IN THE SUPREME COURT OF FLORIDA

DONALD LEE BRADLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93,373

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Donald Lee Bradley, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; this brief will refer to Appellee as such, the prosecution, or the State.

On November 16, 1999, the First District Court of Appeal issued a "Per Curiam" affirmance without opinion in the case of LINDA TAYLOR JONES v. STATE OF FLORIDA, DCA #98-0282, which involved the same murder as the instant case.

The record on appeal consists of 17 volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. Per that Index, for example, the State will reference "Volume I" of the transcript as "VI." The supplemental record will be referenced the same way, except those citations will be prefixed with "SR."

"IB" will designate Appellant's Initial Brief, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State does not dispute Appellant's facts, except it highlights here some of the additions and clarifications on which it relies, especially in ISSUES I and VIII.

Appellant discusses (IB 5) Linda Jones' 911 phone call of November 7, 1995. Because the State's theory of the case was that Linda Jones conspired with Appellant to kill her husband, the State will argue that she, believing that her husband was already dead or dying, made a number of misrepresentations to 911, which are not in Appellant's facts. For example, the 911 operator asked Linda if she knew who the intruders were, to which she responded, "No. They were -- they had on black hoods, black clothes." (XI 1066-67. See also XI 1074) Evidence adduced later in the case showed that Linda and Appellant knew each other prior to the evening of November 7 (See, e.g., XI 1085, XIII 1491-98) and that Appellant talked a number of times during the home-invasion (XI 1105, 1107, XII 1226, 1228, 1230, 1233, 1234, 1236, 1237), including talking to her (XI 1111). Linda also told 911 that she was "pushed all around," dragged "across the room," and "thr[ow]n on top of him" (XI 1072); later in the trial, one of the McWhite brothers, who testified he was one of the ski-masked intruders, said he "touched" her without using any force, and she "did a back flop and fell to the floor" (See XII 1230-31). Linda also told 911 that "He may be dead. *** They've beaten him to death" (XI 1062); still talking with 911, she indicated that "the door's not locked" (XI 1076), which the State will argue is significant because someone whose home had been surprisingly invaded and whose husband had been surprisingly killed would not leave his/her door unlocked.

Appellant discusses (IB 6) his communications with Brian McWhite. He includes: "She wanted her husband beat up so he would

stop seeing the girl." The State clarifies that this is what Appellant told Brian. (XI 1086)

Appellant indicates (IB 7) that "they grabbed a stick of wood from the house ... ." The State adds the following from Brian McWhite's testimony about the wooden "weapon" (XI 1086), which Appellant directed be grabbed:

> Q And did you and your brother [Patrick McWhite] have a name for it?
> A I just called it the Zulu war stick.
> Q Okay. And why did it have a name Zulu war stick?
> A Because I heard it was from Africa.
> Q And how did it come about that ya'll took that stick?
> A He [Appellant] asked me did we have anything to use for a weapon, and I asked him why, and he said because the guy's a pretty bad dude and he said we might not even need it but just in case.
> Q And who got the weapon? Who picked it up?
> A I think he picked it up at first -- or my brother picked it up first and then he said yeah, that'll work, and then he got it.

(XI 1087-88) As Appellant indicates (IB 10), Patrick McWhite testified that Appellant told them to "grab" the stick (XII 1213, 1265).

Appellant discusses Brian McWhite's testimony indicating that when Jack Jones saw them, he "then rushed at Brian swinging." Because the State will argue that Jack revoked whatever "consent" Linda Jones may have given Appellant and the McWhites to enter, the State adds:

> He asked me who I was, then he told me to get out and then he came at me. *** He was like rushing me. *** He was swinging and I was stepping back, knocking his hands away and stepping back towards the door. And then I heard my brother say I got him and he got hit with the stick.

(XI 1103) Concerning Appellant hitting Jack with the stick (IB 8), Brian continued: "He got hit and started losing his balance and Donald [Appellant] hit him again ***" (XI 1104).

Appellant mentions (IB 11) that after Appellant and Patrick McWhite dragged Jack Jones into another room, "[m]ore blows were exchanged between Jones and Donald." The State adds the witness's clarification that he meant that Appellant continued to beat Jack Jones:

> Q ... What happended then?
> A Well, when we drug him into the other room some blows were exchanged with Mr. Bradley and the gentleman on the ground.
> Q Blows with fists or --
> A Fists and the gun.
> Q ... Tell us about that?
> A Well, we drug him to the other room which was a floor -- he was still on the floor, and he started hitting him with the butt of the gun and kicking him and so forth.
> Q Mr. Bradley did?
> A Yes, sir.

(XII 1223-24)

Appellant mentions (IB 12) that when he was driving away from the Jones' home, "Brian threw the duct tape in the water." The State adds that Appellant "instructed Brian to throw the tape out." (XII 1239)

Summaries of records of phone calls betwen Appellant's and Linda Jones' phones were intodcued into evidence as State's Exhibits nos. 28 through 33. Several depictions of the crime scene and the victim were introduced. For example, in addition to photographs, State's Exhibit #4 depicted the layout of the Jones' house (See XII 1283-84), and State's Exhibits nos. 16 and 20 showed some of the victim's injuries.

Appellant's ISSUE VIII, inter alia, claims that he should receive a life sentence because Linda Jones received one. Appellant's record on appeal was supplemented with Linda's. The State will rely upon some of that record to support the trial court's finding that there was a difference between Appellant and Linda regarding CCP:

> The definition of the [CCP] agggravator itself includes language that it was carried out 'without any pretense of moral or legal justification[.]' The jury in Linda Jones' case may well have concluded that she had some pretense of moral justification in wanting her husband murdered because of his infidelity to her and his dissipation of marital assets for the benefit of his mistress. No such pretense of moral justification could be found with respect to Donald Bradley in the application of this aggravator to him.

(V 870-71) For example, Linda wrote:

> Are you interested in salvaging anything in our relationship? Are you interested in doing fun things with me?
> ***
> Shoot me or I'll kill myself. I can't take anymore. We all pray you don't continue to make all our lives a living hell. The girls are wanting wonderful holidays just like we've always had. Jill [daughter] is so very upset. We love you and need you.

(SR V 920 et seq.)

SUMMARY OF ARGUMENT

In the evening of November 7, 1995, Jack Jones was brutally beaten to death in his own home. The murder was motivated by the greed and outrage of his wife, Linda Jones, concerning Jack's affair with Carrie Davis. Appellant was the "triggerman."

In the evening of November 7, 1995, Jack Jones was in his home watching television in a room with his wife, Linda Jones, when ski-masked Appellant and two other ski-masked intruders (the two

muscular McWhite brothers) invaded his home. Jack spotted one of the McWhite intruders who had just entered through his front door, charged at him, and told him to get out of his house. Instead of leaving, Appellant cold-cocked Jack, knocking Jack to the floor. With Jack partially disabled, Appellant and one of the McWhites dragged Jack into an adjoining room, and Appellant repeatedly beat Jack with a large club (which Appellant directed be brought to the house) and Jack's gun (which Appellant had secured from the kitchen of the Jones' home). With his hands, Jack attempted to protect his head from the beating, and at one point Appellant ordered that Jack be tied up, but Jack resisted giving the muscular McWhite his hands. After Jack was finally tied up, Appellant continued to beat Jack, inflicting several lethal injuries to his head. Numerous blows inflicted upon Jack were severe, and there were numerous other injuries according to the medical examiner.

Appellant and the McWhites attempted to make the scene look like a robbery or burglary with theft as the motive, not the murder Appellant was brutally executing. As Appellant and the McWhites left the home, Appellant partially cut the tape with which they had loosely bound Linda Jones.

Appellant directed the destruction of evidence of the murder, just as he had orchestrated its details during its perpetration.

Appellant's attempted concealment of the murder as a theft-motivated burglary/robbery was shattered by statements he and Linda Jones made. Linda had spoken to her friend, Janice Cole, a scant day before the murder about wanting to kill Jack, about

being "real upset" about Jack spending their marital money on jewelry for Carrie, and about getting about $500,000 in proceeds from insurance on Jack's life. After the murder, Appellant admitted to one of the McWhites that Linda would pay him (Appellant) through life insurance proceeds.

Many additional facts showed Linda's complicity in the murder of her husband. For example, she left the doors to the house unlocked for easy access for the intruders. She informed Appellant exactly where to find Jack when he and the McWhites entered the house. She told Appellant where to find the gun that Jack routinely left on the kitchen counter. Phone records substantiated communications between Appellant and Linda.

Accordingly, Appellant entered the home through the unlocked kitchen-garage doors to retrieve Jack's gun, which he used to pistol-whip Jack, and Linda lied to the 911 operator about several matters, such as not knowing the identity of the intruders.

When the police were obviously closing-in on the conspiracy between Appellant and Linda, the two of them confirmed it by renewing their communication to the point that Linda went to the home of the killer of her husband, the home of Appellant.

Under the foregoing and other facts, detailed infra, evidence was sufficient for premeditation and felony murder, where well-settled law requires only one theory be proved. (**ISSUE I**) This was a premeditated, contract killing perpetrated through a conspiracy between Appellant and Linda Jones, yielding a quantum of evidence well-above what is required for a lawful conviction

of First Degree Murder. Concerning the claimed affirmative-defense-of-consent to the burglary underlying the felony murder, the "consent" of a co-occupant of a victim's dwelling for intruders to enter to kill the victim is void ab initio. In any event, Jack's attempt to repel the intruders and Jack's explicit order to "get out" revoked whatever "consent" may have existed. Further, Appellant has failed to meet his appellate burden of showing guilt-phase evidence establishing, as an affirmative defense, that the brutal manner of his beating Jack Jones was consented-to by Linda.

Accordingly, other issues attacking conspiracy (**ISSUE II**) and burglary (**ISSUES III and VII**) are meritless.

Moreover, evidence of vandalism directed by Linda Jones and executed by Appellant upon the property of Jack's girlfriend about one-week prior to the murder was relevant and probative. (**ISSUE IV**) Underlying the vandalism and the murder was Linda's consuming outrage over Jack's affair with the girlfriend and the implications of that affair for Linda's financial situation. To the degree that this evidence was prejudicial to Appellant it was also relevantly probative. It was not error to admit this evidence, and if somehow it was error, it was non-prejudicial and harmless.

ISSUE V concerns evidence introduced elsewhere in the trial on the same matter, and, given other evidence in the case, was quite peripheral to the trial. Its admission was clearly non-prejudicial and harmless. Further, on the merits, the evidence was not introduced for the truth of its content but rather

because of the fact that someone made a statement. As such, the evidence was not hearsay.

ISSUES VI, VII, and VIII concern the death penalty, which the State submits was properly imposed for this highly premeditated, prolonged, and brutal beating death of Jack Jones.

Therefore, the State respectfully submits that the trial court committed no reversible error in this case. Moreover, several of the claims, made on appeal through Appellant's hindsight, were not presented to the trial court, indeed, were waived, thereby procedurally barring them here.

ARGUMENT

ISSUE I

WAS THE EVIDENCE LEGALLY AND REVERSIBLY INSUFFICIENT FOR (A) PREMEDITATION WHERE THERE WAS CONFLICTING EVIDENCE REGARDING APPELLANT'S INITIAL INTENT **AND** (B) FELONY MURDER WHERE, PRIOR TO THE ENTRY INTO THE HOME, A CO-CONSPIRATOR HOME-OCCUPANT SPOUSE "CONSENTED" TO THE ENTRY FOR THE PURPOSE OF KILLING THE HOME-OCCUPANT VICTIM, AND, AFTER THE ENTRY, THE HOMICIDE VICTIM EXPRESSLY REVOKED ANY PURPORTED "CONSENT"? (Restated)

ISSUE I[1] attacks the sufficiency of evidence for the First Degree Murder of Jack Jones, the husband of Linda Jones. The State's theory, as supported by the evidence, was and is that Linda Jones conspired with Appellant to kill Jack due to his infidelity and due to a multi-hundred-thousand-dollar insurance policy on his life.

[1] Discussions infra of several other issues use the discussion of ISSUE I as a foundation. Therefore, ISSUE I will consume a disproportionate number of the pages of this brief.

ISSUE I claims that the evidence was insufficient to support "either" (IB 43) the premeditation theory or the felony murder theory of First Degree Murder. Appellant's trial-level defense strategy emphasized the viability of the felony-murder charge,[2] thereby waiving that aspect of ISSUE I. Similarly, in conjunction with a pre-trial argument regarding the admissibility of other-crime evidence, defense counsel essentially conceded the sufficiency of evidence for premeditation if the jury believed the State's eyewitnesses to the homicide, thereby waiving an appellate attack on sufficiency of evidence of premeditation. Consistent with the defense strategy, ISSUE I was also unpreserved by the defense's perfunctory, boilerplate motions for judgment of acquittal. On the merits, defense counsel's concessions were correct.

On the merits, the State will argue that it adduced evidence that Appellant conspired with Linda Jones to kill her husband, Jack Jones, and that, in fact, Appellant killed Jack pursuant to that conspiracy, thus, establishing premeditation. The existence of evidence that may have conflicted with evidence of premeditation did not entitle Appellant to a judgment of acquittal on First Degree Murder. Moreover, even a narrowed focus to only the events within the immediate situation of the killing was sufficient to establish premeditation.

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[2] As discussed below, this strategy stressed a motive for the State's two eyewitnesses (the McWhites) to lie: They were lying because they faced execution through a felony murder theory based upon the burglary.

Concerning felony murder, the State's alternative theory for proving First Degree Murder, ISSUE I claims that Appellant's accomplice (Linda Jones), a co-occupant of the home, consented to Appellant's entry into the home, thereby rendering evidence of the felony underlying felony murder (Burglary) insufficient. Dispositive is the homicide victim's (Jack Jones') explicit revocation of whatever "consent" the killer (Appellant) had from Linda Jones to enter. Jack Jones, the co-occupant homicide victim, attempted to repulse the ski-masked intruders by charging at one of them he spotted immediately after they entered the house, swinging at the intruder, and explicitly telling him to "get out." In any event, consent is an affirmative defense to burglary, and Appellant has failed to meet his burden of showing trial-evidence indicating that any "consent" from Linda Jones encompassed the brutal manner in which Appellant effected the killing. Moreover, the State respectfully submits that the "consent" of an accomplice for the sole purpose of murdering — or even simply assaulting — a co-occupant is not one that the law, as a matter of public policy and legislative intent, should legitimize by recognizing it as such. Appellant's argument erroneously renders a co-occupant's consensual complicity in a murder a per se defense to a burglary otherwise underlying felony murder. The State elaborates.

A. ISSUE I was waived.

Appellant, **through defense counsel's strategies, explicitly conceded the burglary underlying felony murder and essentially**

conceded evidence sufficient for premeditation, thereby waiving ISSUE I.

Concerning the trial strategy resulting in the waiver of the appellate felony-murder claim, the primary focus of the defense below was upon arguing that Appellant was not at the murder scene. In other words, the primary focus of the defense was on the identification of the intruder-killer. Thus defense counsel's opening statement argued:

> That man, Donald Bradley, wasn't there. That's the issue in this case: was he there; wasn't he there. The evidence is going to convince you that he wasn't there.
> ***
> *** Donald Bradley was not there ... .

(XI 1049, 1055)

Accordingly, defense counsel conceded that someone committed a murder: "This murder happened on November 7 of 1995" (XI 1052). Then, in closing argument, defense counsel continued the theme of contesting identity of the killer:

> So what I'd like to have you look at is the reasons to doubt that Donald Bradley was there.
> ***
> *** We suggest to you that all of that does add up to reasonable doubt and that you should find Mr. Bradley not guilty on these charges because he wasn't there.
> ***[defense counsel argued a "fall-back" position that, if Appellant was at the Jones' home, then Linda Jones, not Appellant, killed Jack]
> But I would ask that you find that Donald Bradley was not there because there are too many doubts in this evidence ***

(XV 1784, 1811, 1817) Consistent with this theme that someone else, not Bradley pursuant to a conspiracy with Linda Jones, killed Jack, defense counsel repeatedly conceded that a Burglary occurred while he attacked the credibility of the testimony of

the McWhite brothers, who essentially testified that they were at the crime scene as home-intruders with Appellant:

Defense's Cross-examination of Brian McWhite

Q And also -- you went inside the house?
A Yes, sir.
Q With the intent to commit a crime?
A Yes, sir.
Q So you're guilty, then, of **burglarizing** that house, are you not?
A I guess so, yes, sir.
Q And you're charged with **burglary** in your indictment, aren't you?
A Yes, sir, I remember that.
Q And during or after **this burglary** Jack Jones died, didn't he?
A Yes, sir.
Q And you understand that **that's felony murder**, don't you?
A Yes, sir.
Q And that's exactly what you're charged with in your indictment, isn't it?
A Yes, sir.

