IN THE SUPREME COURT OF FLORIDA

LABRANT D. DENNIS,

Appellant,

vs. CASE NO. 95,211

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT, IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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This brief has been prepared using 12 point Courier New, a font that is not proportionately spaced. For convenience to this Court, the State will cite to the record in the same manner as the Appellant, i.e., to the clerk's record on appeal as "R" and to the transcript of the proceedings as "T," except that, in addition, the State will include the appropriate volume number as required by Fla. R. App. P. 9.210 (b) (3).

STATEMENT OF THE CASE

Labrant Dennis was arrested on April 30, 1996 and charged with the April 13, 1996 murders of University of Miami football player Marlin Barnes and Timwanika Lumpkins, who was Dennis' former girlfriend and mother of his child. Dennis was indicted on May 8, 1996 (1R 1-4). The indictment contained four counts, including two counts of first degree murder, one count of burglary with assault or battery while armed, and one count of criminal mischief.

Following numerous pre-trial hearings, jury selection began on September 8, 1998 (55T 1030 et seq). The jury selection concluded on September 18, 1998 (70T 2862). The presentation of evidence began on October 6, 1998 (77T 3077), and concluded on October 26, 1998 (90T 4731). The case was submitted to the jury at 11:45 a.m. on October 28, 1998 (92T 5037). Following three and a half hours deliberation (93T 5086), the jury returned a verdict of guilty on all counts (92T 5038).

Penalty phase proceedings began with the presentation of evidence to the jury on November 30, 1998 (95T 5144 et seq). The case was submitted to the jury at 1:45 p.m. on December 2, 1998 (97T 5416). Shortly after 4:00 p.m., the jury notified the court that it had decided on a recommendation of sentence (97T 5422). The clerk thereafter published the jury's recommendation of death on each of the first degree murder counts by an 11-1 vote (97T 5423-24).

Neither party presented additional evidence at the January 22, 1999 Spencer[1] hearing (99T 5440), but Dennis did make a statement to the court, apologizing for what had happened, but declaiming any responsibility for the killings; he was, he insisted, an "innocent man" (99T 5456-57).

On February 26, 1999, the Honorable Manuel Crespo, judge, pronounced sentence (103T 5469 et seq). Judge Crespo found four aggravating circumstances: (1) prior capital felony conviction; (2) during the commission of burglary; (3)heinous, atrocious or cruel; and (4) cold, calculated and premeditated (103T 5489-99, 15R 3255-60). Judge Crespo rejected the proffered mitigators of no significant history of prior criminal activity (103T 5500-01, 15R 3261-62), substantial impairment (103T 5502-03, 15R 3262-63), residual doubt (103T 5504-05, 15R 3263-64), and length of sentence (103T 5504, 15R 3263). Judge Crespo found the extreme mental or

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993).

emotional disturbance mitigator, but gave it little or no weight in view of Dennis' "well thought out and methodically executed plan to commit these murders," (103T 5501-02, 15R 3262). Judge Crespo also found that Dennis' courtroom demeanor had been good and that he had exhibited acts of kindness, love and affection to his family and others and had cared and attended to his children. He gave these circumstances "some weight" (103T 5503-04, 15R 3263).

Judge Crespo concluded:

> This Court finds that the quality of aggravating circumstances in this case greatly outweigh the mitigating circumstances. The strength of the aggravating circumstances in this case are so overwhelming that they make the mitigating circumstances appear insignificant by comparison.

(103T 5505, 15R 3264). Judge Crespo stated that he agreed with the 11-1 jury recommendation, and sentenced Dennis to death (103T 5505-06, 15R 3264).

STATEMENT OF THE FACTS

Guilt Phase

Altogether, some 49 different witnesses testified at the guilt phase of the trial, mostly including family, friends and acquaintances of the defendant and/or the victims, plus law enforcement. The State will attempt to present an essentially chronological exposition of the relevant facts of this case as presented by these witnesses, rather than a witness-by-witness summary. To the extent necessary, the State will identify the witnesses from whose testimony the relevant facts derived.

Labrant Dennis was 24 years old at the time of the murders.[2] He had attended college for a year, on a football scholarship (84T 4015, 89T 4662). In the late 1980s, he and long-time friend Keith Bell, along with another person named Ricky Taylor, began singing and dancing (89T 4650). The three formed a rap group known as the Dogs, which achieved some success before they split up in the early to mid-1990s (89T 4650). They had songs "on the charts" and toured in this country and others, singing and dancing to audiences of 5-6,000 (87T 4335, 89T 4651). During this time and afterwards, Dennis had ongoing intimate relationships with several women, including one of the murder victims, Timwanika Lumpkins; University of Miami basketball player Jennifer Jordan (77T 3151-52); Watisha Wallace (81T 3566); and Katina Lynn, a nude dancer who also danced with the Dogs when they toured (87T 4334-35, 4353).

Dennis' relationship with Timwanika Lumpkins had continued, off and on, for over for over five years.[3] They had a child together. The relationship ended a week before Lumpkins was murdered, when she had moved out with "no intention" of ever going back to him (84T 4019, 4021, 87T 4265, 4279-80, 4302-03, 4321-22). Although Dennis lived with Lumpkins during this time and they had a child together, he also had lived with Watisha Wallace and had a

[2] Labrant Dennis also was known, and referred to by witnesses, as "Anthony" or "Ant."

[3] Timwanika Lumpkins also was known as "T" or "Little Bit."

child by her (81T 3567). Wallace testified that her relationship with Dennis had ended in late December of 1995 (81T 3568), but she had filed a document in October of 1996 identifying Dennis as her boyfriend (81T 3573-74). In fact, Dennis had been arrested two weeks after the murders in Wallace's bedroom, in her bed, wearing only his underwear (81T 3574). In addition, although Dennis' appellate counsel describes Dennis' sexual relationship with Katina Lynn as "casual" (Initial Brief of Appellant at 9), it lasted from December 1994 until April of 1996, ending only when the murders occurred (87T 4333, 4336, 4339), and Lynn testified that she had continued to see Dennis, even though she knew he was seeing other women, because she loved him (87T 4343).

Although Dennis was sexually intimate with several women simultaneously, he was very jealous and possessive, and his relationships with Lumpkins and Lynn were marred by violence.

In the summer of 1994, Timwanika Lumpkins lived two or three blocks from her aunt Karen McKeithen Wallace and Karen's brother (and Lumpkins' uncle) Patrick McKeithen (87T 4291, 4307). One day that summer, Lumpkins called them. She sounded worried and afraid; because of previous trouble with Dennis, Karen Wallace and her brother drove to Lumpkins' apartment (87T 4292, 4307, 4311). When they arrived, they saw Lumpkins standing at the top of the stairs while Dennis, who had been in the process of moving out, got out of his car with a 9 mm pistol and pointed it at Lumpkins (87T 4293,

4299, 4307-08). Dennis called Lumpkins a "stupid bitch" and threatened to kill her "stupid ass" and "that punk nigger standing there," referring to Patrick McKeithen, who was by then standing nearby (87T 4294, 4309-10). When Lumpkins saw the gun, she ran inside her apartment and locked the door, leaving her uncle standing outside (87T 4293, 4310). Dennis pointed his gun at McKeithen, threatened him again, and left (87T 4294, 4310).

McKeithen also witnessed a later confrontation between Dennis and Lumpkins in November of 1995, when, after Lumpkins had moved in with McKeithen's other sister Robin Gore because of problems she and Dennis were having (87T 4294-95), Dennis came to the Gore residence, armed with what appeared to be the same 9 mm pistol he had brandished previously (87T 4297, 4299).

Another aunt of Lumpkins, Robin Gore, testified that sometime in October or November of 1995, Lumpkin was at Gore's apartment, planning to "go out" that evening with a friend (87T 4256, 4258-60). After dinner, while Lumpkins showered and dressed, Gore went outside for a walk (87T 4260-61). As she was returning to her apartment, she saw Dennis near the swimming pool; when he saw her, he tried to hide behind a tree (87T 4262). He was dressed all in black, wearing warm-up pants, a pullover, and a hood which he had over his head (87T 4264). She could see his face, however, and immediately recognized him (87T 4264). Soon afterwards, Lumpkins exited Gore's apartment. Gore told her that Dennis was hiding

behind a tree and pointed him out to her (87T 4266). Lumpkins ran back into the apartment and locked the door (87T 4266). Gore had to bang on her door to get back in (87T 4272). Five to seven minutes later, Dennis knocked on the door; he no longer had the black outfit on, but was now wearing shorts and a t-shirt (87T 4272-73). He demanded to speak to Lumpkins, and told her that if "anything terrible happened," he would "blow his brains out," referring to Lumpkins' date who was waiting in the parking lot (87T 4274). Dennis left, but five minutes later, Gore's phone began ringing (87T 4275-76). Gore answered the first call; Dennis demanded to speak to Timwanika. She hung up, and Dennis called again, stating "Bitch, I'm going to . . ." before being cut off. Gore used her caller ID to confirm that these calls had been made from a pay phone at a fast-food restaurant just down the street (87T 4276-77). Lumpkins eventually went out for a couple of hours that night, but with Marlin Barnes (whom she had known since high school, 87T 4255) rather than her intended date (87T 4277).

Dekeisha Williams testified that she had known Timwanika Lumpkins since high school (87T 4314). She also knew Labrant Dennis through his relationship with Lumpkins (87T 4315-16). In February of 1996, Williams and Lumpkins decided to get tattoos, so Williams went to Lumpkins' house to pick her up (87T 4319-20). Dennis, however, began screaming at Lumpkins, telling her she was not going anywhere; she did not (87T 4320). A month later, in

March of 1996, Williams picked Lumpkins up and took her to Williams' mother's house (87T 4316). Lumpkins planned to go out that night (87T 4316). While they were there, Lumpkins' beeper went off numerous times. After about the tenth time, Lumpkins returned the call; it was Dennis, who screamed at her that she had better come back home and had better do so "now" (87T 4318-19). Williams testified that Dennis and Lumpkins had got along "fine" the first two years of their relationship; "it" started after that (87T 4322). When Lumpkins did things against Dennis' wishes, he became "jealous" and "enraged" (87T 4325). This happened "a lot" (87T 4325). Asked on recross whether Dennis had ever harmed her before April of 1996, Williams testified that Lumpkins once had a black eye that Dennis had given her (87T 4326). In addition, about a week before the murders, Lumpkins had welts on her neck that looked like handprints (87T 4331).

Katina Lynn testified that she first met Dennis in November of 1994 at a nightclub (87T 4333). He asked her to join his rap group as a dancer. She declined at first because of her boyfriend, Marlin McGhee (87T 4334). Later, however, she did join the group and went on the road with them to other cities and other states (87T 4334-35). Dennis had different outfits he wore for his shows, but one outfit was a black jacket with a hood, black pants and black boots (87T 4335). He would wear this outfit even when not doing a show (87T 4341). Soon, she began a sexual relationship

with Dennis (87T 4335). She continued to see Marlin McGhee, whom she considered her "main" boyfriend (87T 4336). She was aware, too, that Dennis had other love interests, including Timwanika Lumpkins and Watisha Wallace (87T 4336-37). Nevertheless, Dennis became jealous of her boyfriend Marlin McGhee 87T 4339, 4353).

Lynn testified that, on her dates with Dennis, he would drive one of three cars: his own Mazda Protégé, a red Honda Civic belonging to Timwanika Lumpkins, or a Nissan Sentra belonging to Watisha Wallace (87T 4340, 4355). Dennis had his own keys to Wallace's car because he had helped her pay for it (87T 4340). Wallace's car had its license plate inside the rear window instead of at the usual place near the rear bumper (87T 4340-41).

Jennifer Jordan testified that she had met Dennis in 1992, while they were both in high school (77T 3137). At some point, they developed a sexual relationship, which continued while Dennis was involved with Lumpkins (77T 3151-52). Jordan knew Marlin Barnes, having dated his brother while still in high school (77T 3139). She never dated Marlin Barnes, but she did socialize with him, and knew where he lived on the University of Miami campus (77T 3140). In 1994, Dennis asked her if she knew someone named Marlin Barnes and where he lived (77T 3142). He told her to watch and see if she ever saw Barnes with a "girl that drove a red car" (77T 3142). Later that year, he called her and asked her again about a "girl in a red car," telling her he believed Barnes "was messing

with his baby's mother" (77T 3143). Several times during 1995, Dennis again asked about Barnes and Lumpkins (77T 3144). In March of 1996, Dennis paid her a visit and again asked about Barnes (77T 3144, 3147). He wanted to know where Marlin Barnes stayed, and Jordan told him apartment 36-C (77T 3148). Dennis also wanted to know who else lived in the apartment; Jordan told him Ray Lewis and Earl Little (77T 3148). Dennis told her he "wanted to know if Marlin was fucking around with his baby's mother" (77T 3148).

Jesse Pitts testified that, in April of 1996, he shared an apartment with Labrant Dennis, Timwanika Lumpkins and Pitts' then girlfriend (and Dennis' cousin) Carolyn Williams (80T 3513-15). On Saturday, April 6, 1996 (one week before she was murdered), Lumpkins moved out, assisted by a man driving a brown or black Ford Explorer (80T 3516-20).

