUTIONAL.

Appellant argues that a death sentence imposed after a bare-majority advisory recommendation for death violates both the state and federal constitutions. This Court has repeatedly found such challenges to be without merit. *Fotopoulos v. State*, 608 So. 2d 784, 794 & n.7 (Fla. 1992), *cert. denied*, 113 S.Ct. 2377 (1993); *James v. State*, 453 So. 2d 786, 792 (Fla.), *cert. denied*, 105 S.Ct. 608 (1984); *Alford v. State*, 322 So. 2d 533 (Fla. 1975). Appellant has provided no adequate reason for this Court to recede from its previous rulings. In *Alford* this Court noted that the same argument was presented but rejected in *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Appellant also argues that Florida's death statute is unconstitutional because it does not require unanimity or a substantial majority to find the existence of an aggravating circumstance. However, this issue has not been preserved for appellate review in that it was never presented below. *See San Martin v. State*, 23 Fla. L. Weekly, S1 (Fla. Dec 24, 1997); *Eutzy v. State*, 458 So. 2d 755, 757 (Fla. 1984). Furthermore, this Court has also found this issue to be without merit. *Pooler v. State*, 704 So. 2d 1375 (Fla. 1997); *Jones v. State*, 569 So. 2d 1234 (Fla.

1990). Again, appellant offers no adequate reason for this Court to recede from its previous rulings.

CONCLUSION

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

Respectfully submitted,

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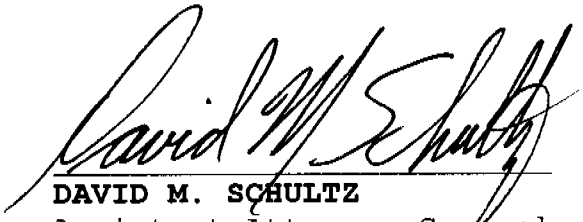

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by U. S. mail to George D.E. Burden, Esq., Assistant Public Defender, 112 Orange Avenue, Ste. A, Daytona Beach, Florida 32114, this 1ST day of May, 1998.

DAVID M. SCHULTZ
Of Counsel