(XI 1139-40)

Defense's Cross-examination of Patrick McWhite

Q So according to what you say, then, you're guilty of conspiring with Donald Bradley to go beat this man up?
A Yes, sir.
Q You feel you are guilty of that?
A Yes, sir.
Q And you're charged with that, aren't you?
A Yes, sir.
Q And you're also guilty of going inside the house and **burglarizing** the house, aren't you?
A Yes, sir.
Q And you're charged with that in your indictment, aren't you?
A I believe so.
Q And during **this burglary** that you were committing or after the **burglary** was finished, Jack Jones died, didn't he?
A Yes, sir.
Q And you're charged with **first degree murder** in your indictment, aren't you?
A Yes, sir.
***

Q Isn't it true that you want to cooperate in this case?
A Yes, sir, it is.
Q And you want to do that because you want to get yourself a deal, right?
A No, sir. I want the truth to come out.

(XII 1253-55)

Accordingly, in the jury instruction conference, the prosecutor requested an instruction on principals because "if he's a principal in burglary, then he's guilty of felony murder." (XIV 1720) Defense counsel conceded, although he might argue the point to the jury, that the jury "could decide that" (XIV 1720-21). It appears that the prosecutor then produced a principals jury instruction, to which defense counsel responded, "I guess I can't object to that" (XIV 1721). The parties then debated whether the jury should be instructed on Burglary with Assault or simply Burglary; defense counsel contended that the jury should be instructed on Burglary with a Dangerous Weapon as the felony underlying felony murder (XIV 1721-23),[3] and the trial court ultimately instructed the jury on Burglary with a Dangerous Weapon as the underlying felony for felony murder (XV 1851). When the trial court finished instructing the jury, defense counsel indicated that he had no "additional exceptions or objections" to the instructions "as read" (See XV 1875).

Thus, a major focus of Appellant's defense was to discredit the McWhites as eyewitnesses to the brutal beating Appellant inflicted upon Jack. It stressed a purported motive for them to

[3] See also XIV 1734-38, 1743: aspects of burglary instructions discussed, after which defense counsel expressed satisfaction.

lie: They were lying because they faced execution through a felony murder theory based upon the burglary. This was the same alleged burglary incident that provided the basis for felony murder.

Because the defense strategy conceded, and attempted to use to its advantage, the existence of a burglary underlying a felony murder, Appellant should not be heard to complain about it now. See Terry v. State, 668 So.2d 954, 962, 963 (Fla. 1996)("[m]ost importantly, a party may not invite error and then be heard to complain of that error on appeal"; "[b]y stipulating to allowing Demon Floyd's testimony to be used as substantive evidence, appellant waived any claim of error"); Bradford v. State, 567 So.2d 911, 915 (Fla. 1st DCA 1990) ("Whether or not resisting arrest without violence is a lesser included offense of resisting arrest with violence (when conviction for the former requires a valid underlying arrest), the parties treated it as such and waived the issue by requesting jury instructions accordingly"); Behar v. Southeast Banks Trust Co., 374 So.2d 572, 575 (Fla. 3d DCA 1979) (order "induced by stipulation of the parties. One who has contributed to alleged error will not be heard to complain on appeal"); U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995)("raise-or-waive rule prevents sandbagging *** precludes a party from making a tactical decision to refrain from objecting, and subsequently, should the case turn sour, assigning error"); Francois v. Wainwright, 741 F.2d 1275, 1282 (11th Cir. 1984)(citing and summarizing several cases). See also Trenary v. State, 473 So.2d 820 (Fla. 2d DCA 1985) (then-Judge Grimes

writing; affirmed the denial of a motion to withdraw a plea on the basis of a defense tactic that was a "reasonable course of action for the benefit of his client").

Moreover, in addition to expressing satisfaction with the jury instruction on felony murder, using burglary with a dangerous weapon as the underlying felony, defense counsel essentially requested it, thereby affirmatively waiving any purported error, regardless of its magnitude, in providing the jury that option. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So.2d 734 (Fla. 1991).

Therefore, defense counsel waived any objection to providing the jury with burglary as an option: This waiver reinforced the defense's position that the McWhites were motivated to lie because they were facing felony murder because of the underlying burglary.

An attack on the McWhites was also consistent with its strategy on premeditation, resulting in defense counsel's concession that the State's evidence proved a conspiracy if the jury believed the McWhites. In arguing against the admissibility of other-crimes evidence, defense counsel stated:

> Moreover, it's cumulative because the State has two eyewitnesses to the murder, Brian and Patrick McWhite. And if the jury believes them, then they are going to believe that Donald Bradley did it and that he conspired with Ms. Jones that very night because they were present when he talked on the phone to someone they didn't know for sure but they concluded was his

> tax lady. And other circumstances will show that that was Linda Jones. So it's evidence that the State doesn't really even need because it is cumulative.

(VIII 436) Thus, when the trial court asked if the page containing the premeditation jury instruction was "all right," defense counsel responded, "Yes, sir" (Compare XIV 1720 with III 506). Hence, under the rationale and authorities cited supra, Appellant should now be bound by the concession he made to the trial court. He waived any claim attacking premeditation.

Accordingly, the appellate attacks on First Degree Murder were not properly presented to the trial court.[4] The state rested its case (XIII 1553), and the trial court invited "any motions" (XIII 1554). Defense counsel responded:

> Your Honor, the Defense would move for a judgment of acquittal on all three counts of the indictment because of insufficiency of the evidence to prove the charges that are alleged in these three counts.

(XIII 1554) Defense counsel continued by arguing for a mistrial and for the inadmissibility of Linda Jones' statements. (XIII 1554-55) The trial court denied the defense motions (XIII 1555-56), and the defense began its case (XIII 1557). The defense eventually rested (X XIV 1702), and the State put on short rebuttal (XIV 1702-1712), after which the defense renewed its motion for judgment of acquittal without "any additional argument" (XIV 1713).

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[4] Having chosen his tactical path and still lost the verdict, defense counsel perfunctorily challenged premeditation and felony murder and other counts in his motion for new trial (See XV 1885, III 534-39). This failed to raise the specific claims asserted now on appeal; especially in light of the tactics-guided paths the defense had already taken, it was too little too late.

Thus, the defense did not timely present to the trial court the claims it makes now in hindsight, rendering both ISSUE I claims unpreserved. See Woods v. State, 733 So.2d 980, 984-85 (Fla. 1999) ("Woods submitted a boilerplate motion for acquittal without fully setting forth the specific grounds upon which the motion was based. He did not bring to the attention of the trial court any of the specific grounds he now urges this Court to consider"); Marquard v. State, 641 So.2d 54, 58 n. 4 (Fla. 1994) (judgment and death sentence affirmed; "not preserved as to the trial court's denial of motion for judgment of acquittal on murder charge" ***); Archer v. State, 613 So.2d 446, 447-48 (Fla. 1993) ("motion for judgment of acquittal *** Archer did not make the instant argument in the trial court, and, therefore, this issue has not been preserved for appellate review"); §924.051, Fla. Stat. (preservation requires trial be informed "sufficiently precise" ground). See also Morris v. State, 721 So.2d 725, 727 (Fla. 1998)("Once the motion [for judgment of acquittal] has been made at the close of the State's case and brought to the trial court's attention, the trial court has been given an opportunity to rule on the precise issue. The issue should then be considered preserved for appellate review"). But see Tibbs v. State, 397 So.2d 1120, 1126 (Fla. 1981) (in capital cases, "an additional review requirement is imposed when insufficiency of the evidence is not specifically raised on appeal namely, that the reviewing court shall consider sufficiency anyhow and, if warranted, reverse the conviction") discussing Fla. R. App. P. 9.140(f) [currently relettered as (h)].

More importantly, the defense failure to present the ISSUE I claims to the trial court as part of a sufficiency of evidence argument was consistent with defense strategies that, the State submits, should bind the defense on appeal, thereby effectively waiving ISSUE I. Perhaps this defense strategy of trying the McWhites' credibility was also prompted by defense counsel's correct assessment that the evidence was, in fact, sufficient for felony murder as well as premeditated murder — topics to which the discussion now turns.

B. Evidence was sufficient for First Degree Murder.

1. Standard of Appellate Review.

Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), enunciated the

> general proposition[] [that] an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

The State contends that Tibbs' principle applies to both theories of First Degree Murder in this case: premeditation and felony murder.

Appellant argues that Florida's circumstantial-evidence test[5] applies to premeditation here. The circumstantial-evidence test requires that "the evidence [be] inconsistent with any reasonable hypothesis of innocence," Mungin v. State, 689 So.2d 1026, 1029 (Fla. 1995), rather than the standard test for sufficiency that "a rational trier of fact could have found proof of guilt beyond a reasonable doubt," Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986). The State disagrees and contends that the State was required only to prove that a rational jury "could have found proof of guilt beyond a reasonable doubt." Here, there were eyewitnesses (the McWhites) not only to Appellant's presence at the crime scene, thereby satisfying the direct-evidence test of Orme v. State, 677 So.2d 258 (Fla. 1996), but also, eyewitnesses

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[5] In Miller v. State (FSC #93,792), the State has asked that this Court recede from the circumstantial-evidence test. The State reiterates that request here. As put by Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789,61 L.Ed.2d 560 (1979): "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Accordingly, for example, People v. Towler, 641 P.2d 1253, 1259-60 (Cal. 1982) (footnote and citations omitted), stated:

> [E]ven though the appellate court may itself believe that the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the determination of the trier of fact. (*See, e.g., People v. Redrick*, *** 359 P.2d 255; *People v. Daugherty*, *** 256 P.2d 911.) Whether the evidence presented at trial is direct or circumstantial, under Jackson and Johnson the relevant inquiry on appeal remains whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.***

(the McWhites) to Appellant's brutal beating of the victim, killing him. (See, e.g., XI 1101-12, XII 1220-37)

Orme, 677 So.2d at 261, enunciated the phases of the analysis:

> [O]ur analysis of this case must begin by determining the threshold question of whether the case against Orme was **wholly** circumstantial.

Here, the evidence was far from "**wholly** circumstantial." Here, more than the "direct evidence presented by the State plac[ing] Orme at the scene of the crime around the time of Redd's death," the McWhites testified regarding the details of Appellant's brutal beating of Jack Jones, which included

- **Appellant** beating Jack in the foyer of Jack's home (See XII 1221-23, 1311, 1314-15, 1318, 1323);
- Jack falling to the floor (XII 1223);
- **Appellant** and Patrick McWhite dragging Jack into another room (XII 1223);
- **Appellant** continuing to beat Jack with the butt of the gun and with the "Zulu" war-like weapon/stick (XI 1088), as Jack lay on the floor (XII 1223-33);
- Jack trying to protect his head from **Appellant**'s beating by covering it with his hands (See XII 1234);
- **Appellant** ordering that Jack be tied up (XII 1233-34);
- **Appellant**, after Jack was tied up, continuing to beat Jack with the gun and the club (Patrick McWhite's testimony at XII 1235-36)[6]; and,

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[6] Brian McWhite testified:
Q Was Mr. Jones taped up when he asked Donald to stop?
A **I don't think** he was, sir. **I don't think** he was. **I think** after -- after he stopped beating him with the stick,

- At one point during the beating, **Appellant** pointing a 45 caliber gun at Jack's head and pulling the trigger, but the gun not firing (XII 1235); in Brian McWhite's words, **Appellant** "cocked the gun back and he tried to shoot but it wouldn't fire" (XI 1105).

In Orme, the State also adduced evidence of a dispute as the motive there. Here,

- **Appellant hoped to be paid "a lot of money"** by Mrs. Jones from insurance proceeds; Appellant mentioned a figure "somewhere" between $100,000 and $200,000. (XI 1121)

Approximately the day before Jack Jones was killed, Linda Jones had told Janice Cole that she (Linda Jones) "could just take a gun and kill Jack and get away with it" (XIII 1434) and that she

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then that's when he got taped up **if I recall correctly**. (XI 1106) Thus, concerning the relationship between Appellant ordering the victim tied and the additional blows, Brian interjected four possible indicators of equivocation: "I don't think," I don't think," "I think," "if I recall correctly." Accordingly, it is well-settled that the trier of fact is properly vested with the role of assessing apparent equivocation and potential (as well as actual) conflicts among witnesses. The result is that, on appeal, such factual matters are resolved in favor of the verdict below. See, e.g., Tibbs ("all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal); Donaldson ("fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury"). Also, see Gordon v. State, 704 So.2d 107, 116-17 (Fla. 1997) ("Why tie him up if he were lifeless?").

Also, Brian, moments before the above quote, testified that Appellant did not stop hitting the victim when his brother told Appellant to stop (XI 1106). Thus, under Brian's version, apparently Appellant was beating the victim, Patrick told him to stop but Appellant continued with the beating, then stopped when he ordered Jack tied.

did not intend to divorce Jack because then she would not "get his life insurance" (XIII 1436).

Orme held that there the "[e]vidence ... cannot be deemed entirely circumstantial," 677 So.2d at 262. A fortiori, here the evidence is not "entirely circumstantial." In Orme and here, the direct evidence renders the circumstantial evidence rule inapplicable.

Appellant argues that Florida's special circumstantial evidence rule applies because, here, evidence of a single element, premeditation was circumstantial. While the State would agree that no one directly saw Appellant's thoughts, it respectfully submits that direct evidence of a mens rea element is all-too-infrequent to require the special circumstantial evidence rule whenever premeditation is proved circumstantially. See, e.g., State v. Mitchell, 666 So.2d 955, 956 (Fla. 1st DCA 1996) ("defendant's knowledge and intent are rarely shown by direct evidence and may be proven by circumstantial evidence") citing State v. Norris, 384 So.2d 298 (Fla. 4th DCA 1980); Bostic v. State, 638 So.2d 613, 614 (Fla. 5th DCA 1994) ("mental intent is rarely subject to direct proof, and must be established based on surrounding circumstances in the case"). In the words of Brewer v. State, 413 So.2d 1217, 1219-20 (Fla. 5th DCA 1982) (footnote omitted),

> Although the State must prove intent just as any other element of a crime, *Uber v. State*, 382 So.2d 1321 (Fla. 1st DCA 1980), a defendant's mental intent is hardly ever subject to direct proof. Instead, the State must establish the defendant's intent (and a jury must reasonably attribute such intent) based on the surrounding circumstances in the case. Keeping in mind

> the test to be applied to a motion for judgment of acquittal, a trial court should **rarely, if ever, grant a motion for judgment of acquittal based on the state's failure to prove mental intent.**

Thus, Appellant's assertion that the "special standard of review applies" here (IB 43) would swallow the general rule for sufficiency with the special circumstantial rule. Returning to Orme, the test is whether, the State's case is "**wholly** circumstantial." See also Woods v. State, 733 So.2d 980, 984 (Fla. 1999) ("argues the trial court erred in denying his motion for judgment of acquittal because the State's case rested **entirely on circumstantial evidence** and that insufficient evidence of premeditation existed to submit this case to the jury").

Thus, Kormondy v. State, 703 So.2d 454, 460 (Fla. 1997), while discussing the circumstantial evidence rule, also favorably cited to Peterka v. State, 640 So.2d 59 (Fla. 1994), which, to some degree, harmonized the circumstantial with the standard rule for reviewing sufficiency:

> The element of premeditation may be established by circumstantial evidence when the evidence relied on by the State is inconsistent with every other reasonable inference. *Cochran v. State*, 547 So.2d 928 (Fla.1989). The jury determines whether the circumstantial evidence fails to exclude all reasonable hypotheses of innocence, and **where substantial, competent evidence supports the jury's verdict, that verdict will not be reversed on appeal**. *Heiney v. State*, 447 So.2d 210, 212 (Fla.), cert. denied, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984). The **circumstantial evidence standard does not require the jury to believe the defense version of the facts on which the State has produced conflicting evidence**, and the State, as appellee, is entitled to a view of any conflicting evidence in the **light most favorable to the jury's verdict**. *Cochran*, 547 So.2d at 930.