Joseph Stewart met Labrant Dennis when they worked together at Doral Hotel and Golf Resort (81T 3623, 3626). Stewart had a sawed-off shotgun he had found in the trunk of an abandoned Chevrolet a year before the murders (81T 3629-31, 3690). The shoulder stock was broken and Stewart was not sure if it even worked (81T 3632, 3702). On Easter Sunday, April 7, 1996, Dennis came to the apartment Stewart shared with Zemoria Wilson, wanting to borrow a gun (81T 3634-35). Stewart told him the only firearm he had was a shotgun he kept at his mother's house (81T 3636). Stewart had his own garage apartment there (81T 3737). They rode over, and Stewart

retrieved the shotgun from under his mattress. He warned Dennis that it was too short to be legal and that he did not know if it worked (81T 3638). Dennis just said "okay" (81T 3638). Stewart started to put the gun in a pillowcase, but Dennis protested that now it "looks like a shotgun," so Stewart put it in a blue duffel bag (81T 3638). Stewart testified that he gave Dennis no ammunition with the shotgun and there were no shells in it (81T 3639-40). When he gave the gun to Dennis, the trigger guard and "wood type grill" under the barrel were not broken (81T 3640).

During the week before Lumpkins was murdered, Dennis stayed with Katina Lynn a couple of nights (87T 4345). Dennis told her that Lumpkins had left him for a guy named Marlin and asked her "what was it about these Marlins that girls like" (87T 4345). Lynn went with Dennis to a gun shop in Okeechobee; Dennis told her he had just bought a shotgun and needed, in Lynn's words, "bullets" for it (87T 4344). Although she did not go into the gun store, she observed Dennis go in and return with "a box" (87T 4345).

Earl Little testified that he had known Marlin Barnes since they were in the second grade, and had known Timwanika Lumpkins at least since high school (77T 3161, 3168). In April 1996, he and Barnes were roommates in apartment 36-C, along with Trent Jones (77T 3159-60). Little was the only one with a vehicle, a black Ford Explorer (77T 3161-62). Little loaned his Explorer to Barnes on April 6, 1996, so Barnes could help Lumpkins move back to her

grandmother's house (77T 3164-65, 3167). Little loaned his Explorer to Barnes again the evening of April 12, 1996, so he could go to a party on Miami Beach hosted by Louis Oliver (77T 3169). Little told Barnes he would need his vehicle back early the next morning (77T 3170).

Louis Oliver was a former Miami Dolphin; the party at Club Salvation on Miami Beach was connected with a charity basketball game to be held the next day, between Miami Dolphin and Dallas Cowboy football players (77T 3080, 3121). Marlin Barnes arrived at midnight, accompanied by two male friends (77T 3081). Timwanika Lumpkins was there, planning to meet with several women friends (77T 3120-24). She was upstairs in the VIP section (77T 3126). Tickets for entry to the club were $10, but tickets for the VIP section were $15 (77T 3123-24). Barnes mingled downstairs for a while (77T 3084), but soon joined Lumpkins upstairs (77T 3126, 3085-86). They were on a catwalk, readily visible to anyone entering the club (77T 3087, 3126). They were very affectionate, hugging, touching and rubbing each other (77T 3127). They remained in this same location for several hours (77T 3128).

When Barnes and Lumpkins left the party, sometime after 4-4:30 a.m. (77T 3088, 3130-31), they discovered that the Explorer's right side tires had been punctured and were flat (77T 3089-91). Across the street from the club were an Amoco gas station and a Chevron gas station (77T 3084). With the help of others, the Explorer was

pushed to the Chevron station (77T 3090-91). Barnes and Lumpkins waited for a tow truck, talking, hugging and kissing (77T 3091-92). Barnes' friends decided not to wait, and left with others; Barnes and Lumpkins stayed with the Explorer (77T 3093).

Meanwhile, Watisha Wallace had decided to drive to Daytona for the weekend with Tracy Little and Shakia Cooper (79T 3423). Wallace owned a gray 1992 Nissan (81T 3575), but they decided to make the trip in a rental car to keep from putting miles on her car (79T 3424). The trip had been planned for some time (79T 3425). The three met at the home of Cooper's grandmother the evening of April 12, 1996 (79T 3425, 81T 3576). While they were at the grandmother's house, Dennis called, and then came over (79T 3426-27). He talked with Wallace 20-30 minutes, and then left (79T 3428-29). Wallace left her Nissan at Cooper's grandmother's house and Wallace and the others drove the rental car to Little's house in Coconut Grove before leaving for Daytona; while they were there, Dennis called Wallace again (79T 3425, 3429, 81T 3576). They left for Daytona between 4 and 5 a.m., returning Sunday evening (79T 3429-30). Dennis called Wallace more than once while she was in Daytona (79T 3430-31).

On the evening/early morning of April 12-13, 1996 Nidia El-Djeije worked an 11:30 to 8 a.m. shift at the Amoco station across the street from Club Salvation (80T 3447-48). She was pretty busy until 3 a.m., when "everything calmed down," and she began cleaning

the restrooms (80T 3450). At about 4 a.m., she saw a gray Nissan parked on the gas station premises (80T 3450, 3452). A man stood next to the Nissan, dressed all in black (80T 3451-52). Although it was a hot night, he was wearing a hooded sweater (80T 3452). After a few minutes, El-Djeije called the police (80T 3453). The man then walked towards the club, with his face down, hood covering his face (80T 3454-55). A few minutes later, he returned to the gray Nissan, driving away just before the police arrived (80T 3455-56). After the police left, the Nissan returned (80T 3458). El-Djeije called Beach Towing and asked them to come over and tell the person he would be towed if he did not leave (80T 3460). Fifteen minutes later, Jose Rodriguez from Beach Towing arrived, parked his truck next to the Nissan, and told the driver to leave or be towed (80T 3492). Rodriguez testified that the driver just cracked his window and that he could not see into the car, which Rodriguez described as a two-door light silver Nissan (80T 3492). The Nissan drove off (80T 3492). As Rodriguez was leaving, he noticed a flatbed with a Ford Explorer on it across the street at the Chevron station (80T 3493). The Explorer was leaning to the passenger side because of a flat tire (80T 3493).

As the Nissan drove off, El-Djeije noticed that it did not have a license plate "at the center" where one normally would see one (80T 3464). She later identified the Nissan as the one belonging to Watisha Wallace (80T 3467).

Robin Lorenzo, a tow truck driver for Dade Towing, went to the Chevron station early Saturday morning to tow a black Ford Explorer with two flat tires (80T 3499, 3501-02). He took the Explorer to the University of Miami campus, accompanied by a male and a female he later identified as Marlin Barnes and Timwanika Lumpkins (80T 3503-05). He dropped them off somewhere between 5:30 and 6:00 a.m. (80T 3506).

Earl Little testified that he spent the night of April 12/13 with a friend (77T 3170). Early in the morning of April 13, the friend drove him back to the apartment he shared with Marlin Barnes and dropped him off (77T 3171). Little estimated he got to the apartment between 7:00 and 7:15 a.m. (77T 3190). As he walked towards his apartment, he noticed his black Ford Explorer, tilting to the right side (77T 3173). He went over to it and saw a puncture in his right rear tire (77T 3174). He then went upstairs to apartment 36-C (77T 3174). He started to use his key to unlock the door, but it was already unlocked (77T 3175). He tried to open the door, but something was blocking it; he had to force it open partway (77T 3175). When he did, he saw a "floor full of blood" and his roommate Marlin Barnes lying on the floor (77T 3175, 3177). Barnes was breathing hard (77T 3177). Little called Barnes' name twice; the second time Barnes turned his head just enough that Little could see his face (77T 3178). Little left to call the police (77T 3177, 3179).

Coral Gables police officer Dan Oppert was the first officer to the scene (78T 3205). He described the apartment building as a three-story building with a stairwell on each end plus a stairwell in the middle which goes to the "back door" for each apartment (78T 3207). He ran up the west stairwell to the front door of apartment 36-C (78T 3208). There were some blood droplets outside the door (78T 3208). Looking inside, he saw the body of a man and a "great deal of blood" (78T 3209). The man had suffered great trauma to the head (78T 3210). Oppert had to force the door open because the man was lying against it; he appeared to be deceased (78T 3210). After waiting for backup, Opppert entered and searched the apartment for any more occupants (78T 3211). In the west bedroom, Oppert found a woman lying face down next to the bed (78T 3212-13). She was "gurgling" as if she were trying to breathe but her lungs were full of fluid (78T 3213). She had suffered obvious trauma to the back of her head; Oppert observed a great deal of blood and what appeared to be exposed brain matter (78T 3213-14). There were no other people in the apartment. The back door was deadbolted (78T 3215). As Oppert was searching, he looked back down the hall to the front door area and saw the man apparently trying to get up; he lifted up a couple of inches and then collapsed (78T 3215).

Other officers and medical personnel arrived. Marlin Barnes was pronounced dead at the scene (78T 3243-44). Timwanika Lumpkins was still alive, so she was strapped to a gurney, removed from the

apartment, and airlifted to a hospital, where she soon died (78T 3240-42, 3244, 3337-38). Other than the few drops of blood just outside the front door, there was no blood on the stairwell until Lumpkins was carried out; she bled onto the stairwell (78T 3237, 3242).

Much of the apartment was neat and orderly, including the other bedroom, the hallway, the closets, the bathroom and the kitchen (78T 3273, 3285-86). There was no blood in any of these places (78T 3273, 3286, 89T 4541). In the bedroom in which Lumpkins was found were two twin beds. Both beds had the covers pulled back and obviously had been slept in. One bed had blood on the corner of the sheet. On the floor next to this bed was a large pool of blood, strands of braided hair, bone fragments and broken fingernails. There were also marks on the wall (78T 3275, 3280). There was also an earring next to the bed and another underneath the bed, probably a foot from the edge (78T 3275-76).

In the living/dining area, police found nine wood and two metal fragments (78T 3287, 3301). The metal fragment was consistent in shape, size and coloring with a trigger guard (78T 3287-88). Police also found bone fragments and teeth (78T 3288). There was a pool of blood by the front door (78T 3287), as well as blood drops on the side of a cabinet, on the coffee table, on the sofa and on the television set (78T 3290). There was more blood on

the draperies and even on the ceiling (78T 3290).[4] In the dining room, police observed more drops of blood; the table had been pushed against the wall and chairs were knocked over (78T 3291). Blood was smeared on a desk, on a chair, and on the wall by the front door (78T 3291-92). Police found an unfired shotgun shell on the floor by the bookcase (78T 3296).

Officer Thomas Charles, who processed the crime scene initially, testified on defense cross-examination that he did not think the overturned furniture and blood smears were evidence that Barnes had struggled with his assailant (78T 3318-19); in his view, the blood spatter and smear patterns showed that Barnes was first struck in the face as he stood in the doorway (78T 3321), the assault quickly moved inside (78T 3329), and Barnes was beaten as he lay on the floor (78T 3321, 3328); afterwards, Barnes had gotten up and staggered around, leaving blood smears (78T 3319).[5]

Toby Wolson, a forensic biologist and blood pattern analyst(89T 4517), agreed with this assessment (89T 4546-63). In

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[4] Officer Charles explained that when one uses a club to strike a person several times, the club will eventually get blood on it which will sling off and leave a trail in whichever direction one is slinging the club, which would account for the drops on the ceiling (78T 3291).

[5] Charles explained that the blood spatters on the back of the cabinet in the living room were in an upward direction, going away from the floor, which would put the victim on the floor (78T 3320). The patterns in the dining area, by contrast, were not consistent with impact spatter, but were free falling droplets and smears from the victim's blood-soaked arms and hands as he staggered towards the front door (78T 3292, 3318-19).

his view, the blood droplets just outside the door indicated that the assailant had been standing outside the door when the assault had started (89T 4594-95) and had smashed Marlin Barnes in the head as soon as the door opened (89T 4605). The blood patterns inside the apartment indicated that Barnes had been beaten as he lay on the floor on the carpeted area near the cabinet (89T 4552, 4554), that Barnes had gotten up and moved around after the beating, leaving blood smears and blood drops in the tiled area in and around the dining table, and had collapsed by the front door where he left a large pool of blood after the assailant had left (89T 4557-63). By the size and number of blood spatter droplets in the attack area, Wolson concluded that the attack had been a "high force situation" (89T 4556-57).

Both Wolson and Charles agreed that an assailant clubbing a victim to death might get very little or no blood on himself, as the "blood could go away from" the person doing the swinging (78T 3326). Wolson testified that it was not only possible that an assailant causing a bloody crime scene might get little or no blood on himself, but that it was "really not that unusual" (89T 4531). If the force of the impact is away from the assailant, the blood will spatter away from him (89T 4532). And even if he did get some on him, he would not necessarily leave any on the seat of his getaway vehicle, for a couple of reasons. First, smaller drops tend to dry very fast and will not transfer. To get a deposit, a

substantial amount of blood - a blood soak - is generally necessary. Second, if the assailant only got blood on his front, he would not transfer anything to a car seat as only the assailant's backside would come in contact with the seats (89T 4564). Wolson testified that, based on his experience, it is more likely *not* to find a transfer of blood into a vehicle than to find such a transfer (89T 4583). Wolson also noted that blood is very difficult to see on very dark clothing (89T 4525-26).