640 So.2d at 68.

Similarly, Woods v. State, 733 So.2d at 985, recently explained:

> In *Gordon v. State*, 704 So.2d 107 (Fla. 1997), we reemphasized the standard courts must apply in considering motions for judgment of acquittal:
>
> > We have repeatedly reaffirmed the general rule established in *Lynch v. State*, 293 So.2d 44 (Fla. 1974), that:
> >
> > > [C]ourts should not grant a motion for judgment of acquittal unless the evidence is such that **no view** which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.
> >
> > *Id.* at 45; *see Gudinas v. State*, 693 So.2d 953 (Fla. 1997), ***; *Barwick v. State*, 660 So.2d 685 (Fla. 1995); *DeAngelo v. State*, 616 So.2d 440 (Fla. 1993); *Taylor v. State*, 583 So.2d 323 (Fla. 1991). In circumstantial evidence cases, 'a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.' *Barwick*, 660 So.2d at 694.
> >
> > Therefore, at the outset, 'the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences.' *Barwick*, 660 So.2d at 694. After the judge determines, as a matter of law, whether such competent evidence exists, the 'question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury.' *Long v. State*, 689 So.2d 1055, 1058 (Fla. 1997).
>
> *Gordon*, 704 So.2d at 112-13; *see also State v. Law*, 559 So.2d 187, 188-89 (Fla. 1989) (applying circumstantial evidence rule to determination of motion for judgment of acquittal). On review, we must view the conflicting **evidence in a light most favorable to the state**. *See Peterka v. State*, 640 So.2d 59, 68 (Fla. 1994). **So long as competent, substantial evidence supports the jury's verdict, it will not be overturned on appeal**. *Id.*

Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993), explained:

> Where circumstantial evidence is relied upon to prove a crime, in order to overcome a defendant's motion for judgment of acquittal, the burden is on the State to introduce evidence which excludes every reasonable hypothesis except guilt. The State is **not**

> **required to conclusively rebut every possible variation of events which can be inferred from the evidence** but only to introduce competent evidence which is inconsistent with the defendant's theory of events. *State v. Law*, 559 So.2d 187, 189 (Fla. 1989). Once this threshold burden has been met, the **question of whether the evidence is sufficient to exclude all reasonable hypotheses of innocence is for the jury to determine.**

See also Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury"); Gordon v. State, 704 So.2d 107, 113 n. 15 (Fla. 1997) ("Gordon's reference to a "mystery man" in the shadows at the stairwell as the possible murderer is unconvincing ... jury could have very reasonably inferred that the unidentified black male was McDonald").

Here, as discussed below, ISSUE I erroneously relies upon "**defense version of the facts on which the State has produced conflicting evidence**" (Peterka), thereby "substantial, competent evidence ... support[s] the verdict and judgment" (Tibbs, Woods) on the premeditation theory. Put another way, a "rational trier of fact could have found" (Jackson) premeditation based upon the evidence, Accord Ross v. State, 474 So.2d 1170, 1173-74 (Fla. 1985) (brutal beating; "sufficient evidence from which the jury could rationally infer the existence of premeditation").

However, as applied in this case, any difference between the standard test for sufficiency and the circumstantial evidence test is "academic" because under extant precedent, regardless of whether the precedent is categorized as standard or

circumstantial, the evidence was sufficient for both premeditated murder and felony murder. For example, the operative facts of Mungin v. State, 689 So.2d 1026 (Fla. 1995) (IB 44), and Kormondy v. State, 703 So.2d 454 (Fla. 1997), do not assist Appellant's plight. The State elaborates.

2. Premeditation.

The evidence established that, within about a day of the murder, Linda Jones, motivated by the infidelity of her husband, Jack Jones, and the large insurance policies on his life, indicated a desire to kill him, not beat him. Appellant killed Jack Jones pursuant to his conspiracy with Linda Jones, thereby establishing premeditation. Hence, after the killing, Appellant discussed his huge pay-off through proceeds from the insurance policy and consulted with Linda on the very day that it was obvious that the police investigation was closing-in on them.

Further, the events immediately surrounding the killing itself established premeditation, as Appellant beat Jack repeatedly in three phases: first, in the foyer area near the front door; second, after knocking Jack to the floor and dragging him into an adjoining room; and, third, after Jack was tied up at Appellant's directions. The prolonged, extensive nature of the beating was corroborated by the medical examiner.

a. Appellant's Conspiracy with Linda Jones and Attendant Premeditation.

This was a contract killing perpetrated through the revenge and greed of Linda Jones. Approximately the day before Jack Jones was killed, Linda Jones told Janice Cole that she (Linda Jones) "could just take a gun and kill Jack and get away with it" (XIII 1434) and that she did not intend to divorce Jack because then she would not "get his life insurance" (XIII 1436). Cole thought that the life insurance figure was $500,000. (XIII 1436) Independent evidence established two policies on Jack's life, with Linda Jones listed as the primary beneficiary on November 7, 1995, the date of the murder: one for $125,000 (XIII 1444-45) and one for $175,000 with a double indemnity clause (XIII 1448-49), totaling $475,000 in potential death benefits. After Jack was killed, Appellant told his accomplice, Brian McWhite:

> Q Did he ever talk to you about what would happen if only you got caught?
> A He told me that ... if he gets caught he won't say anything because he wants to get paid his money.
> Q He wants who to pay him his money?
> A **Mrs. Jones.**
> Q And how did he say that money was going to come to him?
> A He said -- he said that **she** was getting **a lot of money** from the **insurance** people and there was going to be a lot of money that he's going to get. Somewhere like $200,000 and between $100,000. ***

(XI 1121-22) Thus, on the foregoing facts alone, this was a contract killing, and, as such, clearly established a conspiracy to commit murder, Also see ISSUE II infra, and abundant premeditation.

In Archer v. State, 613 So.2d 446 (Fla. 1993), the defendant procured the killing through another person and gave the killer

information about the location of property and entrances. As here, the planned intrusion included wearing gloves and masks. Archer's analysis and alternative holding on the merits focused on the triggerman killing the wrong victim and held that "the evidence is sufficient to support Archer's conviction of first-degree murder." Id. at 448. Here, Appellant, as the "triggerman," killed the intended victim. Archer controls. Accordingly, Bonifay v. State, 680 So.2d 413, 419 (Fla. 1996), upheld CCP on Archer's accomplice. Also, see Archer v. State, 673 So.2d 17, 19 (Fla. 1996) ("Archer's acts were not only calm and careful, but they exhibited heightened premeditation over and above what is required for unaggravated first-degree murder"); Gamble v. State, 659 So.2d 242, 244-46 (Fla. 1995) (killer found murder weapon at scene immediately prior to the killing; upheld CCP); discussion and authorities in ISSUE VI.[7]

In the words of Hoskins v. State, 702 So.2d 202, 210 (Fla. 1997), this was a "contract murder[]," thereby justifying CCP and thereby also more than supporting simple premeditation.

Jackson v. State, 704 So.2d 500, 505 (Fla. 1997) ("[s]he then dropped her keys which gave her the opportunity to shoot the officer in the head"), upheld heightened premeditation, where

> Jackson could have left the scene, but instead she purposely returned to confront the officer [and shoot him]. Jackson did not act on the spur of the moment but

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[7] Of course, the State's use of "heightened premeditation" cases does not suggest this as the minimal standard for the premeditation element of First Degree Murder. Instead, where the evidence was sufficient for the death-penalty aggravator of "heightened premeditation," the evidence was also necessarily sufficient for premeditated murder.

> rather acted out the plan she had conceived during the extended period in which these events occurred.

A fortiori, here, Appellant initially went to the scene to kill Jack, and he stayed at the scene for an "extended period" as he extensively beat the victim. He could have left after administering a beating that would not be life-threatening, but he chose to stay and finish off the victim.

In Grossman v. State, 525 So.2d 833, 837 (Fla. 1988) overruled on other ground 699 So.2d 1312, evidence indicated a motive for the killing, and the killing involved beating the victim and a single gunshot. Here, Appellant's motive was life insurance proceeds, he beat Jack unmercifully, and he attempted to shoot the victim. In the face of a defense that the defendant "merely panicked and killed the officer out of fear," Grossman upheld the conviction on a premeditation (as well as a felony murder) theory.

Echols v. State, 484 So.2d 568, 573 (Fla. 1985), concerning the admissibility of a videotape of the defendant admitting to his planned murder, reasoned, in part: "the proof of premeditation consisted largely of proof of a conspiracy to commit murder in order to obtain control of the victim's estate." Here, this was a "conspiracy to commit murder" via a contract killing in order to obtain insurance money, thereby establishing premeditation. Moreover, Echols also reasoned that its CCP and pecuniary gain could both be properly used as aggravators. There, conspiracy supported CCP, "well above that required to prove premeditation," Id. at 574-75, as it does here.

Larzelere v. State, 676 So.2d 394, 398-99 (Fla. 1996), rejected a sufficiency claim that attacked a First Degree murder conviction based on premeditation facts similar to those here: A deteriorated marriage, obtaining insurance proceeds, a masked killer, a fake robbery, and a conspiracy.

Here, there was abundantly more reflection proved than in Penn v. State, 574 So.2d 1079 (Fla. 1991), where the defendant "took a hammer from the laundry room, beat his mother to death, and stole numerous items from the house." In spite of a defense hypothesis of voluntary intoxication including the killing occurring while robbing to obtain money for drugs, the motive for the killing, Penn held:

> After examining this record, we find sufficient evidence of premeditation to support both the verdict and the jury's disagreement with Penn that he could not have formed the specific intent necessary for premeditated murder.

574 So.2d at 1082. Here, as in Penn, the evidence was sufficient for premeditation where the State produced evidence of a pre-existing motive and where the killing was effected through a beating.

Appellant quotes from Mungin, but in Mungin there was no evidence of any plan to kill the victim and evidence of the killing itself indicated that it was as instantaneous as one finger-flick on a trigger, in contrast to here. Accordingly, in Kormondy v. State, 703 So.2d 454 (Fla. 1997), there was no evidence of a plan to kill the victim, and the killing was done with a single gunshot, there, with a gun unfamiliar to the defendant. Here, the killing was more than planned; it was

contracted. Here, Appellant's multiple swings of the club were no accident.

Although unnecessary for the sufficiency of evidence showing premeditation, additional facts[8] corroborate the conspiracy and premeditation:

- Linda Jones was motivated by her consumption with Jack's infidelity and attendant expenditures on his girlfriend, Carrie Davis, and she used Appellant as a tool to "remedy" her consumption in an incident at Carrie's apartment a week prior to the murder, See ISSUE IV.
- Numerous phone calls were placed between Appellant's and Linda Jones' phones, with the calls clustering around

  (1) October 31, 1995, the day of the prior incident at Carrie's apartment,

  (2) November 7, 1995, the day of the murder, and

  (3) January 22, 1996, the day that the police interviewed Appellant and served a search warrant at his residence (See XIII 1482 et seq).

  Indeed, there were three calls from Appellant's phone to Linda Jones' phone only minutes before Bradley entered the house and killed Jack. The following chart summarizes the relevantly clustered phone calls:

[8] The trial court excluded additional corroborating evidence that would have shown, shortly prior to Jack's murder, Linda Jones attempts to secure others to KILL Jack, not beat him up. (See XI 1010-29)

	Linda to D	D to Linda	Total
10/31/95 (Raid on Carrie Davis)	6	6	12
11/3/95-11/7/95 (Murder)	10	4	14
1/22/96 to 1/25/96 (Police served warrant on Bradley)	0	3	3

D= Appellant. (See State's Exhibits 28-33, introduced at XIII 1546-50 and discussed at XV 1846, 1772-73, 1838-39)

- Key entrance points to the house were unlocked (XII 1221), and the intruders knew this as they approached the house (XI 1094-95, XII 1218, 1220. See also no signs of forced entry at XII 1291, 1296, 1308).
- The intruders knew how to avoid the sensor-activated lights around the house (See XI 1100, XII 1220, 1307).
- The intruders knew where to find Jack when they went into the house (See XI 1096, 1098, 1101, XII 1284-85).
- The intruders knew where to find Jack's gun when they went into the house (See XI 1095-96, XII 1220-21, 1283-84).
- Linda, sitting in a room with Jack, saw the McWhite-intruders donned in ski-masks as they entered the home (See XI 1102, XII 1237), and she exchanged eye contact with Brian McWhite, yet she said and did nothing to alert Jack. (See XI 1101-1102).
- The unlocked doors, knowledge of the sensor lights, knowledge of the location in the house of Jack and his gun,

are explained by the phone calls between Appellant and Linda moments prior to the entry (See XI 1092-98, XII 1217-21).

- Linda stood-by near a phone (See XII 1227-28, 1240)[9] and neither attempted to call the police nor take action to intervene (See XI 1110-11, XII 1222-40).
- One of the McWhite-intruders touched Linda and she "flop[ped] and fell to the floor," exaggerating the touch (See XII 1230-31); accordingly, when Linda asked who the intruders were, it sounded to Brian McWhite like she was "acting" (XI 1109).
- Immediately prior to leaving, killer-Bradley cut tape binding Linda's hands (XI 1112) so she could free herself without too much trouble.

It is noteworthy that there was no evidence of any communication between Appellant and Linda as Appellant cut her tape, indicating that cutting the tape was pre-planned. If the real plan was only to rough-up Jack, then Jack would have likely seen Appellant cut the tape; however, if Jack were dead or dying, Jack could not see the cutting and be able to testify about it later. Therefore, a reasonable inference is that Jack's death was part of the plan.

- As Appellant drove away from the Jones' home, he said that Jack could be dead or dying (See XI 1114, XII 1243-44) and

[9] At one point she said "stop," (XI 1110) and well into the beating, she was taped up at Appellant's direction (See XI 1107-1109, XII 1236). She was not taped tightly. (XI 1105)

yet did nothing to assist Jack, but instead rationally planned with the McWhites on how to cover up their crime (XI 1114), including destroying evidence of it (See XI 1113, XII 1239. See also Appellant's subsequent destruction of evidence at XI 1115-20, XII 1241-44); Appellant's callousness was commensurate with his premeditation, and he was not enraged.

- Knowing that her husband was probably dead (See XI 1062: "They've beaten him to death"), Linda Jones lied in her 911 call about
  - not knowing Appellant's identity (XI 1066-67, 1074), even though they had a prior relationship (See XI 1085, XIII 1491-98) and even though Appellant talked and barked out numerous orders during the home-invasion (XI 1105, 1107, XII 1226, 1228, 1230, 1233, 1234, 1236, 1237), including talking to her (XI 1111).
  - the intruders breaking into the house (XI 1066), when, in fact, the doors were unlocked (See XI 1094-95, XII 1218, 1220, 1291, 1296, 1308);
  - not knowing when the intruders were approaching the house (XI 1071) when, in fact, she was updating Appellant and company through Appellant's cell phone as Appellant drove to the home (See XI 1092-98, XII 1217-21);
  - being beaten and being dragged across the room and thrown on top of Jack (See XI 1064, 1072), when, in

fact, one of the McWhites "touched" her and she acted as if she was pushed to the floor (See XII 1230-31);

- the thrust of the home-invasion being an apparent robbery (See XI 1064: "robbed us"), when in fact, Appellant told the McWhites to take something from the home to "**make it look like** a burglary or something" (XI 1107. See also XII 1234) and when, in fact, the totality of the evidence showed Linda Jones complicity in the murder of her husband.

- Even though her husband had been killed, Linda left the doors unlocked between the time that the intruders left and the time that the police arrived (XI 1076); in other words, she feared no harm, i.e., killing her husband was no surprise to her because she was a party to a plan for murder.

Several of these facts indicate a conspiracy to murder, not simply to rough-up Jack:

(1) A day before the murder, Linda's communication to Cole of a desire to **kill** Jack;

(2) A day before the murder, Linda's communication to Cole in which Linda coveted nearly a half-million dollars in insurance money on Jack's **life**, and Appellant's payment for the **killing** to be derived from those insurance proceeds;

(3) Linda watching Appellant **attempt to kill Jack with the gun** and watching the **killing**, yet doing nothing to call 911, ..., except to say "Stop";

(4) Having seen her husband brutally beaten, with blood "everywhere," Linda cooperated with her husband's **killer**, as she accepted, without any apparent further communication, Appellant partially cutting her tape, further indicating that part of the plan was that **dead**-Jack would not see this cooperation;

(5) Knowing that Jack was probably **dead or dying**, Appellant not calling 911 and callously and rationally directing a cover-up;

(6) Knowing that Jack was probably **dead**, Linda's multiple lies in the 911 call;

(7) Knowing that Appellant had probably just **killed** her husband, Linda left the doors unlocked; she was not fearful of any enraged killer because a killing was pre-planned;

(8) Knowing that Jack was **dead**, continuing to communicate with Appellant, the person whom she knew to be the killer, including rushing to Appellant's home the day that the police interviewed Appellant and served a search warrant there.

In the face of the foregoing overwhelming evidence of a conspiracy to **kill** Jack, Appellant argues that there was evidence that "the plan was to beat up Jack Jones" (IB 45) and that the "beating ... got out of hand" (IB 47). However, under any standard of appellate review, Appellant merely points to evidence that conflicts with a conspiracy and a premeditation to kill. "The circumstantial evidence standard does not require the jury

to believe the defense version of the facts on which the State has produced conflicting evidence," Peterka. The "fact that the evidence is contradictory does not warrant a judgment of acquittal," Donaldson. The State "introduce[d] competent evidence which is inconsistent with the defendant's theory of events," Atwater citing Law. "[V]iew[ing] ... conflicting evidence in a light most favorable to the state," "competent, substantial evidence supports the jury's verdict"; therefore, the judgment for should "not be overturned on appeal," Woods. Moreover, the supposed evidence that Appellant points to is what he himself created, i.e., his statements to the McWhites.

In sum, Appellant's ruse[10] in which he told the McWhites that the intent was only to beat up Jack does not exonerate him from First Degree Murder under any theory.