There was apparently nothing of value taken from the apartment; police found various jewelry in the apartment, including a football championship ring, gold bracelets, a gold chain, and a watch, plus a total of over $700 cash (78T 3289, 79T 3362-66).

Bernadette Hardy testified that in April of 1996 she lived with Zemoria Wilson (83T 3881-82). Through Wilson, Hardy knew Labrant Dennis (83T 3883-84). Several days after Easter Sunday in 1996, Zemoria Wilson went to Chicago (83T 3886). Early in the morning of April 13, 1996, Hardy was awakened by a knock at her window (83T 3889). It was Labrant Dennis (83T 3890). He wanted to know where Zemoria and Joe (Stewart) were (83T 3890). Hardy told him Zemoria was in Chicago and Stewart was at his mother's house (83T 3890-91). Hardy testified that Dennis was wearing a black sweater (83T 3891).

A man wearing black standing outside Wilson's apartment knocking on the window was also seen by a neighbor Deborah Scales;

she did not know or recognize him, but she knew it was *not* Joseph Steward (89T 3922). She saw this man at approximately 7:00 a.m. (83T 3923).

Joseph Stewart testified that his girlfriend Zemoria Wilson had gone to Chicago during the week after Easter Sunday 1996 (81T 3641). While she was gone, he would stay back and forth between his apartment at his mother's house and Wilson's apartment (81T 3641). He spent Friday night, April 12, 1996, at his mother's house with Dorothy Davis, a former girlfriend (81T 3641-42).[6] He left at 6:00 a.m. Saturday morning, April 13, 1996, to go to work (81T 3643-44).[7] He got a call at work from Labrant Dennis, who informed him that he had returned Stewart's shotgun and had left it behind the house (81T 3645-46). About 2-3:00 p.m., Stewart left work and returned to his mother's house (81T 3647). He found the blue duffel bag he had loaned Dennis behind some bushes alongside the driveway toward the rear of the house (81T 3648). It was more fully stuffed than it had been when he had given it to Dennis (81T 3649). He took it into his apartment. Inside the bag he found some black clothing, a pair of black boots, his shotgun and a knife (81T 3649-50, 3654). Stewart had never seen the knife before, and the shotgun was "broken up" and "destroyed" (81T 3650). Stewart

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[6] Stewart's testimony was corroborated by Dorothy Davis, who testified that she spent that night with him (82T 3755-57).

[7] His work records show that he clocked in at 6:32 a.m. that morning (81T 3730-31, 86T 4213)(State's Exhibit 146).

unscrewed the part "where the shells would go," took the springs out, and "some shells fell out" (81T 3651). Stewart testified that he got scared and threw the gun away in a sewer a block or two from his mother's house (81T 3652). He threw the knife down the same sewer (81 3653).

Stewart spent Saturday night at Zemoria Wilson's apartment (81T 3655). The next morning Dennis called him, wanting to know if Stewart had got the bag (81T 3655-56). Stewart told him he had and asked if he wanted the clothes back. Dennis told him no, he could throw them away (81T 3656). Later that day, Stewart put the clothes in a dumpster behind a grocery store (81T 3657-58). He saved the duffel bag because he didn't notice any blood on it, and planned on using it again (81T 3677).[8]

At Stewart's request, Dennis came over Sunday afternoon (81T 3658-59). Stewart told him whatever he was involved in, Stewart did not want to be part of it. Dennis answered: "Don't worry about it. Nobody would think to come here. I just had to do what I had to do and I didn't even go in my car . . ." (81T 3659).

Stewart testified that only later he found out that two people had been murdered (81T 3661). He had never met either one of them, had not known where they would be in the early morning hours of April 13, did not know where Marlin Barnes lived, and did not know

[8] Blood consistent with that of the victims was found on the duffel bag by police serologist Theresa Merritt (86T 4245-47).

what kind of car Barnes might have been driving (81T 3661, 3675-76). He did not go to the police right away because he was scared (81T 3661).[9]

Katina Lynn testified that Dennis called her at noon Saturday, April 13, 1996, and asked her if she had heard about the murder (87T 4345). He came by several times that next week to cut articles about the murder out of the newspaper (87T 4346-47). Dennis told her two different stories about his whereabouts the night of the murders (87T 4348), which made her "suspicious" (87T 4349).[10] He also told Lynn, referring to Lumpkins' murder: "That was good for her ass. The bitch shouldn't have been cheating on me." (87T 4350).

After police talked to Joseph Stewart, Stewart showed them where he had disposed of the shotgun (state's exhibit 141) and knife (state's exhibit 142) in a storm sewer (81T 3664-65, 82T 3828-33). A crime lab technician testified that the metal fragments found in Barnes' apartment fracture-matched broken parts of the shotgun (82T 3851-64).

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[9] Police found out about Stewart's involvement through Zemoria Wilson, to whom he had confided, after Wilson talked about the case to her bus driver on her return from Chicago (79T 3415 et seq, 81T 3663).

[10] Dennis first told her that he had gone to a bachelor party and had come home around 2:00 a.m. Later, he told her that he had dropped Lumpkins off at a club on South Beach, then had gone to a bachelor party, and then had gone home (87T 4347).

Dr. Sam Gulino performed the autopsies (88T 4380 et seq). He observed on Timwanika Lumpkins' head lacerations on the left and front side, around her left ear, and on the left back side (88T 4413). These lacerations were caused by blunt force trauma (88T 4414). Under the cluster of lacerations on the back side of her head, Lumpkins' skull was fractured, with additional fracturing radiating out to other parts of the skull (88T 4415, 4417, 4419). The bone was pushed into Lumpkins' brain, lacerating her brain (88T 4417). One piece of bone had "actually fallen out of one of her scalp lacerations" (88T 4418). There was an additional fracture that went "basically across the top of the head and over to the right side of the head" (88T 4419). Finally, Lumpkins had suffered a "hinge fracture" of the lower part, or floor, of the skull, on which the brain sits (88T 4420). Such fracture is called a "hinge fracture" because the skull can now be "pulled up and apart much like a door on its hinges (88T 4422). The force necessary to inflict the kind of damage Dr. Gulino saw was massive; he testified that such fractures are "typical of high speed motor vehicle crashes," where the person is decelerated "very suddenly after going at high velocity" (88T 4422). These laceration patterns matched various parts of State's Exhibit 141, the shotgun (88T 4415-16, 4423-24, 4427).

Additionally, Lumpkins had lacerations on the inside of her lip and bruising around her lips which were consistent with

Lumpkins having been lying face down on the floor and being hit on the back of her head (88T 4426). She had very deep bruising and hemorrhaging on her upper back and neck, also consistent with her having been beaten with the blunt portion of the shotgun (88T 4427-29). She had defensive wounds on both her hands, including broken fingers and fingernails (88T 4429-33), which most likely were inflicted as she tried to protect her head while she was being struck with a blunt object (88T 4434). Drug and alcohol tests were negative except for lytocaine, which would have been administered by the hospital during the attempt to resuscitate her, and a trace of alcohol (88T 4434).

Marlin Barnes had suffered multiple lacerations all over his face and forehead, on both cheeks and on his lower lip, and had bruising on both cheeks and around his eyes (88T 4435). Barnes' sinus and nasal bones were broken (88T 4436-37). His hard palate, or roof of his mouth, was broken, while several of his teeth were broken and missing (88T 4441). The wounds were consistent with having been inflicted by State's Exhibit 141, the shotgun (88T 4436, 4438-41).

Barnes had some abrasions on the back of his head that were consistent with Barnes having been beaten while the back of his head was against carpet (88T 4442). There was also a laceration on the back of his head that was different than the ones on the front, which could have been caused by his falling to the floor and

hitting his head, or by being hit on the front of his head as he lay on the hard surface of the floor (88T 4442-43). There was a "thin" fracture of the occipital bone under this laceration (88T 4443).

Barnes had defensive wounds on both his hands, corresponding in shape to parts of the shotgun (88T 4444-45).

Some of the wounds to the face caused bleeding and hemorrhaging in and around Barnes' eyes; Dr. Gulino believed that these wounds would have been blinding and that Barnes would not have been able to see clearly following the beating as he was moving around the room (88T 4437, 4447-8, 4450).

Barnes tested negative for drugs and alcohol (88T 4447).

Lead investigator Thomas Romagni testified that, on the afternoon of April 13, 1996, Dennis showed up at the police department in the company of Keith Bell (84T 4009, 4012). Although Romagni would have preferred to not to have talked to Dennis so early in the investigation, he Mirandized him and took a statement from him (84T 4012, 4015). Dennis was not in custody (84T 4018). Dennis told Romagni he lived with Carolyn Williams, her children, and Jesse Pitts, who was Williams boyfriend (84T 4019). There was no telephone at their apartment (84T 4019). Dennis said he had been involved in a relationship with Timwanika Lumpkins for five years and they had a child together. Asked if it had been a violent relationship, Dennis acknowledged only that he "might have

slapped her on one occasion" (84T 4019). On another occasion, she had slammed a door on his finger (84T 4020). Dennis admitted knowing Marlin Barnes and knowing that he lived on campus, but denied ever having been to his apartment (84T 4020). Dennis said that, on April 4 or 5, he and Lumpkins had an argument about her having come in after midnight one night and that, on April 6, Lumpkins had moved out with the help of someone driving a black Ford Explorer who appeared to be a football player and who Dennis believed had been Marlin Barnes (84T 4021). Dennis said he had been trying to reconcile with Lumpkins in the following week and had gone shopping with her Friday night (April 12) (84T 4022). She bought a black dress and new high-heel shoes (84T 4022). He had dropped her off, he said, at her grandmother's house at 8:30 p.m. (84T 4022). Dennis said he called Lumpkins later that evening, using a cell phone he claimed to have borrowed from a friend, to ask her if he could leave their daughter with Lumpkins the next morning, because he had to work the next day (84T 4023). Lumpkins told him that she needed a ride to a sort of half-way point because she was going out with a friend of hers who was not familiar with South Miami; Dennis agreed to take her (84T 4028). Dennis said Lumpkins was wearing the new dress and shoes she had bought earlier that day (84T 4029). Dennis said he refrained from asking her any questions about who she was going out with and where they were going because he wanted to reconcile with her (84T 4029). After

dropping Lumpkins off, Dennis went to a bachelor party, arriving shortly after 11 p.m., and leaving at around 1:30 a.m. (84T 4029-30). He then decided to go to the charity party on Miami Beach. He told Romagni he had not known that Lumpkins or Barnes would be there (84T 4030). He told Romagni he went home, changed clothes, and drove to the club, driving his Mazda Protege (84T 4030). He paid $15 to get in (84T 4033). Dennis told Romagni he saw no one he knew, including Lumpkins or Barnes (84T 4033). After staying about an hour, he went home and went to bed (84T 4033-34, 86T 4199). Dennis said he woke up at 8:30 a.m. and tried to call Lumpkins at her grandmother's house. Failing to reach her, he tried several times throughout the day to reach her by her beeper (84T 4034). He drove to the grandmother's house to drop off his child, and then went shopping with the grandmother; he said he just decided not to go to work that day after all (84T 4037). Dennis got back to his apartment between 1 and 2 p.m. (84T 4037). He told Romagni that, when he got back, he was contacted through his beeper by Keith Bell, who told him that the police wanted to talk to the Dogs (84T 4038).

Dennis consented to a search of his car (84T 4042). Police found a cell phone in the car; Dennis was unable to give a number for it (84T 4043-44). Police determined the number by pushing a button (83T 3820-21, 84T 4044). As they were writing the number down, Dennis said, "Yes, that's the number" (84T 4044). However,

when police tried to call that number, the telephone did not ring (84T 4044-45).

Dennis was not arrested at that time, and left the police station between 8:30 and 9 p.m. (84T 4047).

The number on Dennis' cell phone actually belonged to Lucia Zemoria, who discovered that her cell phone had been cloned after getting a $900 bill (82T 3805-08, 3810-13, 83T 3877-78). Examination of the numbers called as shown on telephone records for this number (State's Exhibit 156), as well as the numbers contained in the memory of Lumpkins' beeper, showed that Dennis had not tried to beep Lumpkins on Saturday, April 13 (84T 5035-36).[11] However, the records did confirm that he had called Joseph Stewart at work at 9 a.m. April 13 (86T 4216). In fact, these records also show that, before he got hold of Stewart at Doral, Dennis had tried to reach Stewart at his mother's house.[12]

Marlin Barnes was 6 feet tall and weighed 228 pounds (88T 4435). Dennis was 5'7" and weighed 175, but had been working out and at the time of the murders could bench press at least 275 pounds (83T 3972-75, 84T 4059, 87T 4342-43).

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[11] Lumpkin's beeper could hold up to eight numbers in memory, but only had five (79T 3389), the last of which was from her friend Dekesha Williams at 10:30 a.m. on the 13th (79T 3395, 84T 4036, 88T 4508-09). The previous two were also from Williams (79T 3395-96). None were from the cloned cell phone Dennis was using (79T 3396).

[12] Sharon Stewart testified that in April of 1996, her telephone number had been 685-5988 (82T 3749-50).

Penalty Phase

Dr. Valerie Rio testified about the wounds inflicted on Marlin Barnes and Timwanika Lumpkins. Many of her observations mirrored that of Dr. Gulino, who had testified at the guilt phase. Additionally, while describing the amount of force used against Lumpkins, Dr. Rio observed that "the hair in the scalp is driven through the tearing of the skin and her scalp and actually embedded in the underlying fractured bone" (96T 5233). She also testified that the location of the earrings was consistent with Lumpkins having tried to hide under the bed and having been pulled out (96T 5235). Her defensive wounds showed that Lumpkins had struggled "quite a bit" (96T 5234). In fact, she had more defensive wounds on her than did Marlin Barnes (96T 5248). Dr. Rio estimated that Marlin Barnes had been hit in the head 20-25 times with the shotgun (96T 5240).

Dennis presented the testimony of his mother and his two grandmothers. Each of these witnesses testified, inter alia, that Dennis had never used drugs or alcohol (96T 5266, 5276, 5279). He was a high school graduate (96T 5261, 5271, 5280), attended college on a football scholarship (96T 5262, 5271, 5280), had been a member of a successful rap group (96T 5263-64, 5273, 5281), had the respect and admiration of his peers (96T 5265, 5275), was a hard worker (96T 5266, 5275, 5283) and, except for the instant case, he had never been in any trouble (96T 5266, 5275, 5279).

Because Dennis had presented testimony that he had never before been in trouble and did not waive the statutory mitigator of no significant history of prior criminal activity (96T 5285), the State presented evidence of prior violent behavior by Dennis.

Patrick McKeithen testified that, during the incident the incident at Lumpkins' apartment he had testified about at the guilt phase, Dennis had not only threatened him with a gun, but had also hit him in the face with it hard enough to daze him and make him bleed (96T 5299-00). The police were called, but in deference to Lumpkins' wishes, McKeithen did not press charges (96T 5300).

Katina Lynn testified that Dennis became so jealous of her boyfriend Marlin McGhee that once, right after her boyfriend had left her apartment, Dennis came inside, grabbed her by the neck and banged her head against the wall (96T 5311-12). He told her not to "play" with his feelings or he would "hurt" her (96T 5312). On another occasion, they were at the gym working out together when she made the mistake of talking to her former high school teacher, whom she had never dated (96T 5312-13). As they were driving away from the gym, Dennis put a gun to her head and told her he had better not find out she was messing with someone else or he would kill her, put her body in a bag and throw her somewhere (96T 5314). On still another occasion, she tried to leave Dennis; he put a gun to her head and told her that she could not leave her; if she

tried, she would "leave the world" (96T 5314). Then he told her to call him in the morning and "don't play with him" (96T 5315).

SUMMARY OF ARGUMENT

There are 13 issues on appeal:

1. Dennis has not preserved for appeal his claim that the jury should have been instructed to use great caution in relying on the testimony of an accomplice. Stewart was not in any real sense an accomplice. Moreover, Stewart was far from the only witness connecting these murders with Dennis and, contrary to Dennis' assertion, Stewart's testimony was neither uncorroborated nor inherently incredible. Thus, no fundamental error occurred.

2. The allegedly improper bolstering complained about here was elicited on *redirect-examination* after Dennis had opened the door on his cross-examination by challenging the motives and judgment of police witnesses and repeatedly asking investigators what witnesses they had to various facts and why they had believed Stewart. Moreover, all but one witness referred to in testimony on redirect testified at trial, subject to cross-examination.

3. The State properly called Watisha Wallace as its witness to elicit important testimony about her ownership of the car Dennis used in committing the murders and to establish its availability for Dennis' use at the time of the crime. Once Wallace testified that, despite the car's availability, Dennis could not have used it, the State properly was allowed to demonstrate her dishonesty and bias by showing that she had been convicted for burning her car after Dennis was arrested. Since Dennis had been in jail for

several months at the time, and the burning had occurred after the police had thoroughly searched the car and found no incriminating physical evidence, there is no reason to assume that the jury would have disregarded the court's instructions not to infer that Dennis had any responsibility for the car burning.

4. There is no requirement for car "line-ups," and the trial court did not err in denying Dennis' motion to exclude Nidia El-Djieje's identification of Wallace's Nissan as the one she had seen at her gas station, driven by a suspicious looking person dressed in black with his face covered by a hood.

5. The trial court committed no reversible error in allowing the State to impeach its witness Jesse Pitts by use of his prior inconsistent statements. Contrary to Dennis' contention, Pitts, who was Dennis' roommate at the time of the murders, had relevant testimony to give and was not called merely so the State could impeach him. Further, Pitts recalled many facts without prompting, and recalled other facts after having been reminded of his prior statements.

6. Evidence that Dennis had threatened, assaulted and stalked Timwanika Lumpkins was properly admitted. Prior difficulties between the defendant and the deceased are relevant to prove motive, intent and premeditation. The prior difficulties between the parties in this case were an integral part of the context in which the murders had taken place.

7. Katina Lynn's testimony that Dennis became jealous of her boyfriend, who also was named "Marlin," was logically connected to these murders and properly admitted. If nothing else, this testimony provides context to Dennis' comment to Lynn, a few days before the murders, asking "what was it about these Marlins that girls like." Furthermore, this testimony fails to show the commission of an extrinsic crime, and its admission was harmless even if error.

8. Autopsy photographs of the two victims were used by the medical examiner to explain the injuries to the victims, how those injuries were inflicted and how much force had been used. They were properly admitted even if some were gruesome.

9-12. The trial court's sentencing order is not defective for any reason urged. It contains a constitutionally sufficient analysis of the massive evidence presented in this case, and Dennis' alleged factual errors are no more than after-the-fact nitpicking about matters that do not undercut the court's analysis and conclusions. This was a well-planned, methodically executed set of murders, and the trial court properly found the murders to have been CCP. The extraordinary brutality of the murders also supports the trial court's HAC findings. The court properly rejected the proposed mitigator of no significant history of prior criminal activity in light Dennis' history of domestic violence, using his hands and a pistol, against not only Timwanika Lumpkins,

but also her uncle and Katina Lynn. Finally, the court did not err in giving little or no weight to the extreme mental or emotional disturbance mitigator, since no expert mental health testimony was submitted and the only evidence supporting the mitigator was that Dennis was shown to be jealous and possessive.

13. Death is not a disproportionate punishment for the planned, cold-blooded and savagely brutal murder of two people in their own home, particularly in the absence of significant mitigation.

ARGUMENT

I.

APPELLANT'S ARGUMENT THAT THE JURY SHOULD HAVE BEEN INSTRUCTED TO USE GREAT CAUTION IN RELYING ON THE TESTIMONY OF AN ACCOMPLICE (FLA. STD. JURY INSTR. (CRIM.) 2.04(b)), WAS NOT PRESERVED FOR APPEAL AND NO FUNDAMENTAL ERROR OCCURRED

Dennis argues that the trial court committed fundamental error in failing to instruct the jury that it should use great caution in relying on the testimony of a witness who was involved in the crime, citing, inter alia, Fla. Std. Jury Instr. (Crim.) 2.04 (b).[13]

Dennis must argue fundamental error because trial counsel failed to preserve this issue for appeal, either by objection or specific request.[14]

Under our criminal rules:

> No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating

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[13] Standard criminal jury instruction 2.04 (b) states:

> You should use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant.
>
> However, if the testimony of such a witness convinces you beyond a reasonable doubt of the defendant's guilt, or the other evidence in the case does so, then you should find the defendant guilty.

[14] The charge conference may be found in the transcript beginning at volume 90, page 4742 through volume 91, page 4818. The jury charge itself in volume 92, pages 4990 through 5030.

> distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the presence of the jury.

Fla. R. Crim. P. 3.390 (d). Here, trial counsel not only failed to object, as required by rule 3.390 (d) but also failed to request the accomplice instruction at issue here. Clearly, he has failed to preserve this issue for appeal.

It is well settled that, absent fundamental error, a criminal defendant may not complain about a jury instruction on appeal unless he objected, and objected on the same grounds, at trial. E.g., State v. Delva, 575 Sol.2d 643, 644 (Fla. 1991) ("Instructions, however, are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred."); Occhicone v. State, 570 So.2d 902, 905 (Fla. 1990) (objection to jury instruction not preserved because "Occhicone did not object again and, most importantly, did not object on the specific ground now advanced"). In addition, it is well settled that a criminal defendant cannot complain on appeal about an *omission* to deliver a jury instruction unless he made a specific request for such instruction *at trial*. Watson v. State, 533 So.2d 932 (Fla. 3d DCA 1988); Williams v. State, 346 So.2d 554 (Fla. 3d DCA 1977). Cf., Esty v. State, 642 So.2d 1074, 1080 (Fla. 1994) (defendant's objection to reasonable doubt instruction not preserved for appeal where he failed to request different instruction; "merely raising an objection to the

standard instruction is not sufficient to preserve the issue for review").

Dennis can get around his failure to preserve this issue for appeal only if he can demonstrate fundamental error. Fundamental error, however, is that which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Keen v. State, No SC88802 (Fla. September 28, 2000)(internal cites omitted). Under this "stringent standard," id., Dennis must show that the jury could not have reached a verdict of guilty if they had been instructed consistently with standard criminal jury instruction 2.04 (b).

Dennis relies on such federal cases as Tillery v. U.S., 411 F.2d 644 (5th Cir. 1969) for the proposition that if "the testimony of the witness is critical and uncorroborated, failure to give the cautionary instruction [about accomplice testimony] constitutes fundamental error." Initial Brief of Appellant at 33. In Tillery, however, the government's only evidence connecting the crime with the defendant was the testimony of the accomplice. Furthermore, the accomplice had given materially inconsistent statements about the extent of the defendant's participation in the crime. Although noting that warning the jury about accomplice testimony was not necessary in all cases even if the accomplice testimony is the only evidence connecting the defendant to the crime, the Tillery court

concluded that because the accomplice's testimony not only comprised the "sum total of the evidence against the defendant," but was "extremely unreliable, if not incredible," it was plain error requiring reversal not to have given the cautionary instruction.

However, where the accomplice's testimony is corroborated, or internally consistent and credible, or both, federal courts find that the general credibility instructions are sufficient and the failure specifically to caution the jury about accomplice testimony is not reversible error. See, e.g., United States v. Robbio, 186 F.3d 37 (1st Cir. 1999) (court need not give unrequested cautionary accomplice instruction even where uncorroborated if accomplice's testimony "looks internally consistent and credible;" here, subsequent amplification by accomplice of his earlier statement was not an inconsistency plus his testimony was corroborated by, inter alia, the defendant's incriminating statements); United States v. Moore, 149 F.3d 773 (8th Cir. 1998) (failure to give *requested* cautionary accomplice instruction not reversible error because accomplice testimony was amply corroborated); United States v. Wiktor, 146 F.3d 815 (10th Cir. 1998) (failure to give cautionary accomplice instruction *sua sponte* not reversible error where accomplice's testimony was corroborated and court's general credibility instructions included as a factor the witness' interest in the result of the trial).

In this case, assuming, arguendo, that the instruction at issue is even pertinent, it was not essential. The standard instructions delivered in this case included all the factors set out in Fla. Std. Jury Instr. (Crim) 2.04, 1-9, including whether the witness seemed to have an accurate memory, was honest and straightforward, or had an interest in how the case should be decided (90T 4779-83, 92T 5014-16). Moreover, Stewart was vigorously cross-examined by defense counsel, and his credibility was a major subject of defense counsel's closing argument.[15] In these circumstances, it seems reasonable to conclude that the jury was given sufficient guidance in weighing Stewart's testimony.

Furthermore, notwithstanding Dennis' contention otherwise, Stewart's testimony was corroborated in many respects; furthermore, although Stewart was an important witness, the state's case did not rest solely on his testimony, nor is it accurate to say it was the only testimony connecting Dennis to the murders. Nor would Stewart have been, as Dennis contends, a "prime suspect." Initial Brief of Appellant at 31.

Unlike Dennis, Stewart simply lacked the motive, opportunity, or knowledge to murder Timwanika Lumpkins or Marlin Barnes. He did not know Lumpkins at all and knew of Barnes only because he worked with Barnes' mother and heard her talk about him. Nor is there any

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[15] Defense counsel's closing argument is set out in volume 91, pp. 4883-4942.

evidence that Stewart was at the party at Club Salvation, or would have known that Barnes or Lumpkins were there, or would have known Barnes was driving a black Ford Explorer, or would have had any idea where Marlin Barnes lived. Furthermore, Stewart was with someone else at the time of the crime, and even if, as Dennis contends, we disregard that testimony, Stewart's work records corroborate his testimony that he clocked in at 6:30 a.m. that morning.[16] Finally, although Stewart (understandably) may not have disclosed right away that he had been "cheating" on Zemoria the night of the murders, there are no affirmative inconsistencies in his testimony, and telephone records for Dennis' cloned phone corroborate Stewart's testimony about having been called at work by Dennis early Saturday morning.