Much of the foregoing evidence also conflicts with Appellant's contention (IB 47-48) that a "reasonable hypothesis" is that Linda Jones killed Jack after Appellant left. He points to the fact that Jack apparently was on his back when police arrived, a position different from when Appellant was beating him. Appellant overlooks the 911 tape that indicates that 911 personnel

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[10] His ruse undoubtedly secured their cooperation as "muscle" for the home-invasion, whereas their testimony suggests that they would not have been willing to come as support for a murder. (See, e.g., Brian "felt Mr. Jones had had enough" at XI 1106; Brian making it clear that his only intent was to beat up Jack at XI 1152; Patrick asked Jack to "please give me your hands, sir" at XII 1233; Patrick did not try to stop Appellant because Appellant "had a gun and a stick" at XII 1235; Patrick making it clear that his only intent was to beat up Jack at XII 1261-62)

instructed Linda Jones to turn Jack on his back prior to police arrival (XI 1069).

Appellant (IB 47-48) also points to blood found at various locations and a wet shower. However, he overlooks the 911 tape in which Linda Jones indicated that she was preoccupied with blood on her and felt compelled to wash it off of herself:

> I've got blood all over me. *** There's blood everywhere. *** [Blood is] everywhere. *** I got to get a wet cloth. *** Blood is everywhere.

(XI 1063, 1069, 1071, 1074)

Personnel at 911 also instructed Linda Jones to get a towel to put pressure on areas where her husband was bleeding:

> What you need to try to do is go get a towel and put it wherever he's bleeding from and try and stop the bleeding ... . Go do that and come back to the phone.

(XI 1072-73)

And, with "blood everywhere," she was instructed, as discussed above, to turn him over.

Further, Linda Jones appears to have wandered away from the phone to free herself from the remaining tape on her:

> ... I can't get this tape off. *** I got to get this tape off. *** I can't get this tape off. *** I'm going to put this phone down and get some scissors and cut this tape off. *** I can't get it out of my hair. *** It's still on my arms.

(XI 1064, 1065, 1065, 1067, 1068. See also XI 1066, 1067: "talking in background")

Appellant (IB 47) also points to evidence of blood in the garage area of the Jones' home and to some duct tape also found in the garage area. However, the only evidence of a perpetrator accessing the garage that evening after the murder pointed to

Appellant (and the McWhites), as they exited the home through the kitchen-garage (See XII 1237. Compare XI 1111 with XI 1095-96, XII 1220-21, 1300),[11] not Linda Jones. Further, Appellant had the tape as they left the Jones' home. (See XI 1113)

Moreover, somehow Linda Jones supposedly managed to kill her husband and dispose of the murder weapon in about one minute. Mr. Zweifel, a neighbor of the Jones', saw Appellant's 1994 or 1995 maroon, window-tinted Nissan van (Compare XIII 1456, 1457 with tag registration introduced at XIII 1478-79 and described at XV 1762. Accord XI 1081-83, XII 1212) drive away at about **8:30 pm** (XIII 1455), and Linda Jones called 911 at **8:31 pm** (XI 1057). A police officer arrived at **8:39 pm** while Linda was still on the phone with 911 (Compare XII 1288 with XI 1076). And, the home was secured as a crime scene (See XII 1295, 1330-31) and thoroughly searched, including the surrounding curtilage (See XIV 1702-1704). On November 9, 1995, the medical examiner even searched the residence for the murder weapon but found nothing she believed to be one. (XII 1357-58)

In contrast, Appellant repeatedly and brutally beat Jack with a gun and a club (See XI 1169, XII 1223-36), which Linda Jones described as "huge" (XI 1068), which Brian McWhite described as "big" (XI 1138. Appellant "took the stick out of the house" (XII 1237), and Appellant and Brian McWhite burned the stick/club after they left the murder scene (See XI 1176). In a word, Appellant's hypothesis is "unreasonable."

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[11] State's Exhibit 4 depicted the layout of the house. (See XII 1283-84).

In addition, Linda Jones, pursuant to the conspiracy with Appellant, hysterically told 911 that three unknown men beat her husband to death: "Three men came in. **They**'ve beat him to death." (XI 1062) The jury was entitled to accept this statement at face value. When combined with the McWhites' testimony, the "they" is Donald Lee Bradley.

b. Premeditation, as Evinced by the Events Immediately Surrounding the Killing Itself.

The beating Appellant inflicted upon Jack was prolonged and extensive, as Appellant

- Beat Jack in a room near the front door of the home (See XII 1221-23, 1311, 1314-15, 1323), beating Jack to the floor (XII 1223);
- With Patrick McWhite, dragged Jack into another room (XII 1223);
- Continued to beat Jack with the butt of the gun and with the club (XI 1088), as Jack lay on the floor (XII 1223-33);
- At some point, pistol-whipped Jack by swiping the gun "back and forth across [his] face" (XI 1169);
- Ordered that Jack be tied up (XII 1233-34);
- After Jack was tied up, continued to beat Jack with the gun and the club (XII 1235-36); and,
- At some point, pointed a 45 caliber gun at Jack's head and pulled the trigger (XI 1105, XII 1235).

State's Exhibits #16 and #20, on file with this Court, illustrate some of the victim's extensive external injuries.

Jack was still alive when he was tied up because Jack resisted Patrick McWhite's attempts to tie him:

> Well, I got in the room, that's when Mr. Bradley said tape his hands and threw me some tape and I attempted to tape his hands. *** The gentleman wouldn't give me his hands. *** He was covering his head.

Patrick told Jack to "please give me your hands, sir," as Appellant "continued to hit" Jack, and Patrick got his hands tied. (XII 1233-34)

Accordingly, the medical examiner testified concerning Jack's extensive injuries:

> *** He basically had bruises, abrasions which are superficial scrapes of the skin, and lacerations which are tears in the skin, and they are all over the head, the trunk, the back of the trunk, and the extremities. [XII 1345]
> ***
> Starting with the face, he had severe bruising on the right cheek. He also had smaller bruising on the left side on the left cheek. He had an abrasion on the upper left forehead. Two little abrasions around the left eye. And he had a big laceration, which is a big tear, through the outer ear, the left ear, with abrasions in the back. [XII 1346]
> Then going to the back of the head, he had several deep lacerations, tears, in the skin right in the back of the head. [XII 1346]

The medical examiner described what she observed after Jack's scalp was shaved:

> He had several lacerations. A total of four with the fourth one being an L-shape laceration which means that it was probably an additional impact just in the same area but in different directions, so we're talking about four to five severe blows and two of those went through the entire thickness of the scalp. [XII 1348]

When asked about what caused the injuries to the head and face area, the doctor testified that "he was struck with an instrument." (XII 1349)

Two blows to the victim's back were "very severe," each fracturing ribs, and one even bruising the right lung. (XII 1356, 1366-68)

Later, the doctor summarized various points of impact:

> [I]n the head area, he had four ... to five -- actually five to six lacerations which are more severe. When we start counting bruises, we have to add probably another seven more.
>
> In the back, he had a total of eight patterned contusions, plus little bruises that were in the lower interior abdomen above the hip.
>
> And in the extremities, there were several small bruises and abrasions and I think they added up to about eight. [XI 1367]

An impact to a knee was "very severe." (XII 1368)

Any of the blows could have been administered while Jack was on the ground, but the "major injuries" to the head and back could not have been caused "by a fall to the floor." (XII 1368-69)

Injuries to the arms, legs, or back would not have caused unconsciousness. (XII 1369) The blow that tore the victim's ear "would be less likely to produce unconsciousness," but any of the blows to the back of the head "would have [very likely] rendered him unconscious," (XII 1370-71) especially the combination of those blows (XII 1377). The victim probably died "fairly quickly" after the severe blows to the head. (XII 1371)

Several of the injuries were likely caused by, or consistent with, being struck by a cylindrical object. (See XII 1350,1351) The cylindrical object inflicting the back injuries "had to be at least two inches in diameter." (XII 1380) The head injuries, but not the "patterned injuries on the back," could have been caused

by the butt of a gun. (XII 1357) The head injuries could have also been caused by a cylindrical object. (XII 1357)

All of the blows were administered while Jack was alive. (XII 1372) The cause of death was "blunt trauma." (XII 1373)

Combining the medical examiner's testimony with Patrick McWhites' testimony, Appellant inflicted non-lethal blows in the foyer, dragged Jack in a nearby room, continued to inflict many non-lethal blows, and then ordered Jack tied, and then, with Jack's hands immobilized and Jack totally defenseless, inflicted several lethal blows and perhaps additional non-lethal ones.

Under several cases, the sustained attack on the victim alone is sufficient to support premeditation. For example, returning to Mungin, here there was a "witnesses to the events preceding the shooting, and [a] **continuing attack** that ... suggested premeditation." 689 So.2d at 1029. Here, the "**continuing attack**" involving multiple blows with a gun and multiple blows with a large club – blows occurring near the front door, blows occurring after dragging the victim to a nearby room, and blows occurring after tying up the victim.

Preston v. State, 444 So.2d 939, 943-44 (Fla. 1984), is dispositive. It discussed the State's burden of proving premeditation in the face of a claim that the State's evidence was "solely circumstantial":

> Premeditation can be shown by circumstantial evidence. *Sireci v. State*, 399 So.2d 964, 967 (Fla.1981) ***; *Spinkellink v. State*, 313 So.2d 666, 670 (Fla.1975) ***. Whether or not the evidence shows a premeditated design to commit a murder is a question of

fact for the jury. *Larry v. State*, 104 So.2d 352, 354 (Fla.1958). In *Larry v. State*, this Court stated:

> Evidence from which premeditation may be inferred includes such matters as 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**. It must exist for such time before the homicide as will enable the accused to be **conscious of the nature of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned. No definite length of time for it to exist has been set and indeed could not be.**

Id. (citations omitted).

There is **substantial evidence** from which premeditation could have been inferred by the jury. The victim sustained **multiple stab wounds**. The nature of the **injuries she sustained were particularly brutal**. There was almost a complete severance of her neck, trachea, carotid arteries and jugular vein. The medical examiner stated the murder weapon was probably a knife of four or five inches in length. Such deliberate use of this type of weapon so as to nearly decapitate the victim clearly supports a finding of premeditation.

Considering all reasonable inferences which the jury could draw from the appellant's statements and the nature and manner of the wounds inflicted on the victim, we cannot conclude that the determination of the trial court was erroneous.

Here, there were "**multiple [blunt trauma] wounds**," and the nature of the **injuries [Jack] sustained were particularly brutal**."

Ross v. State, 474 So.2d 1170, 1173-74 (Fla. 1985), and authorities within it, control:

> The appellant, in his third issue, argues the evidence against him is entirely circumstantial and insufficient to prove that he killed the victim. We recognize that to prove a fact by circumstantial evidence, the circumstances must be inconsistent with any reasonable hypothesis of innocence. *Hall v. State*, 403 So.2d 1321 (Fla.1981); *McArthur v. State*, 351 So.2d 972 (Fla.1977); *Davis v. State*, 90 So.2d 629 (Fla.1956). We find the record contains substantial, competent evidence from which the jury could reasonably conclude that the appellant committed the homicide of

> Gladys Ross. *See Rose v. State*, 425 So.2d 521 (Fla.1982) *** [overruled on other ground 488 So.2d 64].
>
> In the appellant's fourth point, he alleges that the evidence is clearly insufficient for the jury to find that the murder was premeditated. This Court has stated:
>
> > If the evidence shows that the accused had **ample time to form a purpose to kill the deceased and for the mind of the killer to become fully conscious of his own design**, it will be deemed sufficient in point of time in which to enable the killer to form a premeditated design to kill. *Green v. State*, 93 Fla. 1076, 113 So. 121, 122 (1927). **Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner** is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. *See Rhodes v. State*, 104 Fla. 520, 140 So. 309, 310 (1932).
>
> *Buford v. State*, 403 So.2d 943, 949 (Fla.1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). Premeditation, often being impossible to prove by direct testimony, may be inferred from the circumstances surrounding the homicide. *Campbell v. State*, 227 So.2d 873 (Fla.1969) ***; *Dawson v. State*, 139 So.2d 408 (Fla.1962). The evidence in the instant case reveals that the appellant was angry with the victim and that he **brutally beat her about the face, head, torso, and extremities, with fist, feet, and an unknown blunt instrument while she attempted to defend herself**. We find this record contains sufficient evidence from which the jury could rationally infer the existence of premeditation.

Appellant "**brutally beat [Jack} about the face, head, torso, and extremities**" as Jack cowered on the floor trying to protect his head. A fortiori, Appellant directed that Jack be bound and then killed Jack after Jack could no longer protect his head.

In Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981)

> there was ample evidence of premeditation. Circumstances indicating premeditation include the **manner in which the homicide was committed and the nature and manner of the wounds inflicted**. *** The evidence before us was **clearly sufficient** to convict Welty beyond a reasonable doubt.

In Welty, there was evidence of "repeated blows" and "manual strangulation." The defendant admitted to striking the victim "eight or nine times," Id. at 1163. Here, there were at least that many blows and, rather than occurring in one rapid sequence, they were inflicted in the foyer, then, after dragging the downed victim to the next room, inflicted there, and, after Appellant directed that Jack be bound, inflicted then. And, then, Appellant demonstrated his continuing premeditated presence of mind by partially cutting Linda's tape, instructing the McWhites not to talk, and directing the destruction of evidence of the killing.

In Sireci v. State, 399 So.2d 964, 967 (Fla. 1981), the

> defendant contended that the killing was a spur-of-the-moment act occurring after a fight had begun and that he entered the used car lot without any intent to rob or harm the victim.

There, the evidence included extensive stab-wound injuries to the victim. Similarly, Hawk v. State, 718 So.2d 159, 161 (Fla. 1998), included "numerous massive wounds to the head consistent with ... blows," Id. at n. 7, there a hammer, here a gun and a weapon-like club. In Sireci and Hawk the evidence also included some statements by the defendants. Hawk at one point told the police that he did not "kill[] anyone." 718 So.2d at 160. Hawk concluded that the "[e]vidence of premeditation is **extensive**." Here, in addition to Appellant's complicity with Linda's design to kill her husband, Appellant inflicted "numerous massive wounds" all over the upper portion of the victim's body. More importantly, unlike Hawk, there was direct evidence of the time of reflection among the repeated blows with the club and gun.

3. Felony Murder.

Appellant argues that Burglary cannot lawfully provide the basis for Felony Murder because an accomplice co-occupant of the home gave him permission to enter. However, whatever "consent Linda Jones may have given[12] to Appellant was clearly revoked through the words and actions of the victim, as he rushed Appellant's accomplice and told him to get out and then attempted to fight with one of them. Further, the State respectfully submits that whatever "consent" was given was void ab initio: As a matter of public policy and legislative intent, legal effect should not be given to a "consent" the sole purpose of which is for an illegal purpose, here, at the magnitude of killing an occupant of his own home.

The McWhites' testimony is dispositive because it establishes that whatever "consent" may have been given to Appellant was explicitly revoked. At the moment it was revoked, Appellant remained in the home for an unlawful purpose without any valid

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[12] Arguendo, even erroneously accepting Appellant's self-serving statements at face value (that the conspiracy was only to beat up Jack), the original "consent" to enter did not include the brutal multi-phased and premeditated beating he inflicted upon Jack.

Further, the State has found no evidence in the guilt phase of the trial that Linda consented to the brutal manner in which her husband's death was effected. As an affirmative defense, the burden was on Appellant to establish that his entry was within the parameters of pre-existing "consent," See State v. Hicks, 421 So.2d 510, 511 (Fla. 1982) ("consent an affirmative defense"); Robertson v. State, 699 So.2d 1343, 1346 (Fla. 1997) ("consent an affirmative defense to a charge of burglary"), and he failed. Indeed, the evidence that Linda uttered "stop" may be interpreted as disapproving the **manner** in which Jack was killed, which was outside the scope of her consent.

consent. See Routly v. State, 440 So.2d 1257, 1262 (Fla. 1983) ("burglary statute is satisfied when the defendant '**remains in**' a structure with the intent to commit an offense therein").

Patrick McWhite testified that when they got into the Jones' house, Jack noticed him and his brother, Jack charged at them and started fighting with Brian. (See XII 1222, 1273)

Brian McWhite testified that he had a ski mask on his face, Linda Jones saw him when he entered the home and said nothing, and then the victim saw them. (XI 1102-1103) Brian continued:

> He asked me who I was, then **he told me to get out** and then **he came at me**. *** He was like **rushing me**. *** He was **swinging** and I was stepping back, knocking his hands away and stepping back towards the door. And then I heard my brother say I got him and he got hit with the stick.

(XI 1103) Brian clarified that Appellant hit Jack in the head with the stick. (XI 1103) Brian continued: "He got hit and started losing his balance and Donald [Appellant] hit him again ***," (XI 1104) ultimately having Jack tied up and then killing Jack, See facts supra.

A home is more than property; it is a sanctuary for **EACH** of the occupants, especially against outsiders. This Court recognized the more-than-property principle in Weiand v. State, 24 Fla. L. Weekly S124 (Fla. March 11, 1999):

> the privilege of nonretreat from the home stems not from the sanctity of property rights, but from the time-honored principle that the **home is the ultimate sanctuary**.

Jack had a right to the home as a sanctuary, and he explicitly re-affirmed that right by telling the intruders to get out and reinforcing the revocation by attempting to fight with them.

These facts are sufficient to rebut any claim of consent. See Jimenez v. State, 703 So.2d 437, 441 (Fla. 1997) ("Minas withdrew whatever consent she may have given for him to remain when he ..."); Raleigh v. State, 705 So.2d 1324, 1329 (Fla. 1997) ("ample circumstantial evidence from which the jury could conclude that Eberlin withdrew whatever consent he may have given for Raleigh to remain when Raleigh shot him several times and beat him so viciously that his gun was left bent, broken, and bloody"); Robertson v. State, 699 So.2d 1343, 1346-47 (Fla. 1997) ("jury reasonably could have concluded that Ms. Fuce withdrew consent for Robertson to remain when he bound her, ..."); Bundy v. State, 455 So.2d 330, 350 (Fla. 1984) ("inconceivable that Bundy could have been or thought he was invited to be in the house at three o'clock in the morning").

Ray v. State, 522 So.2d 963, 966-67 (Fla. 3d DCA 1988) ("Bryant's struggle with the defendant"), cited approvingly in Robertson v. State, 699 So.2d 1343, 1346-47 (Fla. 1997), explained the principle and applied it to a situation close to the one here: "Florida's modern burglary statute focuses on the safety of people and property." A co-occupant deserves to be safe against all outside intruders whose primary purpose was to batter and kill him. A fortiori, here, those intruders were ski-masked, invaded in nighttime, and had to fight off the attempts of an occupant to repel them from his home.

Ray's reasoning, 522 So.2d at 967, is on point:

> We thus agree with *State v. Mogenson*, 10 Kan.App.2d 470, 475, 701 P.2d 1339, 1344-45 (1985), where the court, confronted with our precise problem, stated:

> 'Assuming defendant was initially authorized to enter the house when his son unlocked the door, that authority was terminated when the defendant's wife demanded that he leave the house.

Analogizing to search and seizure law, once any person, including Jack, with a privacy interest in searched premises revokes any pre-existing consent, that consent is not longer valid. See, e.g., Silva v. State, 344 So.2d 559, 562 (Fla. 1977) ("a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another"). Jack, as a lawful co-occupant of a home, was no less protected simply because accomplice-Linda lived there. Jack's right to peacefully use his home as "sanctuary" is no less important than his right to not retreat from it (Weiand); the latter springs from the former, and the former belies Appellant's position. Here, Jack's words and actions expressed his desire to maintain this home as his sanctuary.

In a nutshell, regardless of any purported "consent" for third-parties to enter, it can be effectively revoked by anyone with a sufficient privacy interest in the property. Jack revoked it by his words and actions.

Moreover, as a matter of statutory interpretation and public policy, the State respectfully submits that, even without Jack's explicit revocation punctuated with swings at the ski-masked intruders, the co-conspirator's "consent" should not be cognizable under the law; it is void ab initio. In this sense, this ISSUE I claim distills to statutory interpretation of whether the Burglary statute prohibits a person from entering a

victim's home for the purpose of killing the victim where a co-conspiring "consenter" is a co-occupant of the home and where the purpose of the conspiracy was the illicit purpose of entry. The State submits that the legislature could not have intended for the statute to exclude Bradley entering and remaining in the home for the purpose of killing Jack.

Reading Section 810.02(1), Fla. Stat., with related provisions to ascertain its intent,[13] Appellant's interpretation runs afoul of the penultimate purpose of the burglary statute of securing citizens' safety in their homes. By enhancing the penalty for burglarizing a **dwelling**, the legislature has made clear its desire to protect the privacy of one's home. The home should be a place where one feels safe from intruders, where one can relax, such as in one's TV room in the evening on November 7, 1995. Compare §810.011(2), Fla. Stat. (dwelling as a structure "designed to be occupied by people lodging therein at night, together with the curtilage thereof") with §810.02(3) (higher penalty for burglary of a dwelling). If there is any situation where the application of the penultimate purpose of the burglary statute is clear, it is against the intrusion of non-occupants of the home.

Further, the legislature reserves the **highest penalties for assaulting or battering a person in the structure**. See

[13]See, e.g., State v. Espinosa, 686 So.2d 1345, 1347 (Fla. 1996) ("in pari materia"); Mack v. Bristol-Myers Squibb Co., 673 So.2d 100, 110 (Fla. 1st DCA 1996) ("a law should be construed in harmony with any other statute having the same purpose"); State v. Baxley, 684 So.2d 831, 832 (Fla. 5th DCA 1996) ("gives both schedules meaning").

§810.02(2), Fla. Stat. This statute, by specifying a single assault on "**any**" single occupant, is clearly designed to protect **each and every occupan**t, including a co-occupant (Jack), from co-conspirator non-home-occupant intruders (Bradley and the McWhites). Appellant's position runs afoul of the combined intent of both of the foregoing provisions.

In Fotopoulos v. State, 608 So.2d 784 (Fla. 1992) (penalty aggravator of "murder was committed during the course of a burglary"), where "[a]fter Chase shot Lisa, Fotopoulos shot Chase repeatedly in an attempt to make it appear that Chase was killed during a burglary":

> Fotopoulos, the son-in-law of the owner and occupant of the burglarized home, had no legal or moral authority to consent to entry by his coconspirator for the purpose of murdering another occupant.

608 So.2d at 793. Apparently, Fotopoulos was also occupying the home at the time. Here, Linda Jones "had no legal or moral authority to consent to entry by [her] coconspirator for the purpose of murdering another occupant."

Applying Fotopoulos' parenthetical summary, Id., of K.P.M. v. State, 446 So.2d 723 (Fla. 2d DCA 1984), the wife of a co-owner "and occupant of the burglarized home had no legal or moral right to consent to [a co-conspirator's] entry into family home for purpose of" killing the spouse-occupant.

Indeed, the holding and reasoning of K.P.M. v. State, 446 So.2d 723, 724-25 (Fla. 2d DCA 1984), are on point. As here, a co-occupant (Tim Koda) "consented" to the entry of others for the purpose of committing a crime inside the co-occupied house —

there, theft, and here, murder. As here, the co-occupant facilitated the entry. K.P.M. rejected consent as a defense:

> In *Damico v. State*, 153 Fla. 850, 16 So.2d 43 (1943), *** the Florida Supreme Court affirmed the conviction finding that the corporate officer had no legal or moral right to consent to the crime.
>
> Similarly, Tim Koda had no legal or moral right to consent to K.P.M.'s entry into his family's home for the purpose of stealing property which did not belong to Tim. The consent of Tim Koda was unauthorized and inoperative.

Here, Linda Jones' "consent" to commit unlawful acts against the person and property of a co-occupant of a dwelling was "unauthorized," illustrating that such a consent is not a per se defense to the charge of what would otherwise be a burglary. Linda Jones had "no legal or moral right to consent to" Appellant's entry into the home for the purpose of killing a co-occupant.

Thus, facial "consent" is not necessarily legally cognizable consent. Applying the rationale of Jones v. State, 640 So.2d 1084, 1086 (Fla. 1994) (upholding "that portion of section 800.04, which provides that consent is not a defense to a prosecution for sexual activity with a minor under sixteen"), entering a dwelling for the purpose of killing a resident "constitutes an intrusion upon the rights of that [resident], whether or not [a co-conspirator co-owner] consents." See also §794.011(2)(a), Fla. Stat.; Godwin v. State, 369 So.2d 577, 578 (Fla. 1979) (upholding conviction of "sexual battery by a person eighteen years of age or older upon a person eleven years of age or younger").

Further, just as the judiciary has refused to enforce other agreements as violative of public policy, See Liquor Store v. Continental Distilling Corp., 40 So.2d 371, 376 (Fla. 1949) ("contract is, therefore, contrary to public policy and void"); Lopez v. Life Ins. Co. of America, 406 So.2d 1155, 1159 (Fla. 4th DCA 1981) ("life insurance policy is void ab initio if it is shown that the beneficiary procured the policy with an intention to murder the insured"), it should refuse to enforce the one here, the sole purpose of which was to take a human being's life.

Here, whatever "consent" Linda Jones may have been construed as giving was "void ab initio" as "contrary to public policy" and contrary to legislative intent, and, arguendo, Jack clearly revoked whatever "consent" there may have been.

Appellant primarily discusses (at IB 49-52) two cases: Balletti v. State, 261 So.2d 510 (Fla. 3d DCA 1972), and McEver v. State, 352 So.2d 1213 (Fla. 2d DCA 1977). Appellant's primary reliance upon two DCA cases each over 20-years-old is indicative of the weakness of Appellant's position.

Further, Balletti did not even concern Florida's modern burglary statute but instead, "breaking and entering a dwelling with intent to commit a misdemeanor." Further, Balletti held that there the defendant did not enter for any unlawful purpose, whereas here Appellant entered and remained for the purpose of a contract killing, i.e., killing the victim in his own home. Although the law might recognize a co-occupant's "consent" for the purpose of taking photographs, it should not recognize it for the reprehensible purpose here.

As Appellant concedes (IB 51), McEver was "decided on another legal point." Therefore, Appellant is relying upon 1977 dicta from a DCA. Moreover, in light of the discussion above, the State respectfully submits that the dicta is erroneous, in light of the purpose of the modern burglary statute and in light of sound public policy.

C. Premeditation and Felony Murder as Alternative Theories.

The jury was instructed on both premeditated and felony murder (XV 1849-51), and it returned a general verdict of guilty as charged of First Degree Murder. (III 531, XV 1876) The State has argued that it adduced sufficient evidence to support First Degree Murder under **both** premeditation and felony murder theories. However, under countless precedents from this Court, the State need have proved only one of those theories. See, e.g., Johnson v. State, 720 So.2d 232, 236-37 (Fla. 1998) ("jury returned a general verdict of guilt *** evidence is sufficient to uphold the conviction based on a theory of premeditation **or** felony murder"); Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998) ("sufficient evidence by which to sustain Donaldson's conviction of first-degree murder under a theory of **either** felony murder or premeditated murder"); San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997) ("evidence is sufficient to support San Martin's conviction for premeditated murder. Furthermore, the jury returned a general verdict on the first-degree murder charge and the circumstances of this case clearly support a conviction under the felony murder theory *** no error as to San Martin's

conviction for first-degree murder"); Jenkins v. State, 692 So.2d 893, 894 (Fla. 1997) (claim attacking sufficiency of premeditated murder; "Assuming without deciding whether the trial court erred, we find this error would be harmless because the evidence clearly supported a first-degree murder conviction on a felony-murder theory"); Parker v. Dugger, 660 So.2d 1386, 1390 (Fla. 1995) ("even the reversal of an underlying felony conviction does not affect a first-degree murder conviction where the jury is instructed on both premeditated and felony murder, there is ample evidence supporting premeditation, and the jury returns a general guilty verdict of murder"); Mungin v. State, 689 So.2d 1026, 1029 (Fla. 1995) (Although the trial judge erred in denying the motion for judgment of acquittal as to premeditation, we do not reverse Mungin's first-degree murder conviction because the judge correctly denied the motion as to felony murder); Atwater v. State, 626 So.2d 1325, 1327-28 n. 1 (Fla.1993) ("reversal of the robbery conviction would not affect the murder conviction because the jury was instructed on both premeditated and felony murder, there was ample evidence to demonstrate premeditation, and the jury returned a general guilty verdict of murder"); Teffeteller v. State, 439 So.2d 840, 844 (Fla. 1983) ("evidence shows that the conviction can be sustained not solely under a felony murder theory but also under a premeditation theory. The latter being valid, the alleged inadequacies in the underlying felony instructions become moot"); Vasil v. State, 374 So.2d 465, 470-71 (Fla. 1979) ("there was evidence to support a conviction for first degree murder based on premeditation *** this Court has

held that any error in instructing on homicide in the perpetration of other crimes is harmless"); Frazier v. State, 107 So.2d 16, 20 (Fla. 1958) ("We have carefully reviewed the record and find sufficient evidence to support a finding by the jury that the killing was by premeditated design. In view of this the charge complained of [concerning felony murder] cannot be said to be harmful, even if it were erroneous"); Sims v. Singletary, 155 F.3d 1297, 1313 (11th Cir. 1998) ("jury did not need to agree on the precise theory of first degree murder, only the offense itself").

In this case, where Appellant posed no cognizable challenge to **either** theory in the trial, he wishes his conviction for First Degree Murder set aside because the State did not prove **both** theories. Especially given Appellant's trial strategies that should bind him now, the State submits that this is not the case to revisit the well-settled principle.

Arguendo,[14] in an abundance of caution, (1) **if** the State did not prove both theories, and (2) **if** Appellant is a proper party to make this claim, and (3) **if** the Court then decides to consider this argument on its merits, the State respectfully submits the reasoning in Mungin as sound. See 689 So.2d at 1030.

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[14] Apparently a formal process involving consideration of a rule change that would require special verdicts or special jury interrogatories is currently underway. That formal process includes this Court's request of the Office of the Attorney General for its position on the proposal. The State in this brief focuses on whether special verdicts are **required by the law**, not whether such a change would be wise or otherwise desirable in future cases.

Moreover, in the face of the enormous body of law applying the principle of alternative theories, Appellant would cast aside the pivotal value of stare decisis. See Perez v. State, 620 So.2d 1256, 1261 (Fla. 1993) (Justice Overton, concurring; e.g., "our 1988 decision in *Bernie* has been consistently applied by this Court and other courts of this state for the past five years"). See also Dade County School Board v. Radio Station WQBA, et al., 24 Fla. L. Weekly S71, S72-73 (Fla. Feb. 4, 1999) (collecting authorities; right result for any reason); Murray v. State, 692 So.2d 157, 159 n. 2, 159-60 (Fla. 1997) (trial court summarily denied motion to suppress; "the trial court reasonably could have denied Murray's motion to suppress because" of consent); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Richardson v. State, 677 So.2d 43 (Fla. 1st DCA 1996) ("We affirm the denial of his sworn motion to vacate judgment of conviction and sentence, although for a different reason from the one given by the trial court"); Robinson v. State, 393 So.2d 33, 35 (Fla. 1st DCA 1981) (motion for new trial; "If a trial court's order is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been entered for erroneous reasons, the order will be affirmed").

Concerning Appellant's argument (IB 52) that he merits a new trial because of an alternative theory of guilt is flawed as a matter of law rather than as a matter of evidentiary support, he

fails to point to any guilt-phase evidence whatsoever that Linda Jones consented to the heinous, atrocious, and cruel manner in which her husband was killed. There was no guilt-phase evidence that she consented to what Appellant did, i.e., the prolonged and agonizing beating of her husband. As discussed in a footnote supra, consent is an affirmative defense, and as such, the burden was on Appellant to establish that his entry was within the parameters of pre-existing "consent," and he failed. Indeed, the evidence that she uttered "stop" may be interpreted as disapproving the manner in which Jack was killed.

ISSUE II

IF THIS ISSUE IS NOT PROCEDURALLY BARRED, WAS THE EVIDENCE SUFFICIENT FOR CONSPIRACY TO COMMIT FIRST EGREE MURDER? (Restated)

ISSUE II is procedurally barred because it was not presented to the trial court and waived. See Woods; Marquard; Archer; §924.051, Fla. Stat.; Lucas; Armstrong; and accompanying discussions in ISSUE I. Also, see Lott v. State, 695 So.2d 1239 1243 (Fla. 1997) ("issue challenging the admission of crime scene photographs is procedurally barred due to Lott's failure to identify objectionable photographs or state specific grounds for reversal other than asserting that the photographs were gruesome"); Hamilton v. State, 678 So.2d 1228, 1230 (Fla. 1996) ("Because the defense did not object to this particular statement on hearsay grounds, that issue now is procedurally barred"; "irrelevant that on initial appeal we found similar [but preserved] hearsay from a state social worker inadmissible");

Hill v. State, 549 So.2d 179, 181-82 (Fla. 1989) ("The constitutional argument grounded on due process and *Chambers* was not presented to the trial court. Failure to present the ground below procedurally bars appellant from presenting the argument on appeal."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (at trial, defense argued credibility as ground for cross-examination whereas on appeal defendant argued development of a "a viable defense theory"); Tillman v. State, 471 So.2d 32, 35 (Fla. 1985)("Here defense counsel merely proffered the testimony and argued its relevance. Trial defense counsel did not present to the court the specific argument relied upon here that the testimony came within an exception to the hearsay rule").