Dennis, on the other hand, did have the motive, opportunity and knowledge. Plus, he made incriminating statements to others and gave inconsistent and demonstrably false statements about his activities and whereabouts before and after the murders. In fact, it may be accurate to say that all we really need to know is that Dennis had been increasingly jealous, possessive and violent as to Timwanika Lumpkins, had been suspicious of her and Marlin Barnes and had been stalking her for years. As early as 1994, Dennis was pumping Jennifer Jordan for information about Barnes and Lumpkins,

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[16] Thus, under Dennis's own time-line theory, Stewart could not have committed the murder. Initial Brief of Appellant at 35-36.

telling her to let him know if she ever saw Barnes with a "girl that drove a red car," and later explicitly asking her, and finding out, where Marlin Barnes lived. More than once during his relationship with Lumpkins, Dennis had ordered her either not to go out or to return home, had pointed a gun at her and others, and had threatened to kill Lumpkins, her uncle and her date. He also had given Lumpkins a black eye, had tried to strangle her, and had stalked her at her aunt's house while dressed in a black outfit with a hood over his head - the same kind of black outfit that Katina Lynn testified Dennis wore during his shows and at other times, and the same kind of black outfit that Nidia El-Djeije saw a suspicious person wearing at her gas station just across the street from where the victims' Ford Explorer was being loaded on a wrecker.

Moreover, Dennis knew that Lumpkins and Barnes were at Club Salvation. Dennis told Katina Lynn that he had taken Lumpkins to Club Salvation several hours before she was murdered, and, although he denied having gone inside the club himself while talking to Lynn, he admitted to police that he had been in the club. He also told police he had paid $15 for his ticket, which, coincidentally, was just exactly the right price for a ticket to get into the VIP section where Barnes and Lumpkins were, hugging and kissing and being openly affectionate.

The evidence also shows that the person dressed in black watching the Explorer was driving a gray Nissan with no tag; Dennis had the keys to just such a car, belonging to Watisha Wallace who, conveniently, was out of town that weekend. Moreover, Dennis knew exactly where Wallace had left the car, because he had come over to Shakia Cooper's grandmother's house Friday evening, plus, he had called Wallace at Tracy Little's house just before they left for Daytona.

Stewart's testimony that Dennis had borrowed his shotgun and had returned it shortly after the murders is corroborated not only by the phone records showing that Dennis had called Stewart at work, but also by testimony that Dennis had come by Zemoria Wilson's apartment at 7:00 a.m., dressed in black, looking for Stewart, not knowing that Stewart had spent that night at his mother's house instead of in the apartment he shared with Wilson.[17]

[17] Dennis argues that if he really was at Wilson's apartment at 7:00 a.m., he could not have committed the murder because he would have had to leave Barnes' apartment no later than 6:30, and Barnes would already have been dead when Earl Little arrived shortly after 7:00 a.m. He says deposition testimony by the medical examiner shows that Barnes would have died within 10-15 minutes of the assault. Initial Brief of Appellant at 35-36. However, pretermitting the propriety of his reliance on deposition testimony rather than on trial evidence, an examination of the deposition shows that the medical examiner testified that it could well have taken longer than 10-15 minutes for Barnes to bleed enough that his vital organs would no longer be supplied with blood (5R929-30). Barnes in fact was barely conscious when Little arrived and showed no signs of life when police arrived after Little had run to his girlfriend's apartment to call them and then ran back to his and Barnes' apartment. Furthermore, the actual drive time from Barnes' apartment to Wilson's apartment was never

Not only is Dennis' presence at Wilson's apartment at 7:00 a.m. inconsistent with his statement to police that he was in bed at that time, but there is really no other plausible explanation for why Dennis would have been so interested in seeing Stewart that morning than, as Stewart claimed, to dispose of the murder weapon and other incriminating items, including the black outfit. Stewart's testimony about having loaned the shotgun to Dennis is also corroborated by Katina Lynn's testimony that in the week before the murders, Dennis told her he had obtained a shotgun and needed ammunition for it, and that they had gone to a gun shop to buy that ammunition.[18]

Dennis also lied to police about having tried to beep Lumpkins several times throughout the day, as the saved numbers on Lumpkins' beeper show.

Finally, Dennis made incriminating statements following the murder. He told Stewart that he had only done what he had to do and had not even used his own car. He told Katina Lynn that Lynn deserved to die because she had been cheating on him.

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actually measured, only estimated (86T 4196-97), and the 7:00 time for Dennis being at Wilson's apartment was an approximation, not an exact time (83T 3923). Thus, there is no merit to Dennis' argument that his presence at Wilson's apartment at approximately 7:00 a.m. proves that he was not the murderer.

[18] Stewart testified that he had not given Dennis ammunition to go with the shotgun.

In short, Stewart's testimony was not uncorroborated, and it was far from being the only evidence supporting Dennis' conviction.[19]

Dennis can cite no Florida case finding the failure to charge the 2.04(b) instruction sua sponte to have been reversible error. Although the issue seems not to have arisen very often, what precedent the State has found supports its contention that this issue is not fundamental error. See Archer v. State, 673 So.2d 17, 20 (1996) (in a case in which a co-defendant who was convicted and received the death penalty testified against the defendant, no fundamental error in the failure to give the 2.04(b) accomplice instruction); Boykin v. State, 257 So.2d 251 (Fla. 1971)(no fundamental error in failing to give cautionary accomplice instruction where defense counsel argued that it should not accept

[19] Dennis makes additional arguments about the strength of the evidence. The State is not sure why such arguments belong here since Dennis does not contest the sufficiency of the evidence to support the conviction, but would respond to a couple of points. First, the fact that Dennis was not injured or bloodied during the assault was amply explained by the testimony. Although Dennis was not as big as Barnes, he was no weakling, having been a college football player himself, and having worked out to the point that he could bench press over 300 pounds. Furthermore, the evidence indicated that the victims had been asleep; it is entirely plausible that a sleepy Barnes was no match for a surprise attack by a shotgun-wielding ex-football player muscleman. As for the penis Dennis keeps reminding us of, the deposition testimony he refers to shows that Barnes could have answered the door with his fly unbuttoned because he either had been undressed and in bed or was preparing to undress and go to bed, and that his penis could have come out of the white boxer shorts on its own at some point during or after the assault (5R 946-47).

accomplice's testimony and general witness-credibility instructions were given).

No reversible error has been shown here.

II.

THERE WAS NO IMPROPER BOLSTERING OF STATE'S WITNESSES

Dennis divides this issue in two parts. In the first, he contends that the prosecutor improperly elicited hearsay and opinion testimony. In the second, he complains of the prosecutor's argument. The State will address each prong of this issue separately.

1. The alleged improper hearsay and opinion testimony. Two witnesses are at issue here: lead detective Romagni and detective Hellman. Dennis does not acknowledge that the testimony at issue was elicited on re-direct examination in explicit response to his trial counsel's cross-examination. It is the State's contention that the cross-examination at issue was legitimate response to matters raised in the first instance by defense counsel and that error, if any, was invited.

(a) Detective Romagni. Detective Romagni was extensively cross-examined by defense counsel.[20] The obvious purpose of this cross-examination was to portray the police investigation as incompetent; the defense theory was that police had no eyewitnesses

[20] The cross-examination is found beginning in volume 85 at page 4075 and extending through volume 86 at page 4201. There is also a re-cross at pp. 4225-38 of volume 86.

to the crime or events surrounding the crime and had based their decision to arrest Dennis on an unreliable witness - Joseph Stewart - who, through laziness or incompetence or just gullibility, police chose to believe.[21]

Thus, a major part of the cross-examination concerned the extent to which Romagni had discovered "eyewitnesses" to various facts. For example, defense counsel asked: "Did you have any eye witnesses to state that my client was in a position to see [where] Marlin [Barnes] parked . . . ?" (85T 4079); "Did you have eyewitnesses to testify that they saw Labrant Dennis slash those tires?" (85T 4081); "Am I correct to say that you have no independent eyewitnesses to testify that my client was seen following [the victims] to the University of Miami?" (85T 4082); "Could you verify that [Dennis] did drive his vehicle to the [bachelor] party? . . . "You did not verify? . . . Through any witness?" (85T 4092); "Ms. Djeije, she said she didn't see any license plate; correct?" (85T 4096); "there are no eyewitnesses at all to this crime?" (85T 4113); "was anyone present to overhear that my client confessed to [Stewart] . . . besides him?" (85T 4224); "Did you ever check the alibis of any of those other men that she was seeing while she was seeing [Dennis]?" (85T 4137).

[21] See, e.g., defense counsel's closing argument at volume 91, pp 4892, 4904-06, 4908-09.

Another major subject of the cross-examination was why Romagni chose to believe Stewart and why he had not prosecuted Stewart. For example, defense counsel asked: "it is only from what Mr. Stewart says that you gather it is only one assailant involved here?" (85T 4114); "you want to believe Joseph Stewart, right?" (85T 4116); "That's what [Stewart] tells you, correct?" (85T 4116); "When you say he had nothing to do with it, you choose to believe Joseph Stewart, correct?" (85T 4118); "Why isn't [Stewart] charged?" (85T 4134); "Did you ever take fingernail scrapings from Joseph Stewart?" (85T 4138); "Did you ever take a blood test from Joseph Stewart?" (85T 4138); "did you check to see . . . if perhaps [Dorothy Davis] was someplace else [instead of with Stewart at the time of the crime]?" (85T 4140); "So Joseph Stewart tells you that he's a mere acquaintance of my client who loans him a shotgun that he's not sure is going to work or not?" (85T 4150).

On redirect, the State responded by asking its own questions:

> Q. Now, the defense attorney asked you a series of questions beginning with, "Do you have an eyewitness to certain things?" Remember that?
>
> A. Yes.
>
> Q. And I want to sort of continue with that here. Do you have any eyewitness to the defendant abusing Timwanika Lumpkins?
>
> A. Yes.

(86T 4205). At this point, defense counsel objected on hearsay grounds. The State responded that defense counsel had opened the

door to its questioning by challenging the competency of Romagni's investigation, and by asking Romagni why he had believed Stewart (86T 4206-07). The court agreed and overruled the objection, based not only on its agreement that defense counsel had opened the door, but also on the State's representation that these witnesses had or would testify anyway. The court told defense counsel that, if any of the witnesses did not testify, the court would strike their testimony; however, defense counsel would have to raise the issue at the appropriate time (86T 4209). The State then proceeded to ask Romagni if he had spoken to any witnesses about Dennis' jealousy of Lumpkins (86T 4209), about Dennis spying on Lumpkins (86T 4209), about Dennis finding out where Marlin Barnes lived (86T 4210), about Dennis spying on Barnes and Lumpkins (86T 4210), about Dennis' knowing that Watisha Wallace's car was available that weekend and where it was left (86T 4210), about Dennis showing up at Zemoria Wilson's apartment at 7:00 a.m. dressed in black (86T 4210) and about Dennis having possession of the murder weapon (86T 4210). Romagni answered these questions in the affirmative, without elaboration. In response to further questioning, Romagni also testified, without going into any details of what the witnesses had told him, that besides the cell phone records, other witnesses had corroborated Stewart, including Zemoria Wilson, Bernadette Harding, Robert Smith, Dorothy Davis and Sharon Stewart (86T 4217-18).

It is generally permissible to allow the lead detective to testify that he took action based on information received, although it is "the better practice" not to go "into the details of the accusatory information" when its only relevance "is to show a logical sequence of events leading up to an arrest." State v. Baird, 572 So.2d 904, 908 (Fla. 1990). This may be especially true when the information is from confidential informants or other "mystery witnesses" who never testify and cannot be cross-examined. Keen v. State, No. SC88802 (Fla. September 28, 2000) (citing Conley v. State, 620 So.2d 180 (Fla. 1993); Wilding v. State, 674 So.2d 114 (Fla. 1996)). In this case, however, every single witness referred to in the complained of re-direct examination except Zemoria Wilson did testify and defense counsel had ample opportunity to cross-examine all of them. Further, absolutely no details of any statement Zemoria Wilson may have made to detective Wilson were revealed in this line of questioning, and defense counsel did not revisit this issue when the state rested without calling her as a witness, as the trial court had asked defense counsel to do if any of these witnesses did not testify. Moreover, unlike the testimony at issue in Keen, Conley and Wilding, here the elicited testimony was not offered on direct examination, but only in rebuttal of defense cross-examination about what witnesses Romagni had spoken to and why he had believed Stewart. Because defense counsel had opened the door to the testimony at issue, and

because the State based its case on substantial evidence properly admitted during trial, this case is controlled by Baird, and no harmful error occurred. Baird at 907-08 (challenged testimony harmless error because, although admitted prematurely during state's direct examination, it would have been admissible anyway on redirect after defense counsel had challenged the motives and judgment of the police witness on cross examination).

(b) Detective Hellman. Likewise, that portion of detective Hellman's testimony at issue here was elicited on re-direct examination after defense counsel repeatedly asked him about what "facts" he knew about the motive for the crime and who had committed it (78T 3372-77). Further, trial counsel's only objection to the re-direct examination was hearsay, not that the witness was expressing an opinion as to the guilt or innocence of the accused. Thus his present objection that the witness impermissibly expressed such opinion is not preserved for appeal. As for the hearsay objection, the only "facts" the witness claimed to be aware of were the "fact" that Joseph Stewart had spoken to Detective Romagni and the "domestic abuse history with the defendant and Ms. Lumpkins" (78T 3379). Since defense counsel opened the door to the question, and since Romagni, Stewart and the witnesses to the domestic abuse all testified directly, the re-direct examination was not improper. Alternatively, even if it was improper, it was, at most, harmless error, given the brevity of

detective Hellman's testimony, the extensive direct evidence covering the same subject matter, and the strong evidence supporting the conviction. Foster v. State, No. SC93372 (Fla. September 7, 2000) (error in the admission of hearsay harmless in light of substantial unrebutted direct evidence establishing defendant's knowledge and motive).