Arguendo, regarding the merits, Appellant (at IB 54) relies upon his discussion of ISSUE I to support his ISSUE II claim that the evidence was insufficient to prove Conspiracy to Commit Murder. He contends that the "evidence was equally consistent with a plan to merely beat Jack up and scare him." However, as the State argued at some length in ISSUE I, evidence showing a conspiracy to commit **MURDER** was introduced, thereby rendering it in conflict with evidence indicating a conspiracy to only beat up Jack. Under any standard of appellate review, whether it be the standard one or the circumstantial-evidence one, the evidence of a conspiracy to **MURDER** was sufficient. Also, see State v. Spioch, 706 So.2d 32, 34-35 (Fla. 5th DCA 1998) (affirmed a "conviction of Mary Spioch for conspiracy to commit premeditated murder"; evidence included motive and intent to pay the killer, communications with the killer, attempted cover-up). Cf. Jimenez

v. State, 715 So.2d 1038, 1039-41(Fla. 3d DCA 1998) ("jury could have reasonably inferred that the appellant conspired with Ulloa to purchase cocaine based upon the facts that the appellant arrived in Miami for a short visit; rented and followed the vehicle in which the money used to purchase the cocaine was transported to the site of the sale; and police K-9 dogs alerted to the former presence of U.S. currency in luggage found where the appellant had been residing"); Spera v. State, 656 So.2d 550, 551-52 (Fla. 2d DCA 1995) (defendant's actions coordinated with others in a drug deal); Manner v. State, 387 So.2d 1014, 1015-16 (Fla. 4th DCA 1980) ("conspiracy to obtain cocaine"; held that in addition to the defendant being present at the scene of the crime, he knew of the illegal nature of the transaction, thereby rendering the evidence sufficient).

ISSUE III

WAS THE EVIDENCE LEGALLY AND REVERSIBLY INSUFFICIENT FOR BURGLARY WHERE, PRIOR TO THE ENTRY INTO THE HOME, A CO-CONSPIRATOR HOME-OCCUPANT SPOUSE "CONSENTED" TO THE ENTRY FOR THE PURPOSE OF KILLING THE HOME-OCCUPANT VICTIM, AND, AFTER THE ENTRY, THE HOMICIDE VICTIM EXPRESSLY REVOKED ANY PURPORTED "CONSENT"? (Restated)

ISSUE III is procedurally barred because it was not properly presented to the trial court. See authorities cited in ISSUE I and II.

Arguendo, regarding the merits, Appellant adopts his ISSUE I attack on felony murder in arguing that the evidence was insufficient for Burglary, which was Count 2 of the indictment (I 7) and on which the jury convicted Appellant as charged (III

532). Accordingly, the State adopts as its response to ISSUE III its discussion of Burglary and felony murder in ISSUE I. Briefly put, Jack Jones, a legitimate co-occupant of the home revoked whatever "consent" co-conspirator Linda Jones gave to Appellant; at that moment **at a minimum**, Appellant nonconsensually remained in the home with an intent to commit an offense in the dwelling. Further, "consent" to enter for the purpose of killing a legitimate occupant is not "consent" contemplated by legislative intent or public policy underlying the crime of Burglary. In effectuating that "consent," the judiciary would be sanctioning an illegal act. And, even if Linda Jones gave Appellant "consent" that the law is somehow willing to sanction, Appellant has not shown that the affirmative defense was proved by establishing that the brutal manner in which he killed the victim was within the scope of that "consent." There was sufficient evidence to establish Burglary, as a matter of fact and law.

ISSUE IV

DID THE TRIAL COURT REVERSIBLY ERR BY ADMITTING INTO EVIDENCE VANDALISM AGAINST THE CAR OF JACK'S GIRLFRIEND ABOUT ONE WEEK PRIOR TO THE MURDER? (Restated)

Appellant contests the admission into evidence of testimony concerning vandalism of Carrie Davis' car on October 31, 1995.[15]

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[15] When the general topic of the 31st was encountered in the trial, defense counsel objected "for the same reasons raised in the pretrial motion," and the trial court granted counsel's request for a "standing objection as to any testimony about what happened on Halloween." (XI 1131)

The contested evidence was not so-called "*Williams* rule evidence." See Griffin v. State, 639 So.2d 966, 968 (Fla. 1994)

However, this evidence, was inextricably intertwined with the charged Murder by Linda Jones' motive, the temporal relationship between the two events, the parties involved in both of them, and the method in which Linda Jones perpetrated both.

Most importantly, both incidents involved Appellant as the leader-henchman in effectuating Linda Jones' motive: On October 31, 1995, he was her henchman to secure the return of her property, and on November 7, 1995, he was her henchman for killing Jack. The motive for both was Linda's pre-occupation over Jack's affair with Carrie Davis and its implications for her financial situation, and Linda used Appellant to "execute" her motive in both incidents.

Thus, as the prosecutor argued below, the incidents were inextricably intertwined. The October 31st incident was relevant and probative. It was admissible. Appellant has failed to meet his appellate burden of establishing that the trial court's ruling was unreasonable. Compare Jent v. State, 408 So.2d 1024, 1029 (Fla. 1982)("trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed"); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994)("trial court's rulings with regard to the relevancy and admissibility of evidence ... subject to an abuse of discretion standard of review"), with Canakaris v. Canakaris, 382 So.2d

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(distinction between (a) Williams rule evidence, limited to "[s]imilar fact evidence," and (b) evidence that is an "inseparable part of the act which is at issue").

1197, 1203 (Fla. 1980)(to establish an abuse of discretion, Appellant must show that the trial court's ruling was "arbitrary, fanciful, or unreasonable").

As Appellant indicates (IB 55), the purpose of the October 31, 1995, raid on Carrie's apartment was to retrieve a wedding-set of rings that Jack had given to Carrie. (Compare XIII 1386 with XIII 1423-25). Accordingly, about one day before the murder, Linda Jones told Janice Cole that she knew of Jack's affair with Carrie and that

> one of the biggest reasons for the money problems was that he was going out and charging a lot for Carrie, and one of the items was a diamond ring that she [Linda] had seen on her charge statement and she was real upset about it.

(XIII 1432-33) After narrating Linda's preoccupation with the finances and jewelry, Cole testified:

> Q After that part of the conversation did she indicate anything to you about how upset she was?
> A Definitely.
> Q What did she tell you?
> A She told me she was real upset with the situation and everything that she had been through. That she knew at this point that she could just take a gun and kill Jack and get away with it because of the issues that had come up and she was so upset with him.
> Q What did you say in response to that?
> A I told her ... not to be crazy.
> I said, Linda, don't do anything like that. I said, The next thing I know I'll be reading about you in the paper, seeing you on TV, and they'll be calling you Linda Buttafuco or something like that. I said get a divorce. You know, there's life after divorce. I said, Look at me. I'm very happy. I said, Go on with your life.
> [At this point, Janice recommended a divorce lawyer, but Linda thought she was recommending a man for "something else"]
> Q *** What did you say in response to that?
> A That's when -- sometime through this conversation is when I came back and said, Linda, don't be crazy.
> ***

> Q ... Did she give you any other reason why she could not get a divorce from Jack?
> A She said that if she gets a divorce that his new wife would get his life insurance. And she told me, and I thought the figure was $500,000 at the time, if they got a divorce that she would not be able to get that life insurance. And that was one of the main things, that she wasn't going to be fat and forty and alone. [Two days later Janice heard that a "Lake Asbury man" was beaten to death, and she told a companion, "I just know that's Jack."]

(XIII 1434-37)

Janice Cole's testimony is dispositive. As discussed in ISSUE I, it shows Linda Jones premeditation to **kill** Jack. Linda Jones was consumed by Jack's infidelity and attendant expenditures on his girlfriend, Carrie Davis, and on October 31 **and** November 7, she used Appellant as a tool to "remedy" her outrage and "make things right" financially for herself while simultaneously striking back at the Jack-Carrie relationship.

Having failed to obtain her "remedy" of retrieving the jewelry on October 31, Linda was "real upset," and "executed" her anger on November 7 through the same henchman she used on October 31, i.e., Appellant, who, in turn, secured roughly the same "muscle" for both raids. Therefore, the contested evidence was relevant to, and probative of, the November 7 Burglary-First Degree Murder effectuated through a conspiracy to kill Jack; the contested evidence was not "introduced solely for the purpose of showing bad character or propensity" (IB 56). **The November 7 incident flowed from the October 31 incident, and they both flowed from Linda's hatred of Jack's affair with Carrie and its financial implications. The two incidents were inextricably intertwined.**

Recently, Jorgenson v. State, 714 So.2d 423, 426-28 (Fla. 1998), summarized and applied the distinction between similar-fact evidence under Section 90.404 and evidence relevant to "motive for the alleged murder." Accord Griffin. Just as the evidence of "drug dealing" in Jorgenson was admissible, the evidence showing Appellant's "motive for the alleged murder" was admissible here.

In ISSUE I, Appellant argues (IB 47) "frenzy" as a "reasonable hypothesis" of innocence from premeditated murder, yet in ISSUE IV he attempts to deprive the State of evidence showing motive-related background of the planned killing of Jack Jones. Spencer v. State, 645 So.2d 377, 381 (Fla. 1994), discussed the defense of "heat of passion," 645 So.2d at 381, and like here, pointed to the nature of the wounds as a type of evidence showing premeditation. Most pertinent to ISSUE IV, Spencer continued, Id.:

> Spencer's **previous attacks** on Karen and the **threats that he made to both Karen and her son** are also proper evidence of premeditation. *King v. State*, 436 So.2d 50, 54-55 (Fla.1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 163 (1984).

Here, Linda's orchestration of the raid on Carrie's apartment using Appellant as her tool was just as relevant and probative as the prior attacks in Spencer and not nearly as prejudicial.

Spencer cited to King, which also controls. King upheld the admissibility of "testimony that he had severely beaten the victim twenty-three days prior to the killing." Thus, although King was decided on multiple grounds, Spencer cited it concerning premeditation. In King, evidence showing the nature of the

relationship between the defendant and the victim was admissible because it showed its deterioration. Here, the Carrie raid showed the deteriorated Linda-Jack relationship that ultimately resulted in the contract killing.

In Pittman v. State, 646 So.2d 167, 170-71 (Fla. 1994), the contextual background of the charged murders included Pittman's pending divorce proceedings involving one of the victim's daughters. The divorce proceedings were hostile and included the defendant's "threats against Marie and her family." As here, evidence of a hostile relationship and the bad acts due to it were admissible.

Layman v. State, 652 So.2d 373, 374-75 (Fla. 1995) (footnotes omitted), is on point and controls:

> Greg Layman's girlfriend, Sharon DePaula, broke off their relationship in April 1991. The next month, Layman battered her and **vandalized cars belonging to her and her friend**. On the night of July 24, 1991, Layman laid in wait outside Sharon's home and surprised her when she returned from work. He shot her twice with a sawed-off shotgun, killing her.

In Layman, two months prior to the murder of the ex-girlfriend, vandalisms and battery were "integrally connected to the murder" because of their relevance "to show motive and premeditation." Here, within about a week of the murder of the husband, vandalism was "integrally connected to the murder" because of their relevance "to show motive and premeditation."

Griffin v. State, 639 So.2d 966 (Fla. 1994), upheld the admissibility of evidence that included, inter alia, stolen keys from a motel room even though it implied that Griffin was involved in burglary that was not being tried; testimony

concerning a home-invasion robbery the night before the charged events; and testimony concerning Griffin's intent "to rob someone" and concerning an uncharged aborted burglary. In Griffin, the killing of a police officer flowed from events motivated by an intent to rob and burglarize. Here, the killing of Jack Jones and the raid on Carrie's apartment flowed from Linda Jones' motives for revenge and property/money, and, when she did not receive a full measure of satisfaction from the Carrie-raid, she resorted to killing Jack through the same henchman that she used October 31, Appellant.

Because the contested evidence concerns Linda's hatred of Jack's relationship with Carrie and the artifacts of that affair and concerns the same henchman (Appellant), it is more crime-specific and therefore far more relevant and probative than in Armstrong v. State, 642 So.2d 730, 736-37 (Fla. 1994) (police officer killed), where a witness testified "that Armstrong told her, over a year before the shooting, that he hated police officers."

Here, more than in Heiney v. State, 447 So.2d 210, 214 (Fla. 1984), the evidence was "relevant to show motive for the subsequent crimes and to establish the 'entire context' of the crimes charged." In Heiney, the evidence was "relevant to show that Heiney's desire to avoid apprehension for the shooting in Texas motivated him to commit robbery and murder in Florida so that he could obtain money and a car in order to continue his flight from Texas," whereas here the evidence was "relevant to show that [Linda's] desire to [obtain revenge and] obtain money"

and effectuate that same motive in both instances through Appellant.

Thus, the vandalism showed that Linda was consumed by the victim's association with Carrie. All of these events were inextricably intertwined with motive and "reflective" of her premeditation, ultimately to have Jack killed by Appellant. See, e.g., Damren v. State, 696 So.2d 709, 711 (Fla. 1997) (evidence of a prior crime that occurred within "several weeks before the murder" was "integrally connected to the present crimes" because it was pertinent to "specific intent"); Finney v. State, 660 So.2d 674, 681-82 (Fla. 1995)("other crime evidence is used to prove motive"); Maharaj v. State, 597 So.2d 786, 790 (Fla. 1992) ("newspaper articles accusing him of committing various crimes *** were relevant to show Maharaj's motivation in harming Derrick Moo Young"); Fotopoulos v. State, 608 So.2d 784 (Fla. 1992) (analyzing severance issue; "evidence of each offense ... admissible at the trial of the other to show common scheme and motive, as well as the entire context out of which the criminal action occurred"); Herzog v. State, 439 So.2d 1372, 1376-77 (Fla. 1983) ("previous threat..., ... 'fast-draw' contest, ... two black eyes"); Brown v. State, 611 So.2d 540 (Fla. 3d DCA 1992) ("rocky relationship, that there were problems with his jealousy, and that he did not want anyone else in the house"). See also Sireci v. State, 399 So.2d 964, 967 (Fla. 1981) ("previous difficulties between the parties").

Appellant argues that the evidence was not "necessary" (IB 57-58), yet elsewhere in his brief (ISSUES I and II), he contends

that the evidence was insufficient to establish that he and Linda conspired to kill Jack. In ISSUE IV, he argues the State did not need this evidence, and, on the other hand, he argues that the State's evidence showing a desire to have Jack killed was inadequate. In ISSUE IV, he would deprive the State of evidence that showed Linda's persistent, if not increasing, outrage over Jack's affair and her persistent, if not increasing, pre-occupation over the financial implications of that affair. He would deprive the State of evidence providing integral pieces of the puzzle answering ISSUES I and II.

Moreover, as discussed in ISSUE I, the identity of Appellant as the killer was the primary defense below, and evidence of the October 31 raid showed that Appellant and Linda already had an ongoing relationship in which he (Appellant) was assisting Linda in attacking the Jack-Carrie relationship.

Further, Appellant's argument suggests that the State, in deciding whether to seek admission of evidence that fleshes out a relationship underlying a murder, must anticipate every angle that the defense would attack at trial and on appeal; in other words, in deciding whether to seek admission of evidence, the State must anticipate "necessity." Such a requirement would be patently unreasonable, especially where the defense did not stipulate pre-trial that the killing was the result of any contract with Linda nor stipulate that Appellant was even at the house at the time of the killing. The October 31st incident is sufficiently intertwined with those of the killing through Linda's motives of revenge and greed and use of Appellant to

execute that motive; it was probative of a planned killing and Appellant as the perpetrator.

Arguendo, if any error exists, it was non-prejudicial and harmless, thereby not constituting a ground for reversal. See §924.051(1)(a),(3),(7) (appellant required to show "prejudicial error"), 924.33. Fla. Stat. (no reversal unless error "injuriously affected ..."); §924.051(8), Fla. Stat. ("strictly enforced").

Appellant admits that the "Halloween incident added little," but then somehow concludes that it was highly prejudicial (See IB 55,58). Although the October 31 incident fleshes out the flow of events and provides context of the murder, Linda Jones' statements to Janice Cole regarding killing her husband and obtaining insurance proceeds, combined with Appellant's post-killing statement that Linda would pay Appellant through insurance proceeds, rendered the introduction of the vandalism **relatively** inconsequential. Also, see facts bulleted in ISSUE I supra. Perhaps most dispositive is that **vandalism pales in contrast to the ski-masked, brutal, nighttime beating that Appellant inflicted upon Jack Jones in his home.**

Further, defense counsel expressly rejected an instruction on Williams rule evidence (XIV 1752), which would have been a gratuity[16] that, nevertheless, would have softened any prejudicial impact of the evidence. Appellant should not be heard on appeal

[16] The evidence was not Williams Rule evidence. See Griffin v. State, 639 So.2d at 968.

complaining of prejudice when in the trial court he declined a remedy for the prejudice.