2. The alleged improper argument. Dennis concedes that trial counsel did not object to the argument at issue here. Thus, this issue is not preserved for appeal, absent fundamental error. Shellito v. State, 701 So.2d 837, 842 (Fla. 1997); Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Suggs v State, 644 So.2d 64, 68 (Fla. 1994); Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994). In reviewing for fundamental error, the prosecutor's argument must be viewed in context, because the State disagrees that the prosecutor expressed any personal opinion. On the contrary, she was simply arguing inferences from the evidence, in response to defense counsel's closing argument.

In his closing argument, defense counsel, noting that Stewart had said nothing about having an alibi until "almost three months later when he called down to the State Attorney's Office and finally thought on somebody" (91T 4911), argued: "[I]t wasn't a real alibi of Joseph Stewart. It was a lie and he got Dorothy Davis to lie for him" (91T 4920). He also argued; "My client never

confessed to [Stewart]. That was manufactured by Joseph Stewart in order to get himself out of trouble" (91T 4921).

In response to this argument, prosecutor Seff argued, inter alia:

> Nobody can suggest any motive whatsoever for Joseph Stewart pinning this murder on the defendant, if the defendant didn't do it.
>
> The defense attorney says Joseph Stewart only told that statement after he realized he was in so much trouble that he better come up with more evidence or something to that effect.
>
> Joseph Stewart told that statement to myself and another state attorney on July 2nd in the State Attorney's Office. The defendant had been in custody for these murders since April 30th, 1996, and he was still in custody on July 2nd and nobody had ever threatened. You heard the questions.
>
> Nobody ever threatened Joseph Stewart for being arrested for anything so the argument that Joseph Stewart came up with this because he was scared of getting arrested is [absurd]. Nobody said it looks bad for you Joseph.

(91T 4959).

It should be noted, first of all, that the reference to prosecutor Seff having talked to Stewart at the State Attorney's office was supported by testimony elicited without objection; in fact, defense counsel asked Stewart a series of questions about his interview with prosecutor Seff (81T 3674, 81T 3719-21) and his cross-examination of detective Romagni established that this interview had occurred on July 2, 1996 (85T 4123). Moreover, the evidence also clearly showed that Dennis had been in custody for

over two months at the time of this July 2 interview, that Stewart had not been charged with anything at that time, and that he was not considered a suspect. Thus, the evidence supported the prosecutor's argument, and it was legitimate response to the defense closing argument that Stewart had beefed up his original story to stay out of trouble. Moreover, the prosecutor's statement to the jury, that "You heard the questions," makes it clear that she was referring to the evidence rather than impermissibly asserting personal knowledge. Even if there is any ambiguity in her argument, we have been counseled by the United States Supreme Court that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly v. De Christoforo, 416 U.S. 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Had trial counsel objected, any possible ambiguity could have been cleared up. Instead we are offered post-trial speculation about the nature of the prosecutor's argument.

Given the brevity of the argument at issue here, and the overall strength of the evidence, Dennis cannot show fundamental error; that is, he cannot show the argument at issue here, even if error at all, "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained

without the assistance of the alleged error." Keen v. State, supra. Thus, no reversible error has been shown here.

III.

DENNIS WAS NOT DENIED A FAIR TRIAL OR PENALTY PHASE BY EVIDENCE THAT, MONTHS AFTER HE WAS ARRESTED, AND AFTER THE POLICE HAD SEARCHED WATISHA WALLACE'S CAR, FOUND NO PHYSICAL EVIDENCE IN THE CAR, AND RETURNED THE CAR TO HER, WALLACE BURNED THE CAR

Dennis contends here that the prosecutor called Watisha Wallace as a witness for no purpose other than to impeach her in order to beef up "weak and problematic" evidence that Dennis had used her car the night of the murders. He further contends that impeaching her with her conviction for arson and insurance fraud was a back-door attempt to show that Dennis had participated in the destruction of evidence.

Wallace, however, had relevant testimony to give and the State should not have been precluded from calling her as a witness to deliver that relevant testimony merely because she might also have been prepared to give testimony harmful to the State if she could. Moreover, the State's evidence that Dennis had used Wallace's car the night of the murder was not, as Dennis contends, "weak and problematic." Furthermore, by the time Wallace had burned the car, (1) Dennis had been in jail for some five months and (2) police had already searched the car, found nothing incriminating (no blood, hair or fibers) in it, and had returned it to Wallace. In these circumstances, it is highly unlikely that the jury would have

disregarded the court's explicit instructions not to infer that Dennis was guilty of burning the car.

Wallace testified that she and Dennis had been involved in a long-term relationship and that he had helped her pay her bills and buy her car (81T 3566-68). She testified that she owned a 1992 Nissan Sentra, which Dennis drove occasionally (81T 3575). She acknowledged having left town with friends on a trip to Daytona Beach the weekend of April 12, and that she had left at 3:00 a.m. Saturday morning (81T 3575). She acknowledged that she had not taken her car with her that weekend, but had left it at Shakia's grandmother's house (81T 3575-76). She also testified that they had gone from the grandmother's house to Tracy Little's house, from where they had left for Daytona (81T 3576). They had returned Sunday, and her car was still at the grandmother's house (81T 3576). However, she testified that Dennis could not have driven her car because (1) her car was in the exact same spot where she had left it and (2) Dennis did not have a key to the car (81T 3576, 3582). She claimed that when Dennis had used her car in the past, she had given him her key and he had returned the key when he returned the car (81T 3583). She claimed that there were no other keys to her car (81T 3584).

At this point, the State impeached Wallace with the fact that she had been convicted for felonies arising out of her having

burned the car. Before that occurred, the court instructed the jury:

> The witness, Miss Wallace, may allude in her testimony to certain facts regarding or relating to the burning and destruction of a certain automobile, which fact may constitute a crime.
>
> That crime, if any, is not a charged crime in this case. Therefore, you shall not infer from said testimony any guilt or responsibility on the part of the defendant, Mr. Labrant Dennis, whatsoever for that act.

(81T 3588). Then, pursuant to the State's examination, Wallace testified that a couple of weeks after Dennis had been arrested, police came and got her car. At some point she got the car back, and sometime thereafter paid someone to steal and burn it (81T 3592-93). She subsequently pled guilty to having burned her car (81T 3593-94).

On cross-examination, Wallace testified that she had also loaned her car to Joseph Stewart and others (81T 3605-06). She testified that the police had seized the car, looking for evidence, and had returned the car to her *5-6 months* before she burned it (81T 3608-09).[22]

Much of Wallace's testimony was favorable to the State. She confirmed that she owned a gray Nissan that Dennis had helped pay for; she identified photographs of it (the same photographs Nidia El-Djieje had looked at in identifying the car at her gas station);

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[22] She was arrested for the car burning on October 2, 1996 - not quite six months after the murder (81T 3612).

and she admitted that she had left town with friends the weekend the murder had occurred and that she had left her Nissan at a friend's grandmother's house. The unfavorable part of her testimony was that she claimed that Dennis could not have used it because he did not have a key and because the car had been parked at the exact same spot where she had left it.[23]

In a case involving impeachment by prior inconsistent statements, this Court stated that "where a witness gives both favorable and unfavorable testimony, the party calling the witness should usually be permitted to impeach the witness . . . ." Morton v. State, 689 So.2d 259, 264 (Fla. 1997). Wallace's testimony was in large part favorable and was highly relevant. Her testimony fails to support Dennis' claim that the prosecutor called Wallace solely to impeach her.

Nor is there any merit to Dennis' claim that Wallace's conviction for burning her car was improper impeachment or would not have helped the jury evaluate her credibility as to her claim that Dennis could not have used her car while she was out of town. The impeachment evidence was not merely unrelated "bad acts," Breedlove v. State, 580 So.2d 605, 609 (Fla. 1991), it was in fact a *conviction* involving dishonesty. Section 90.610 Fla. Stat. (1999). Furthermore, the object of this arson/insurance fraud was

[23] She could not, however, show the jury the exact spot; she could not remember (81T 3614).

evidence in this case. Wallace's willingness to destroy potential evidence in this case is relevant to an evaluation of the credibility of her insistence that Dennis had no key to her car. This impeachment was not, as Dennis contends, irrelevant evidence merely of her bad character or greed. Initial Brief of Appellant at 53.

Alternatively, Dennis argues is that this that the probative value of this impeachment evidence was outweighed by prejudice. See State v. Page, 449 So.2d 813 (Fla. 1984). However, the trial court was justified in concluding that the impeachment evidence was sufficiently relevant to Wallace's honesty and motivation to be admissible and that any potential prejudice to Dennis could be dealt with by jury instruction. Since the jury learned that Dennis had been in jail some five months when the car burned, and also knew it was undisputed that, months before the car had burned, police had thoroughly searched the car and found no incriminating physical evidence in it, there is no reason to believe that the jury would have been incapable of disregarding the court's instructions (which he later repeated) explicitly advising the jury not to infer that Dennis bore any responsibility for this act of Watisha Wallace.

Finally, the prosecutor's brief mention of the car-burning in her argument gave no more weight to this evidence than whatever impeachment value as to Wallace's testimony it deserved. The

prosecutor did not contend that it was substantive evidence of Dennis' guilt, but merely that it adversely reflected on Wallace's testimony that Dennis did not have a key to her car (91T 4869). Trial counsel did not object to this argument, and it was not fundamental error.

Finally, even if error occurred, it was harmless. That Wallace had burned up her car after police had searched it and found no incriminating evidence could not reasonably have contributed to the jury verdict in light of evidence presented establishing that: (1) Timwanika Lumpkins was involved in an abusive long-term relationship with Labrant Dennis; (2) Dennis was jealous, controlling and violent towards Lumpkins; (3) Dennis knew about and was jealous of her friendship with Marlin Barnes; (5) Dennis stalked Lumpkins and Barnes; (6) Dennis pointed a pistol at Lumpkins and threatened to kill her; (7) one week after Lumpkins moved out for good with Barnes' help, she and Barnes were brutally murdered; (8) Watisha Wallace owned a gray 1992 Nissan with its tag in the rear window instead of where it belonged; (9) Dennis had the keys to the car and had often used it; (10) Dennis had a black outfit that included a hooded black sweater; (11) Watisha Wallace's gray 1992 Nissan was available for Dennis to use in the early morning hours of April 13, 1996; (12) Nidia El-Djeije saw a suspicious looking black man dressed in black, wearing a hooded sweater on a hot night, standing next to a gray 1992 Nissan with no

visible tag, at about the same time that the victims' black Ford Explorer was across the street being loaded up on the wrecker, a very short time before the victims were murdered; (13) a few days before the murder, Dennis had borrowed the shotgun positively identified as the murder weapon from Joseph Stewart; (14) Dennis returned the murder weapon to Stewart a few hours after the murder; (15) when Stewart got the murder weapon back, the bag it was in contained a black outfit and a knife he had never seen before; (15) Dennis afterwards told Joseph Stewart that he had just done what he had to do and had not used his own car; and (16) Dennis told Katina Lynn that Lumpkins deserved to die.

No reversible error has been shown here.

IV.

THE TRIAL COURT DID NOT ERR IN DENYING A DEFENSE MOTION TO EXCLUDE NIDIA EL-DJEIJE'S IDENTIFICATION OF WATISHA WALLACE'S NISSAN

Dennis argues here that the trial court erred in denying his motion to exclude Nidia El-Djieje's identification of Watisha Wallace's Nissan as the one she saw at 4:00 a.m. on April 13, 1996, at her gas station, being driven by a suspicious man dressed in black, including a hooded black sweater. He contends that the pre-trial identification procedures were unnecessarily suggestive in violation of Stovall v. Denno, 388 U.S. 293 (1967); Neil v. Biggers, 409 U.S. 188 (1972); and Manson v. Brathwaite, 432 U.S. 98 (1977). These cases and their progeny, however, all apply to

eyewitness identifications of the *defendant*. Dennis cites no Florida cases, and no cases from anywhere for that matter, which hold that it is proper to apply a Stovall/Neil/Biggers type analysis to the identification of automobiles or other physical evidence and the State is aware of none. The Ninth Circuit Court of Appeals, however, has addressed and rejected such a claim:

> Johnson contends that the victim's in-court identification of the automobile which Johnson used to carry Jones out to the desert was tainted by unduly suggestive pretrial identification procedures and therefore should have been excluded. While this argument deserves credit for creativity, Stovall and its progeny do not require car line-ups. There is no authority holding that a defendant's due process right to reliable identification procedures extends beyond normal authenticity and identification procedures for physical evidence offered by the prosecution. See, e.g., State v. Roscoe, 700 P.2d 1312, 1324 (Ariz. 1984) (en banc) (holding that right to pretrial identification procedures is inapplicable to items of physical evidence.

Johnson v. Sublett, 63 F.3d 926, 931-32 (9th Cir. 1995). In an unpublished opinion, the Fourth Circuit cited and applied Johnson in a case involving shotguns. U.S. v. Zenone, 153 F.3d 725 (4th Cir. 1998) (unpublished opinion retrievable on Westlaw)(citing Johnson, court rejected claim that case law involving suggestive police identification procedures of persons had any applicability to physical objects).