Further, the trial judge repeatedly instructed the jury to evaluate the evidence in terms of the charges in the indictment and decide whether the State proved those beyond a reasonable doubt. (See XV 1847-75, XI 1038-43)

Moreover, evidence of the Carrie raid was kept in proper perspective. The State's direct examination of Brian McWhite consumed about 54 pages of transcript (See XI 1077-1132), and his testimony about the vandalism perpetrated on October 31 occupies less than three lines of transcript (See XI 1132 lines 16, 17, 18). Within the State's direct examination of Patrick McWhite, coverage of the Halloween incident was likewise relatively minor. (See XII 1208-50) Even within Carrie Davis' direct-examination testimony, she mentioned the damage done to her car in two lines of transcript. (See XIII 1425) Michael Clerk only testified about the Halloween incident for about fives pages of transcript (XIII 1385-90), and his testimony highlights the probative value of the incident, such as Appellant talking on the cell phone then directing the McWhites to break the windows (XIII 1389-90). Also, see State's Exhibit #30, showing October 31 Bradley-Linda phone calls.

Accordingly, the Halloween incident at Carrie's apartment was not overplayed in the prosecutors' two arguments. (See XV 1771-73, 1822-23, 1839-40, 1846)

Indeed, the prosecutor properly pointed out for the jury the probative value of the pattern of the Linda-Appellant phone

records, which included October 31 (XV 1846) as an intertwined part of that pattern. See table in ISSUE I supra showing phone calls. To the degree that evidence of October 31 is prejudicial, it is prejudicial because of its probativeness.

ISSUE V

DID THE TRIAL COURT REVERSIBLY ERR BY ALLOWING THE PROSECUTOR TO ASK A CRIME SCENE ANALYST ON CROSS-EXAMINATION IF ANOTHER OFFICER TOLD HIM THAT APPELLANT'S VAN HAD "PROBABLY BEEN DETAILED AT LEAST FIVE TIME SINCE DECEMBER 1995"? (Restated)

Even assuming that the evidence contested in ISSUE V was erroneously admitted, its admission was non-prejudicial and harmless. See §924.051(1)(a),(3),(7), (8), Fla. Stat.; §924.33, Fla. Stat. Cf. DiGuilio. Moreover, on the merits, the evidence was not hearsay.

The evidence contested here was the following prosecution cross-examination of FDLE crime scene analyst Steve Leary:

> Q Mr. Leary, on January 26, 1996, when you were processing the maroon van, prior to doing that did Lieutenant Redmond give you some information regarding the van having been detailed?
> A Yes, sir, he did.
> Q And what was that?
> A The information was that the vehicle had probably been detailed at least five times since December of 1995.

(XIV 1685) Through two further questions, the prosecutor clarified that the witness had no personal knowledge of the detailing or what it entailed or did not entail. (See XIV 1685)

Even assuming that the jury considered the content of the testimony as such, it was merely cumulative of what Lieutenant

Waugh had already testified, without objection, in the State's case-in-chief concerning what Appellant told the officer:

> Q And, what if anything, did he tell you that had been done to the van between November 7th, 1995 and January 22nd, 1996?
> A He said that it had been -- I'm thinking of the term. It was where you take it and have it cleaned at a place.
> Q Detailed?
> A Detailed. It had been detailed four or five times since then.

Through the prosecutor's questions, the witness then clarified that he did not ask Appellant if he (Appellant) had the detailing done and clarified that Appellant volunteered the information when the officer told Appellant that he was looking for the van. (See XIII 1532-33)

Because the content of the evidence contested in ISSUE V was already in evidence, it is not "stuff" at the level of requiring a new trial. See Rogers v. State, 660 So.2d 237, 241 n. 2 (Fla. 1995)("already testimony that Daniel had previously given consistent statements, so any mention of additional cumulative statements was cumulative"); Kearse v. State, 662 So.2d 677, 684-85, 685 (Fla. 1995) (harmless beyond a reasonable doubt because "same information regarding Kearse's use of an alias was admitted without defense objection through the testimony of Pendleton and the State exhibits of Parrish's ticket book and notepad and a printout of the BOLO"; also, "error in admitting this... [hearsay] testimony [regarding location of victim's body] was harmless beyond a reasonable doubt, ... as others present at the scene testified about Parrish's location without defense objection"); Morgan v. State, 639 So.2d 6, 11 (Fla. 1994)

("Morgan provided this same version of events to a psychiatrist and what he told that psychiatrist was also admitted at trial. Consequently, we find that even if the statements were not voluntarily given to the officer, any error in admitting those statements was harmless"); Rogers v. State, 511 So.2d 526, 532 (Fla. 1987)(harmless hearsay and speculation; "substance of this hearsay testimony had already been presented to the jury during the cross-examination of Arzberger herself"); Echols v. State, 484 So.2d 568, 572 (Fla. 1985) (harmless error applied to search and seizure issue; inter alia, because first tape admissible, rendering any error in admitting second tape harmless); Palmes v. State, 397 So.2d 648, 654 (Fla. 1981)("the error is harmless where substantially the same matters are presented to the jury through testimony of the same or some other witness").

A fortiori, to the degree that any specifics whatsoever were provided about the detailing, it was through Waugh, not Leary. Further, it was clear that the source of Leary's information was another witness (Redmond), who was present with Waugh when he interviewed Appellant. (See XIII 1482) Thus, putting Waugh's and Leary's testimonies together, the only apparent source of the information provided to Leary was Appellant himself.

Arguendo, on the merits, the State submits that the contested testimony from Leary was not hearsay at all. To be hearsay, a statement must be "offered in evidence to prove the truth of the matter asserted" in it, §90.801, Fla. Stat. In the words of Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982): "The hearsay objection is unavailing when the inquiry is not directed to the

truth of the words spoken, but, rather, to whether they were in fact spoken."

Here, the contested statement was not offered to prove the truth of the content of the statement, i.e., it was not offered at that time to prove that the van was detailed, but, instead, to corroborate Waugh's earlier testimony that Appellant, in fact, made the statement about detailing the van. Redmond, who was with Waugh during the interview of Appellant, was able to tell Leary about the detailing because Appellant, in fact, did tell Redmond and Waugh about it: It was the fact that Redmond was able to make the statement, which, in turn, supported Waugh's testimony that Appellant did volunteer the detailing information. See Emmco Ins. Co. v. Wallenius Caribbean Line, S.A., 492 F.2d 508, 511 n. 3 (5th Cir. 1974) ("Since Sibila was a party to the conversation, his testimony is properly admissible to prove there was such a conversation" distinguished from offering it to prove the truth of what is asserted in it).[17]

Put another way, Redmond's ability to tell Leary about the detailing was a "verbal act," not even a statement, as defined in the evidence code. See U.S. v. Hansbrough, 450 F.2d 328, 329 (5th Cir. 1971) ("the statement was not offered to prove the truth of the matter asserted therein (i.e. the identity of the caller) but rather was offered merely to establish that the call was made.

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[17] Also compare §90.704, Fla. Stat. ("facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial") with Leary's testimony at XIV 1677 (although would not change manner of processing the van, it was "another key piece of information").

As such, the statement was offered to prove a "verbal act" and was not excludible as hearsay").

A tell-tale sign that Redmond's statement to Leary was not offered to prove the truth of what was asserted in it was that its probative value did not depend upon "credibility of the declarant," U.S. v. Grant, 519 F.2d 64, 67 (5th Cir. 1975), i.e., the credibility of Redmond. It was Redmond's ability to make the statement prior to Leary processing Appellant's maroon van on January 26, 1996, that was significant.

The verbal act of Redmond's timely ability to communicate what he had heard (information about detailing while he was with Waugh) supported the position that Waugh had not fabricated it. This comports with the policy of Section 90.801(2)(b), Fla. Stat. See, e.g., Stewart v. State, 558 So.2d 416, 419 (Fla. 1990) ("Marsicano's testimony was properly offered to combat Stewart's charge of recent fabrication"). Thus, the State disagrees with Appellant's position that there was no "implied charge of fabrication" (IB 62). Defense counsel, on re-cross examination, asked Waugh where Appellant's detailing statement was on the tape, and Waugh responded that Appellant turned the tape off two or three times. Defense counsel then asked if the detailing comment was made while the tape was off, and then defense counsel pointed out that the detailing statement was not in Waugh's police report either. (See XIII 1533-35)

However, the detailing statement was relatively inconsequential in the case; the defense's emphasis on it in its cross-examination of Waugh exaggerated a flaw in the case, and

the prosecution was entitled to corroborate Waugh by showing that Redmond must have also heard of the statement at about the same time as Waugh — otherwise Redmond would not have been able to tell Leary about it then. Therefore, the inference is that Appellant, in fact, made the statement, because Redmond showed his knowledge of it almost contemporaneous with when Waugh said it was made.

Because Appellant has failed to show how the contested evidence was hearsay, he has failed to meet his appellate burden of showing that the trial court's ruling was unreasonable. See Jent; Taylor; Canakaris; Dade County School Board v. Radio Station WQBA, et al. (right result for any reason); Murray v. State ("the trial court reasonably could have denied Murray's motion to suppress because" of consent); Caso v. State ("conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it").

In a nutshell, to the degree that Appellant asserts that the content of the Redmond-Leary "statement" was significant, the same content was in evidence through Waugh. To the degree that Appellant argues that the "statement" was significant because it supported Waugh, he supports the position that Redmond's ability ("verbal act") to contemporaneously communicate the same information legitimately corroborated Waugh. In any event, whatever significance this statement had, it paled in contrast to the other evidence in the case. See facts discussed in ISSUE I supra.

ISSUE VI

WAS THERE SUFFICIENT EVIDENCE FOR CCP? (Restated)

The State has extensively argued supra (ISSUE II and especially ISSUE I) that its evidence was sufficient to establish that Linda conspired with Appellant to kill her husband. See also ISSUE IV. The State's discussion included reliance upon a number of CCP cases, on which the State also relies here. Based on these and other cases, there was abundant evidence of CCP. See Archer v. State, 673 So.2d at 19-20 (Fla. 1996) (upheld CCP; "a contract murder, which is by its very nature cold"); Bonifay v. State, 680 So.2d at 419 (upheld CCP); Gamble v. State, 659 So.2d 242 (upheld CCP); Hoskins, 702 So.2d at 210 ("contract murder[]" justifies CCP); Jackson, 704 So.2d at 504-505 (dropped her keys, ...; upheld CCP); Echols v. State, 484 So.2d at 574-75 (conspiracy to commit murder in order to obtain control of the victim's estate supported CCP); Fotopoulos v. State, 608 So.2d at 792-93 ("staged like a production"; upheld CCP).

Here, as extensively discussed in ISSUE I, there was sufficient evidence to establish that Linda Jones contracted with Appellant to kill her husband. The proceeds Linda would obtain from the policy on Jack's life was to be Appellant's blood money. Moreover, as also discussed in ISSUE I, there was evidence that the beating was multi-phased, culminating in Appellant's cold and calculated approach to covering it up as drove from the bloody crime scene. CCP permeated this murder and events surrounding it.

In sum, there was abundant evidence conflicting with Appellant's self-serving ruse in which he stated that he did not

plan on killing the victim and conflicting with his claim that Linda killed Jack. Again, see ISSUE I.

ISSUE VII

WAS THERE SUFFICIENT EVIDENCE FOR THE AGGRAVATOR THAT THE MURDER WAS COMMITTED DURING A BURGLARY? (Restated)

This claim (IB 65-66) relying upon coconspirator-accomplice Linda Jones' consent for Appellant to enter the marital home to kill her husband was extensively briefed in ISSUE I and then briefly summarized in ISSUE III. Relying upon those discussions, the State contends here that the evidence was sufficient, and the instruction was proper on this aggravator.

ISSUE VIII

WHETHER APPELLANT'S DEATH SENTENCE WAS PROPORTIONATE? (Restated)

Appellant again argues that the killing was unintentional. This claim was addressed supra, primarily in ISSUE I, and also in II, and VI. The gravamen of ISSUE VIII, then, is Appellant's claim that he did not deserve death because co-conspirator Linda Jones received a life sentence (IB 68-83. See also IB 42, 66).

By a vote of 10-2, the jury recommended that Appellant be put to death (III 566, XVII 2228-30), and the trial court imposed the death sentence (XVII 2318) contested in ISSUE VIII. Facts in the record below supported the trial court's decision to sentence Appellant to death.

Appellant knew he was going to kill Jack as he donned a ski-mask and entered Jack's home in the evening of November 7.

Knowing his deadly design, **Appellant** beat Jack to the floor in a room near the front door of the home. Knowing his deadly design, **Appellant** dragged Jack into another room. Knowing his deadly design, **Appellant** continued to beat Jack with the butt of the gun and with the club; at some point, **Appellant** pistol-whipped Jack by swiping the gun "back and forth across [his] face." Knowing his deadly design, **Appellant** ordered that Jack be tied up; after Jack was tied up, **Appellant** continued to beat Jack with the gun and the club. And, at some point, **Appellant** pointed a 45 caliber gun at Jack's head and pulled the trigger, but the gun did not end Jack's agony.[18]

The blows that could have caused Jack's death or that could have rendered him unconscious were not inflicted until after Appellant ordered that Jack be tied up. As Patrick McWhite testified:

> Well, I got in the room, that's when **Mr. Bradley said tape his hands** and threw me some tape and I attempted to tape his hands. *** **The gentleman wouldn't give me his hands**. *** **He was covering his head**.

Patrick told Jack to "please give me your hands, sir," as Appellant "continued to hit" Jack, and Patrick finally succeeded in tying Jack's hands. (XII 1233-34) Sometime after Jack's hands were tied, Appellant struck the lethal blows that also would have rendered Jack unconscious.

State's Exhibits 16 and 20 and Dr. Arruza's testimony illustrate results of Appellant's prolonged, brutal, and

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[18] These facts are derived from discussion in ISSUE I supra.

extensive torture of the victim. For example, the doctor testified that Jack had "bruises, abrasions ..., and lacerations all over the head, the trunk, the back of the trunk, and the extremities" (XII 1345). She indicated that Jack had the following injuries:

- "Starting with the face, ... severe bruising on the right cheek[,] ... smaller bruising on the left side on the left cheek[,] ... an abrasion on the upper left forehead[,] [t]wo little abrasions around the left eye[,] ... a big laceration, which is a big tear, through the outer ear, the left ear, with abrasions in the back, *** orbital fractures" (XII 1346);
- "In the back, he had a total of eight patterned contusions, plus little bruises that were in the lower interior abdomen above the hip" (XI 1367), including two blows to his back that were "very severe," each fracturing ribs, and one even bruising the right lung (XII 1356, 1366-68);
- "[I]n the extremities, there were several small bruises and abrasions ... [that] added up to about eight" (XI 1367); an impact to a knee was "very severe." (XII 1368)
- "[G]oing to the back of the head, he had several deep lacerations, tears, in the skin right in the back of the head" (XII 1346), including "four to five severe blows and two of those went through the entire thickness of the scalp" (XII 1348); "actually five to six lacerations which are more severe" in the head area, plus an additional seven bruises in the head area (XII 1367).

Injuries to the arms, legs, of back would not have caused unconsciousness. (XII 1369) Any of the blows to the back of the head "would have [very likely] rendered him unconscious," (XII 1370-71) especially the combination of those blows (XII 1377). The victim probably died "fairly quickly" after the severe blows to the head. (XII 1371) All of the blows were administered while Jack was alive. (XII 1372) The cause of death was "blunt trauma." (XII 1373)

Appellant, not Linda Jones, chose to inflict the multiple bruises and abrasions to Jack's face. **Appellant**, not Linda Jones, chose to partially tear off Jack's ear. **Appellant**, not Linda Jones, chose to inflict "eight patterned contusions" and other bruises to Jack's back area. **Appellant**, not Linda Jones, chose to inflict two blows to Jack's back that were so severe they broke ribs, and one of them even bruised a lung. **Appellant**, not Linda Jones, chose to inflict on Jack's extremities about eight bruises and abrasions and a "very severe" blow to Jack's knee. And, **Appellant**, not Linda Jones, chose to inflict seven bruises to Jack's head, including five or six severe blows to the back of Jack's head.

There is no doubt that Appellant's deeds constituted **the essence of HAC**.

Here, contrary to his suggestion otherwise (IB 76-80), Appellant has failed to show that Linda Jones was complicit in the enormously cruel manner in which the Appellant slowly and

tortuously executed Jack.[19] She did not plan this enormous and prolonged cruelty "down to the last detail" (IB 68) or "every detail" (IB 78).[20]

Thus, the trial court found that the "principal difference" between the aggravators against Appellant and Linda was HAC:

> [T]here is no evidence that she planned or instructed Bradley on **how the beating would actually be inflicted**. Although Linda planned that her husband would be beaten to death, that could be carried out by a single blow to Mr. Jones' head, which the medical examiner testified could have rendered Mr. Jones unconscious, if not killed him. Had Donald Bradley carried out the beating murder in that manner such that with the first blow Jack Jones was either killed or rendered unconscious, then the heinous, atrocious, and cruel aggravator would not have been available to the State in this case and would not have been given to the jury. For whatever reason existed in his mind, Donald Bradley elected to carry out the beating death of Jack Jones in a way that maximized the victim's suffering rather than minimizing it. It was factually and logically appropriate that the H.A.C. aggravator be given in Donald Bradley's case and not in Linda Jones' case. This creates a significant and persuasive difference between the aggravating factors present in each of those two cases.