In any event, El-Djeije did not review only photographs of Wallace's Nissan; police had earlier showed her photographs of Dennis' Mazda and she told police that was *not* the car she saw. When she saw photographs of Wallace's Nissan, El-Djeije immediately

and positively identified it as the one she had seen at her gas station. As for her identification of the Nissan, Dennis claims that in the photographs Wallace's Nissan looks white, not gray, that El-Djeije got the year wrong, that she failed to see the damage on the passenger side, and that she failed to see the license plate in the rear window. However, it is undisputed that El-Djeije saw a gray Nissan and that Wallace's Nissan is gray. It is also undisputed that El-Djeije never saw the passenger side of the car (80T 3471). Furthermore, it is undisputed that the license plate on Wallace's Nissan was not in the place near the rear bumper where it was supposed to be, and it is not unreasonable to conclude that El-Djeije did not see a plate in the rear window because (a) she wasn't looking for it there, (b) she couldn't see it from 40 feet away (80T 3475) under the lighting conditions that existed at 4:00 a.m., as the car was driving away, or (c) it was not in the window at that time. Finally, although Dennis argues that there is a tremendous difference between a 1986-87 Nissan and a 1992 Nissan, based on Jose Rodriguez' testimony that the newer models were "much rounder," Rodriguez also testified that there was "not much difference" between the 1986-87 and 1992 Nissans (80T 3494-95).

Finally, even if we assume that El-Djeije could not recognize Watisha Wallace's gray 1992 Nissan with no tag to the exclusion of all other gray 1992 Nissans with no tag, these facts still remain: (1) Watisha Wallace owned a gray 1992 Nissan with its tag in the

rear window instead of where it belonged; (2) Dennis had the keys to the car and had often used it; (3) Dennis had a black outfit that included a hooded black sweater; (4) Watisha Wallace's gray 1992 Nissan was available for Dennis to use in the early morning hours of April 13, 1996; (5) Nidia El-Djeije saw a suspicious looking black man dressed in black, wearing a hooded sweater on a hot night, standing next to a gray 1992 Nissan with no visible tag, at about the same time that the victims' black Ford Explorer was across the street being loaded up on the wrecker, a very short time before the victims were murdered; (6) Dennis afterwards told Joseph Stewart that he had not used his own car. It was not reversible error for the trial court to have allowed El-Djeije to identify Watisha Wallace's car as the one she had seen that morning.

V.

DENNIS WAS NOT DENIED A FAIR TRIAL BY THE STATE'S IMPEACHMENT OF ITS OWN WITNESS, JESSE PITTS

The State called Jesse Pitts as a witness. Pitts and his girlfriend Carolyn Williams were Dennis' roommates at the time of the murders (80T 3513-14). At the outset of its examination, the State asked Pitts if he had ever been convicted of a crime (80T 3510). There was no objection to this question (80T 3510). At first, Pitts claimed that he had been charged, but never "really convicted" (80T 3510). When the State began to refresh his memory by showing him a conviction, defense counsel objected that the

prosecutor was trying "to impeach her own witness" (80T 3511). The prosecutor responded that under the rules, "You're allowed to impeach your own witness." The court overruled the objection, but stated to defense counsel that if he had any other objections during the examination, counsel was welcome to raise them (80T 3511). The State then proceeded to prove that Pitts had one prior conviction, for possession of a controlled substance (80T 3513).[24]

Pitts then testified that Lumpkins had lived with them until she moved out (80T 3516). At first, Pitts claimed not to remember when she had moved out, but after having his memory refreshed by his prior statement to the State Attorney (80T 3516-18), Pitts testified that he remembered that she had moved out about a week before the murder (80T 3519), assisted by a man driving a brown or black Ford Explorer (80T 3520).

Next, Pitts was asked if he had talked to Dennis after Pitts had given his first statement soon after the murder. He answered no (80T 3521). The State then asked him if he remembered giving a second statement to the effect that he had talked to Dennis after the first statement and that Dennis had said: "Don't worry about it. You don't know nothing. Don't worry about it. . . . I'm sorry you got to be dragged into this" (80T 3522). At this point, defense counsel objected that the prior statement was not

[24] The State showed Pitts several other convictions, which were his brother's, not his. The State apologized to Pitts for confusing him with his brother (80T 3512-13).

"contradictory" to what Pitts had said in court (80T 3523). This objection was overruled.

Defense counsel made no other objections during Pitts' testimony. At times, Pitts was reminded of his prior statements, some of which he recalled and some of which he did not. However, Pitts testified, without any prompting, that he had come home at 6-7 p.m. Friday evening after work (80T 3524), that he had last seen Dennis at 11-12 p.m. (80T 3525), that Dennis had been getting dressed to go out (80T 3526), that Pitts had awakened to feed the baby and had seen Dennis' Mazda outside the apartment between 2 and 4:00 a.m. (80T 3526-28), and that Dennis' door had been shut (80T 3530-31).

Relying on Morton v. State, 689 So.2d 259 (Fla. 1997), Dennis complains of the State's impeachment of its witness Jesse Pitts. He contends that the State "manifestly" called Pitts "for the primary purpose" of impeaching him with otherwise inadmissible evidence. Initial Brief of Appellant at 73.

Initially, the State would question whether Dennis has preserved this issue for appeal. Although trial counsel did object to evidence that Pitts had a prior conviction for possession of drugs, this was not impeachment with prior inconsistent statements which would be, except for their impeachment value, inadmissible hearsay, which is what Morton is concerned with. Trial counsel's only other objection was that Pitts' failure to remember Dennis'

mildly incriminating statement was not "truly contradictory," which seems meritless on its face and has not been renewed on appeal. The remainder of the questions about Pitts' prior statements were asked and answered without objection. Thus, the trial court was never called on to determine whether or not the probative value of this impeachment evidence was "substantially outweighed by the danger of unfair prejudice or confusion." Morton, supra at 264.

In any event, the State disagrees that introducing otherwise inadmissible hearsay testimony was the prosecutor's "primary purpose" for calling Pitts. Pitts had relevant testimony to give and there is no evidence that the prosecutor knew that Pitts had repudiated his earlier statements; in fact, Pitts gave significant testimony without prompting and, when prompted about other prior statements, recalled the facts he had testified to previously. As for the facts he did not recall even after being prompted, Dennis has not demonstrated that the prosecutor asked "Nit-picking" questions, Morton, supra at 262 (quoting Charles W. Ehrhardt, *Florida Evidence*, Section 608.4, at 391-93 (1996 ed.), or relied on such unproven facts in closing argument. Morton, supra at 264 ("The prosecutor compounded the problem in closing argument . . . by asserting the content of the impeaching statements as proven facts.").

In Morton, this Court found the "cumulative effect of so much impeachment of so many witnesses," coupled with the prosecutor's

reliance on impeaching statements as proven facts, to have been harmless at the guilt phase. Id. at 264. In this case, there is no cumulative effect, and no prosecutorial reliance. Given the very strong evidence of guilt and the minimal effect of Pitts' testimony, any error in his impeachment with prior inconsistent statements is harmless beyond a reasonable doubt.[25]

VI.

EVIDENCE THAT DENNIS HAD THREATENED, ASSAULTED AND STALKED TIMWANIKA LUMPKINS WAS HIGHLY RELEVANT AND PROPERLY ADMITTED

As detailed in the State's Statement of Facts, *post*, Dennis had been jealous, possessive and violent towards Timwanika Lumpkins, had been suspicious of her and Marlin Barnes, and had been stalking her for years. As early as 1994, Dennis was pumping Jennifer Jordan for information about Barnes and Lumpkins, telling her to let him know if she ever saw Barnes with a "girl that drove a red car," and later explicitly asking her, and finding out, where Marlin Barnes lived. More than once during his relationship with Lumpkins, Dennis had ordered her either not to leave or to return

[25] Dennis, unlike Morton, does not claim that any error here affected the penalty phase, and the State does not see how it could have. Nothing in Pitts' testimony contributed at all to the proof of any statutory aggravator, much less contributed in a major way. Compare Morton at 265 ("much of the evidence in the instant case supporting the CCP aggravator was introduced through inmpeachment" . . . and "the prosecutor asked the jury to accept the content of the impeaching statements as true"). Moreover, as noted in Rodriguez v. State, 25 Fla. L. Weekly S89, S95 (Fla. Feb. 3, 2000), relevant prior inconsistent statements may be considered substantively in the penalty phase.

home, had pointed a gun at her and others, and had threatened to kill Lumpkins, her uncle and her date. He also had given Lumpkins a black eye, had tried to strangle her, and had stalked her at her aunt's house while dressed in a black outfit with a hood over his head - the same kind of black outfit that Katina Lynn testified Dennis wore during his shows and at other times, and the same kind of black outfit that Nidia El-Djeije saw a suspicious person wearing at her gas station just across the street from where the victims' Ford Explorer was being loaded on a wrecker. Invariably, these abusive incidents occurred when Lumpkins tried to leave Dennis or otherwise act against Dennis' wishes.

Dennis argues that all this evidence was irrelevant, that the reason for these "quarrels" as he calls them is unknown, and that they were merely expressions of "momentary anger." This argument is nonsense. It is not necessary to parse the testimony at issue point by point. It is sufficient to say that, in summary, the evidence shows: (1) Timwanika Lumpkins was involved in an abusive long-term relationship with Labrant Dennis; (2) Dennis was jealous, controlling and violent towards Lumpkins; (3) Dennis knew about and was jealous of her friendship with Marlin Barnes; (5) Dennis stalked Lumpkins and Barnes; (6) Dennis pointed a pistol at Lumpkins and threatened to kill her; (7) one week after Lumpkins moved out for good with Barnes' help, she and Barnes were brutally murdered. This evidence was an integral part of the crime on trial

and was properly admitted to show motive, intent and premeditation. Sireci v. State, 399 So.2d 964, 967 (Fla. 1981) ("Evidence from which premeditation may be inferred includes . . . previous difficulties between the parties."); Brown v. State, 611 So.2d 540, 542 (Fla. 3rd DCA 1992) (in attempted first degree murder case, victim's testimony "that she and the defendant had a rocky relationship, that there were problems with his jealousy, . . . that he did not want anyone else in the house . . . [and] that the defendant had threatened to kill her if he caught her with another man" was properly admitted as evidence of motive, intent and premeditation); Burgal v. State, 740 So.2d 82 (Fla. 3rd DCA 1999) (in attempted first degree murder case, prior incidents of domestic violence by defendant against victim were properly admitted in evidence to prove motive, intent, and premeditation); Craig v. State, 510 So.2d 857, 863-64 (Fla. 1987) (evidence that defendant had been stealing cattle from ranch whose owners were murdered was properly admitted; cattle thefts were an "integral part of the entire factual context in which the charged crimes took place;" although evidence of motive is not necessary to a conviction, "when it is available and would help the jury to understand the other evidence presented, it should not be kept from them merely because it reveals the commission of crimes not charged;" the test for admissibility is not necessity, but relevance).

VII.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ALLOWING KATINA LYNN'S BRIEF TESTIMONY THAT DENNIS WAS JEALOUS OF HER BOYFRIEND MARLIN McGHEE

The testimony at issue here is:

Q. [to Ms. Lynn] Were there any problems at the beginning of your relationship with the defendant?

A. No.

* * * *

Q. Did there come a time when you did begin having problems with the defendant?

A. Like four to five months later.

Q. And what was the basis of those problems?

A. He was jealous that I was with Marlin [McGhee].

(87T 4337, 4339). Dennis contends this was impermissible character trait testimony. The State would disagree. Dennis was carrying on an intimate relationship with Lynn at the same time he was involved in an intimate relationship with Timwanika Lumpkins with whom -like Lynn - Dennis had no problems at first. In the Lumpkins relationship, Dennis was jealous of another Marlin (Barnes), and after Lumpkins left him with Barnes' assistance, a week before they both were murdered, Dennis demanded that Lynn explain "what was it about these Marlins that girls like" (87T 4345).[26] The relationships were sufficiently similar and the testimony

[26] If nothing else, the complained-of testimony places this testimony (admitted without objection) in context.

sufficiently logically connected to justify the admission of Lynn's testimony in evidence. Salmanca v. State, 745 So.2d 502 (Fla. 3rd DCA 1999) (on prosecution for child abuse of son for shocking him with stun gun, proper to admit evidence that defendant had also used stun gun on girlfriend's daughter). Moreover, the testimony at issue here fails to show the commission of an extrinsic crime, and, in view of its brevity, any error in its admission is clearly harmless beyond a reasonable doubt.

VIII.

THE TRIAL COURT DID NOT ERR IN ADMITTING AUTOPSY PHOTOGRAPHS OF THE TWO VICTIMS WHICH ASSISTED THE MEDICAL EXAMINER IN HIS TESTIMONY TO THE JURY

Dr. Gulino, who performed the autopsy of the two victims, testified that he had taken in excess of 100 photographs of each victim (88T 4389). Of these 200 plus photographs, the State proffered less than 50 (88T 4391-4409), of which the trial court excluded half a dozen (88T 4403, 4410). Approximately one half of the remainder were admitted without objection. Of these, approximately one half (or about one fourth of the total) were objected to on the grounds that they were inflammatory. Of these, seven are explicitly complained about on appeal. Initial Brief of Appellant at pp 82-83.