(V 872) This finding was supported by the evidence summarized above and in ISSUE I supra.

Clear distinctions between the facts here and Appellant's cases illustrate the appropriateness of the death penalty here for the party clearly responsible for the brutal details above. For example, Appellant's reliance upon Puccio v. State, 701 So.2d

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[19] Also, concerning reasonable lack of weight that might be placed upon Detective Waugh's testimony about what Greg Green told him that Linda told him (Green), it was obvious hearsay.

[20] Further, Linda did say "stop" (XI 1110), suggesting that she had some second thoughts about the extremely cruel and prolonged manner that Appellant chose to execute her husband.

858 (Fla. 1997) (discussed at IB 70-71), is misplaced. In Puccio an accomplice struck the first blow (stabbing the victim), accomplices participated in tackling the victim and additional stabbings, and an accomplice "delivered the final blow with a weighted baseball bat," whereas here, Appellant struck the first blows with the lethal weapons (i.e., the club and gun), the last blows with them, and all of the blows in between with them. In Scott v. Dugger, 604 So.2d 465 (Fla. 1992) (IB 71-72), like Puccio, and unlike here, the accomplice was the "first to try" to kill the victim, and in Scott, unlike here, there was "little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent," 604 So.2d at 468. In Hazen v. State, 700 So.2d 1207 (Fla. 1997) (IB 72), a disparately treated accomplice (Buffkin) lead the intruders to the victims' house and confronted the victims at their door with a gun and told them "I'll blow your fucking head off," and another accomplice threatened a victim, pistol-whipped, and shot him. There was even doubt whether Hazen knew what was going on. Here, in contrast, Appellant micromanaged and actually perpetrated the brutality in all its gory details.

Under appropriate circumstances, as in Larzelere v. State, 676 So.2d 394 (Fla. 1996) (IB 72-73, 80), Linda could have been lawfully sentenced to death even if Appellant had been sentenced to life, if, in addition to Linda conspiring the murder, she had endorsed the manner in which the murder was executed by reenacting the murder with the killer, See Id. at 398. Unlike Linda, Larzelere was setting up the murder for insurance money

months in advance by procuring insurance policies on the victim's life. Moreover, in Larzelere, the defendant was unfaithful to the victim in their marriage, whereas here, the victim's unfaithfulness was the major impetus behind Linda's general planning and actions.

Therefore, Appellant has failed to address the trial court's reasonable finding that Linda Jones' situation was imbued with some degree of "pretense of moral justification" (V 870-71, 873).

Concerning some of the specific evidence pertaining to Linda Jones' "pretense of moral justification," her trial included her writings to Jack, to various family members, and to diary:

> Are you interested in salvaging anything in our relationship? Are you interested in doing fun things with me?
> ***
> Shoot me or I'll kill myself. I can't take anymore.
> We all pray you don't continue to make all our lives a living hell. The girls are wanting wonderful holidays just like we've always had. Jill [daughter] is so very upset. We love you and need you.
> ***
> Frank. *** I don't want Jill [daughter] to suffer anymore. I love you. Your sister.
> Mom and Dad. Your support has got me further than I thought I could make it but I can't take the degradation any longer. You helped me in every possible way you could. Please take care of my babies. Jack is out of their life. ***
> Is written at 1:00 am. I couldn't sleep. I'm like a mad person sick with rage but don't anyone ever tell you I was crazy. You both know Jack wants to be happy. Well he should be happy now. *** I'll always be by your side and in your hearts.
> I love you, Mom.
> *** I'm sorry for bringing that whore in this house.[21] I ruined your life. *** It pains me so I can't fix this

[21] Linda invited Carrie to stay with her and Jack. Carrie did not even know Jack before Linda invited her into the home. (XIII 1419)

> mess but I've had to face the fact you or I didn't make this mess. Jack doesn't want us anymore.
>
> I hope Jill [daughter] can forgive me and you too Shane for bringing that whore into this house. Jill suffered the most. Jack pushed that whore on Jill all the time.
>
> Don't ever help anyone. You will get screwed.
>
> ***
>
> Shane and Jill. I can't stand it any longer. Every morning at 5:15 or before and every nite your dad leaves me. He wants his *** freedom. *** I love you both more than life itself. You both know where everything is. Take care of business. I'm so proud of both of you and I made you stronger than me. Yes, I did love Jack to the very end. ***

(SR V 920-21, 926-31) (footnote supplied)

> [Linda Jones' Calendar entries]
> 9/25/95 - 9/27/95:
> On vacation. Decent.
> 9/29/95: Came home. Dropped me off. Straight to whore.
> 9/30/95: Went to whore and shopped at Pic N' Save. He charged. Jill [daughter] home.
> 10/13/95: Charged ring.
> ***
> 10/16/95 - 10/20/95:
> Late every night.
> 10/19/95: He left me alone. Had lunch with whore.
> ***
> 10/27/95 - 10/28/95:
> Stayed at whore's. Jill [daughter] asked him to come home.
> ***
> 11/1/95 - 11/4/95:
> Offered numerous times to pay bills and keep current. He refused.
>
> ***

(SR V 922-25)

This evidence, showing Linda's "pretense of moral justification," was presented in Linda's trial, over which the same trial judge as here presided (Compare, e.g., SR I 1 with V 874).

Thus, the State disputes Appellant's assertion that the "trial judge found no difference in the CCP aggravator[]" (IB 75). The

trial court's reasoning was supported by, inter alia, the trial record here as well as the foregoing excerpts from Linda's trial record:

> The definition of the [CCP] agggravator itself includes language that it was carried out 'without any pretense of moral or legal justification[.]' The jury in Linda Jones' case may well have concluded that she had some pretense of moral justification in wanting her husband murdered because of his infidelity to her and his dissipation of marital assets for the benefit of his mistress. No such pretense of moral justification could be found with respect to Donald Bradley in the application of this aggravator to him.

(V 870-71) The trial court, having noted that Linda also "planned this murder in a cold, calculating, and premeditated manner," then concluded that a comparison of this aggravating factor [of CCP] in each case would be given "little weight" (V 870-71)

In Appellant's case, the trial court gave "some weight" to pecuniary-gain and committed-during-a-serious-felony aggravators applicable in both Appellant's and Linda's cases. (V 871)

Concerning comparing Appellant's and Bradley's mitigators, the trial court found that Linda was entitled to receive the mitigating factor of "absence of any significant history of criminal activity," whereas Appellant waived application of that factor. (V 872. Accord XVI 2142-47) Appellant should now be bound by that waiver. Further, the trial court pointed out that Bradley had a "prior felony conviction as an adult which resulted in a three-year prison sentence" as well as a "significant prior juvenile criminal record" (V 872). Appellant all-too-casually brushes aside the differences between his multi-faceted and rather extensive criminal record when he contends that comparing

his criminal history with hers is "like comparing apples and oranges" (IB 82); importantly, Linda appears to have been a law-abiding citizen until she was "rewarded" for helping Carrie with shelter by her husband's infidelity and dissipation of marital assets. Indeed, it is the trial court's discretionary role to compare "apples and oranges," and, where exercised reasonably, as here, it should not be disturbed on appeal.

To capsulize much of the discussion to this point, Linda's premeditation was emotionally precipitated by Jack's unfaithful acts, whereas Appellant's premeditation was not. And, as Linda at least uttered a "stop" during Appellant's beating of her husband, Appellant continued to pound the life out of Jack. In any event, there was no evidence that Linda planned for Appellant to rip Jack's ear, break his ribs, bruise his lung, and inflict the other numerous wounds described above. There was no evidence that Linda planned for Appellant to beat Jack to the floor, drag him into the next room, beat him some more, then, only after this torture, administer the fatal blows. There was no evidence that Linda planned for Appellant to pistol-whip Jack and "swipe" the gun back and forth across Jack's face. The trial court's reasoning was supported by the record. It merits affirmance.

The State now discusses several cases that address the relative culpability of defendants within the same case, address the significance of the HAC, personally inflicted here by Appellant, and address the general appropriateness of the death penalty here.

Cole v. State, 701 So.2d 845 (Fla. 1997) (four aggravators of HAC, pecuniary gain, committed during kidnapping, previous felony conviction; two nonstatutory mitigators), is especially pertinent because it upheld a death sentence, HAC as one of the aggravators, the disparate treatment of the codefendant (Paul) receiving life **even though he was a participant at the crime scene**, and proportionality. There, HAC was based upon multiple blows to the head, including "at least three severe blows to the head caused by a blunt instrument." While Cole also involved suffering caused by cutting the victim's throat, Appellant inflicted substantially more suffering than the three blows there. Here and in Cole, the defendant was the "dominant actor [at the scene] and the one who committed the actual murder," 701 So.2d at 852. As in Cole, the death sentence here merits affirmance. Cole controls.

In Hayes v. State, 581 So.2d 121 (Fla. 1991), Gillam made the initial proposal to rob a taxicab driver and participated in the planned robbery in which Hayes also proposed that he murder the driver. After Hayes shot the driver pursuant to the plan, Gillam attempted to wipe off fingerprints. Hayes rejected a claim based upon the disparate treatment of the codefendants, including Gillam, who was allowed to plead to Second Degree Murder. Id. at 127. As here, there "was ample support in the record," Id., that the "triggerman" was more culpable. Here, although Linda proposed the general plan, Appellant executed it with brutality.

Hoffman v. State, 474 So.2d 1178 (Fla. 1985), upheld a death sentence in the face of a challenge that the person procuring the

murder was given life. There and here, HAC was an aggravator, as well as CCP. There, as here, the killer was more culpable.

Gordon v. State, 704 So.2d at 116-17 upheld HAC where

> the medical examiner opined that the doctor could have been rendered unconscious from the first blow to the head, the facts belie that this is what happened. If the victim had been rendered unconscious from the first blow, why inflict the others? Why blindfold him if he couldn't see? Why tie him up if he were lifeless?

Here, Appellant "inflict[ed] ... other[]" blows" and commanded that Jack be "tie[d] up." Moreover, there was direct evidence that he was still alive while being tied. Moreover, in Gordon, like here, an accomplice who instigated the killing received life. As here, in Gordon, the culpability of the accomplices was not equal, rendering the death sentence proportionate. Further, in Gordon, as here, the death sentence, based upon four aggravators (including, like here, committed during felonies, pecuniary gain, HAC, CCP) and "relatively minor nonstatutory mitigation" (family background, religious devotion, accomplice's life sentence)[22] was proportionate to other cases, Id. at 118.

Jennings v. State, 718 So.2d 144, 154 (Fla. 1998) (three aggravators including CCP; one statutory mitigator and eight nonstatutory mitigaors), upheld the death sentence in the face of a challenge based upon an accomplice receiving life:

> We find no abuse of discretion in the trial court's ruling on this issue. The fact that the eighteen-year-

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[22] Here, the trial court noted that the defense waived "no significant history" and failed to request the jury to consider his age. It continued by indicating that Appellant had no "recent ... criminal history," but gave it "very little weight," and gave Appellant's age "very little weight" because it failed to see how the age of 36 "in any way mitigate[s] the sentence." (V 865-66)

> old codefendant received life does not prevent the imposition of the death penalty on Jennings, whom the trial court found to be the actual killer and to be more culpable.

Here, there was no abuse of discretion in imposing death on Appellant, who was found to be "the actual killer and to be more culpable." Moreover, as here, the death sentence was not disproportionate to other cases, Id. at 154.

Although Orme v. State, 677 So.2d 258 (Fla. 1996), involved strangulation, it included the defendant administering a "severe beating," as here. Orme upheld HAC and the death sentence. Pointing to the defendant's ability to drive and other "normal" behavior surrounding the crime, Orme also rejected the claim that he could not control himself mentally at the time of the killing. Here, the Appellant-administered beating is at the same magnitude as in Orme, and Appellant was able to drive away from the crime scene while discussing ways to cover-up the crime. Most importantly, at the crime scene, Appellant had the "presence of mind" to have Jack tied and to cut Linda's tape as he left the home. Moreover, in Orme, only three aggravators were found (murder committed in the course of a sexual battery; heinous, atrocious, or cruel; and pecuniary gain), whereas here there are four. In Orme and here, to the degree that there was anything approximating statutory mitigation, it was outweighed.

Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985), upheld a trial court HAC finding based upon the

> nature and description of the wounds by the Medical Examiner support that the victim tried to defend herself for some period of time.... The documentation of diverse locations of blood pools and splatters

> around and about the grisly scene corroborate that the [appellant] did not effect instantaneous death of the victim and that she endured torturous knowledge of her impending death with excruciating pain.

As here, "[t]he evidence confirms that [Jack Jones] was the victim of a vicious, barbaric and savage murder by the [appellant], supporting the finding.

Colina v. State, 634 So.2d 1077, 1082 (Fla. 1994), upheld HAC where the defendant bludgeoned victims to death with several blows:

> In this case, both victims were beaten to death with a tire iron and the record reflects that neither victim was killed instantly. We find that the heinous, atrocious, or cruel aggravating factor was clearly supported by the evidence.

Here, Appellant "beat[]" the victim "to death" with a club and gun, "and the record reflects that [the] victim was [not] killed instantly" as he cowered on the floor attempting to protect himself from the shower of Appellant's blows and as Appellant readied him for his execution by having him tied.

Zakrzewski v. State, 717 So.2d 488, 494 (Fla. 1998) (HAC and two other aggravators; two statutory mitigators, ...), summarized Bruno v. State, 574 So.2d 76 (Fla.1991): "affirming the death penalty where the defendant beat the victim in the head with a crowbar, followed by shooting the victim in the head." The operative facts of Bruno are quite similar to those here, except here, there were more blows.

Grossman v. State, 525 So.2d 833, 840-41 (Fla. 1988), upheld HAC, emphasizing that "the murder was preceded by a brutal beating," which was roughly of the magnitude as here:

> [H]e struck the officer twenty to thirty times with a heavy-duty flashlight but was unable to beat her into unconsciousness or to subdue her despite his large size and the assistance of Taylor.

As there, "the trial judge did not abuse his discretion in finding that the murder was heinous, atrocious, and cruel. *Wilson v. State*, 436 So.2d 908, 912 (Fla.1983)," and here, the trial court did not abuse his discretion in finding HAC more applicable to Appellant than Linda.

Lawrence v. State, 698 So.2d 1219 (Fla. 1997), is particularly on point. Lawrence upheld HAC based on the defendant inflicting a "massive beating," Id. at 1221-22, as here. Moreover, Lawrence also put aggravators and mitigators in the context of other cases:

> Lawrence ... claims that his death sentence is disproportionate to other death penalty cases. We disagree. Three strong aggravating circumstances [under sentence of imprisonment, HAC, CCP] are arrayed against five nonstatutory mitigating circumstances. We have upheld the death penalty in comparable cases. *See, e.g., Johnson v. State*, 660 So.2d 637 (Fla. 1995) (death sentence upheld where three aggravating circumstances were arrayed against fifteen nonstatutory mitigating circumstances) ***; *Johnson v. State*, 660 So.2d 648 (Fla. 1995) (same), ***; *Finney v. State*, 660 So.2d 674 (Fla.1995) (death sentence upheld where three aggravating circumstances were arrayed against five nonstatutory mitigating circumstances) ***. Further, this was an extraordinarily brutal crime. We find the death sentence proportionate.

698 So.2d at 1221. Here, this "was an extraordinarily brutal crime," and Appellant orchestrated and executed the extraorininariness of that level of brutality, not Linda Jones. Here, there were four "strong aggravating circumstances," not three. Here, as in Lawrence, two of those were HAC and CCP. Moreover, as in Lawrence's trial court's consideration of "the

disparate treatment of Brenda," here the trial court expressly considered Linda's "disparate treatment." Here, as in Lawrence, "[c]ompetent substantial evidence supports the trial court's findings," 698 So.2d at 1222. Lawrence upheld the death sentence, as it merits upholding here.

Also, see Whitton v. State, 649 So.2d 861 (Fla. 1994) (HAC and death penalty upheld; five aggravators and several nonstatutory mitigators; beating; wounds that would have caused unconsciousness did not occur at outset of attack; proportionality claim rejected); Fotopoulos v. State, 608 So.2d 784 (upheld death sentence; four aggravators, including CCP and committed during burglary; five nonstatutory mitigators); Garcia v. State, 492 So.2d 360, 368 (Fla. 1986) ("We are not presented with a *Slater* situation where a trigger-man receives a life sentence and an accomplice the death penalty"); Echols v. State, 484 So.2d 568 (upheld jury override based upon three aggravators, which included CCP and pecuniary gain).

Therefore, Appellant's death sentence was proportionate and supported by the record and pertinent case law.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgments as to all charges and affirm the death sentence entered in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Nada M. Carey, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 19th day of November, 1999.

_____
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