The record shows that Dr. Gulino used these photographs to explain the injuries to the two victims, how those injuries were

inflicted and how much force had been used (88T 4420-21, 4443-44, 4428-29, 4417-20).

The admission of photographic evidence is within the trial court's discretion, and a ruling on this issue will not be disturbed on appeal absent a clear showing of abuse. Gudinas v. State, 693 So.2d 953 (Fla.1997); Pangburn v. State, 661 So.2d 1182, 1187 (Fla.1995). This court has "consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence." Czubak v. State, 570 So.2d 925, 928-29 (Fla. 1990). Here, the trial judge reviewed the photographs and admitted those which the court felt were not duplicitous and would assist the medical examiner in explaining wounds found on a murder victim are admissible. King v. State, 623 So.2d 486 (Fla.1993). The medical examiner used these photographs to identify the murder weapon and to illustrate the circumstances of the victims' death, the extent of their injuries, and the amount of forced used. Especially where the defense had raised an issue about the number of assailants and the absence of blood or injuries on him or in his car, these photographs were relevant to the issues of identity and premeditation.[27] The trial court did not abuse its

[27] Hence, the cases he cites are inapposite. Copertino v. State, 726 So.2d 330 (Fla. 4th DCA 1999), is not a murder case and so there was no issue of premeditation, and identity was not an issue. In Thompson v. State, 619 So.2d 261 (Fla. 1993), the photos at issue were admitted at the penalty phase, when there was no issue of identity and CCP was not supported by the evidence. In Czubak v. State, supra, the victim's body had not been discovered

discretion in admitting these photographs, gruesome though some of them may have been. Vargas v. State, 751 So.2d 665, (Fla. 3rd DCA 2000) ("Almost any photograph of a homicide victim is gruesome. But the medical examiner used the photographs during his testimony to illustrate the nature of the wounds and the element of premeditation for the first degree murder charges. Because the photographs were relevant to the medical examiner's testimony, the trial court did not abuse its discretion in admitting them.")(citing Lott v. State, 695 So.2d 1239 (Fla.1997) (no abuse of discretion where admitted photographs were probative of the premeditated murder charge); Gudinas v. State, supra (pictures were necessary to explain location and extent of wounds); Sanchez-Basulto v. State, 601 So.2d 1263 (Fla. 3d DCA 1992) (admittance of photographs was probative of the nature of the victim's wounds, type of weapon used, and cause of victim's death)).

Even error occurred as to one or more of the photographs, it was harmless given the testimony of the medical examiner and other witnesses and the other photographs admitted in evidence. Thompson v. State, supra.

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until it had decomposed so badly that it was unrecognizable; the photographs did not show any wounds and were not probative of the cause of death or identity. Under the "unusual circumstances presented in this case," id. at 929, they simply were not relevant and should not have been admitted.

IX, X, XI AND XII.

THE TRIAL COURT'S SENTENCING ORDER PROVIDES A SUFFICIENT BASIS FOR APPELLATE REVIEW AND CONTAINS A THOROUGH AND SUFFICIENT ANALYSIS OF THE MASSIVE EVIDENCE PRESENTED IN THIS CASE AND OF THE PROFFERED AGGRAVATORS AND MITIGATORS

In these issues, Dennis complains of accuracy of the trial court's factual determinations and contends the court erred in finding the CCP and HAC aggravators and in giving little or no weight to the extreme mental or emotional disturbance mitigator. The State will address these issues together because Dennis addresses all of these findings in his Issue IX, in which he complains of various alleged factual and legal errors committed by the court in its sentencing order, and then reprises these same arguments in his Issues X, XI and XII.

Dennis argues that the trial court's sentencing order is "replete" with errors, conjecture and "conclusory assertions." He contends that "numerous errors" in the court's sentencing order "not only preclude adequate appellate review but also call into question the reliability of the trial court's findings and its ultimate decision to impose the death penalty." Initial Brief of Appellant at 84-85. He accuses the trial court of relying on "non-existent" evidence and of being "confused" about the weighing process. He further contends that the trial court erred in finding the murders to have been cold, calculated and premeditated because he had no plan and merely committed the murders in a jealous rage;

that the trial court erred in finding that the murders were heinous, atrocious or cruel because this was a crime of passion and he did not intend to torture; that the trial court erred in its rejection of the mitigator of no significant prior criminal activity because the evidence the court relied on did not exist, and that the trial court erred in giving little or no weight to the statutory mitigator of extreme mental or emotional disturbance on the basis that the murders were well thought out and methodically executed because, again, Dennis had no "plan." The State will address the evidence and the trial court's order as to each of these aggravators and mitigators in turn.

1. The cold, calculated and premeditated aggravator. The evidence shows: (1) after Timwanika Lumpkins moved out for the last time, with Marlin Barnes' assistance, Dennis obtained a sawed-off shotgun from an acquaintance, went to a gun shop and bought ammunition for the gun; (2) Dennis pretended to remain on good terms with Lumpkins, taking her shopping the evening before the murders and later that night took Lumpkins to a nightclub; (3) he later entered the nightclub himself, where he confirmed that she and Marlin Barnes were together; (4) at some point, Dennis switched cars so he would not be driving his own; (5) Dennis slashed the tires of Marlin Barnes' Explorer, and waited nearby dressed in a black, hooded outfit which hid his face, until he saw that the Explorer had been put on a wrecker and was ready to leave; (6)

Dennis went to Barnes' apartment, having earlier found out where he lived; (7) Dennis accosted Barnes at the doorway to the apartment, hitting him in the face with the shotgun 25 or more times; (8) Dennis accosted Lumpkins in the bedroom, hitting her on the head until her skull was broken open and her brains exposed; (9) Dennis left the apartment, returned the borrowed gun and car, disposed of his clothes, and played innocent.

Dennis does not contend that the trial court relied on non-existent facts or testimony here, but argues that no plan can be inferred from these facts because the facts are equally consistent with the absence of a plan. The State disagrees. It may be true that when each of these circumstances is considered in isolation, a "plan" is not necessarily the only inference to be drawn, but when considered together, it is obvious that Dennis obtained a weapon in advance, learned in advance where the victims would be, took pains to use items (the car and the gun) that could not readily be traced to him, and attempted to hide his tracks afterwards. The fact that he was ultimately caught establishes only that his was not a perfect plan, not that he did not have a plan, or even a reasonably good one.

Dennis further argues that this murder was not CCP even if there was some evidence of planning because it arose out of a domestic situation and the brutality of the murder shows it to have been committed in a fit of rage or emotional frenzy. However,

Dennis showed little emotion after supposedly learning that Lumpkins had died, and the efforts he made to hide his identity, to use items which could not be readily traced, and to cover his tracks both before and after the murder were committed are inconsistent with a crime committed in a fit of rage or a frenzy.

Citing Douglas v. State, 575 So.2d 165 (Fla. 1991) and Santos v. State, 591 So.2d 162 (Fla. 1991), Dennis argues that this murder cannot be CCP even if it was planned, because it is a domestic murder and was committed in the heat of passion. However, the facts of Douglas show little evidence of any plan, and in Santos, unrebutted expert mental health testimony had been presented which indicated that the domestic dispute had severely deranged the defendant. Dennis presented no mental health expert testimony.

Furthermore, even though Dennis' motivation may have been grounded in passion, these murders simply were not committed as the result of frenzy, panic or sudden fit of rage. Dennis had ample time for "cool and calm reflection," Jackson v. State, 648 So.2d 85, 89 (Fla. 1994); he obtained the murder weapon several days in advance, and he had already obtained a concealing outfit and another's vehicle before ever going to the victims' apartment. These murders clearly were cold, calculated and premeditated, and the trial court did not err in so finding. Zakrzewski v. State, 717 So.2d 488, 492 (Fla. 1998)(murders CCP where defendant obtained weapon in advance, lay in wait, murdered wife and two children, and

fled to Hawaii); Cummings-El v. State, 684 So.2d 729 (Fla. 1996) (murder CCP where defendant killed ex-girlfriend after relationship ended after having stated, two weeks earlier, that if he could not have her, no one could); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990) (CCP properly found even though defendant's motivation may have been grounded in passion where defendant stole a gun from a friend to murder his former lover and her male companion after having stalked her for several days).[28]

2. The heinous, atrocious, or cruel aggravator. Dennis contends the trial court relied on non-existent testimony in its consideration of the HAC aggravator. He cites two errors: "the court states that Mr. Barnes was struck with the shotgun with such force that pieces of the firearm were embedded in his brain" and "that the bones in Ms. Lumpkins' face were crushed or fractured." Initial Brief of Appellant at 87.

The State acknowledges that it is unaware of testimony or evidence that pieces of the firearm were embedded in Barnes' brain.[29] However, he was massively injured by having been hit in the head an estimated 20-25 times with the shotgun (96T 5240). Besides having multiple lacerations, bruises and abrasions, his

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[28] Even if this finding were error, it would be harmless beyond a reasonable doubt since, inter alia, Dennis committed two murders in a heinous, atrocious or cruel manner.

[29] There was testimony, however, that Lumpkins had been hit so hard that her hair was embedded *in her skull* (96T 5233).

sinus and nasal bones were broken, several teeth were broken or missing, the hard palate in the roof of his mouth was broken, his cheekbones were broken, and the occipital bone in his skull was broken (88T 4435-4488, 96T 5243). Bone fragments and teeth were found near the body (78T 3288). Based on this testimony, as well as the photographs introduced in evidence, the trial court correctly found:

> Although no specific number of blows could be determined which were inflicted on Mr. Barnes, many, many blows had to be in fact inflicted to have caused the horrendous physical damage to the face and head of Mr. Barnes. The evidence further established beyond a reasonable doubt that gashes were inflicted to the lower face, cheeks, nose, ears, forehead, and both sides of the face. That these savage injuries so distorted and disfigured Mr. Barnes' face as to render him almost unrecognizable.

(15R 3257).

As for Lumpkins, after noting that the evidence suggested that Lumpkins had been asleep when the attack began, the trial court found:

> The evidence established beyond a reasonable doubt that defensive action was taken by Timwanika in the midst of this desperation. Wounds to both her hands observed by the medical examiner during her post-mortem examination were testified to and characterized as was the case also with Mr. Barnes earlier as "defensive wounds" indicating an attempt to protect her face and/or head against devastating blows. Also an earring was found under the bed indicating that she possibly tried to hide there to avoid detection.
>
> The evidence showed beyond a reasonable doubt that Ms. Lumpkins also sustained numerous blows to the face and head. That her skull was fractured in such a brutal manner that brain matter oozed from the cranial cavity.

> That bones in Ms. Lumpkins' face were crushed or fractured; that large gashes were inflicted to her face, ear, forehead, and the back of her head.

(15R 3258).

Dennis' only complaint about the factual correctness of these findings is the characterization that bones in Lumpkins' "face" were crushed or fractured. It is true that Lumpkins was primarily beaten about the back and side of her head, and that a major area of injury was the rear of her head, where her skull was crushed and brain matter was visible.[30] However, there was a laceration on her left temple (78T 3340, 88T 4414) and another on her left ear that "goes through both the skin and cartilage of the ear (88T 4413, 4422). In addition, she had bruises and abrasions on her lip and one tooth was chipped (88T 4426).

The fracture on the rear of the skull spread out to other parts of her skull, including one that went across the top of the head and over to the right side of the head (88T 4419-20). In addition, the base of her skull, underneath the brain was fractured "clear across the middle portion of the skull" (88T 4421).

In view of all this, the court's use of the word "face" rather than "head" cannot diminish the value of the court's conclusion that Lumpkins sustained "horrific injuries" (15R 3259).

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[30] Crime scene technician Elvey Melgarejo testified that she examined Lumpkins' body at the medical examiner's office. She could tell from the blood and brain tissue in Lumpkins' hair that her skull was fractured, so she felt the skull; it was "very mushy" (78T 3343).

Nor is there any merit to Dennis' argument that these murders were not heinous, atrocious or cruel. Undisputed testimony was presented that both victims suffered a high degree of pain and were conscious during at least part of the beatings (as evidenced by the defensive wounds). The shooting-murder cases cited by Dennis are inapposite. This was an extremely brutal beating murder and such murders are properly found to be HAC. E.g. Willacy v. State, 696 So.2d 693, 696 (Fla. 1997) (where victim was beaten, strangled and burned, this Court noted that "each of these factors has been ruled dispositive of HAC"); Geralds v. State, 674 So.2d 96, 102 (Fla. 1996) (HAC properly found where victim was severely beaten prior to death); Whitton v. State, 649 So.2d 861 (Fla. 1994) (HAC properly found where victim was beaten and stabbed to death); Atkins v. State, 497 So.2d 1200, 1201 (Fla. 1986) (HAC properly found where victim beaten to death with steel rod, crushing his skull); Davis v. State, 461 So.2d 67 (Fla. 1984) (HAC properly found where, inter alia, victim was beaten on head with pistol almost beyond recognition).

Any factual inaccuracy was de minimus in this case. Shellito v. State, 701 So.2d 837 (Fla. 1997) (no reversible error in rejection of age mitigator where trial court incorrectly stated that defendant was 19 at time of crime rather than 18). The trial court did not err in finding these murders to be heinous, atrocious or cruel.

3. The proposed mitigator of no significant history of prior criminal activity. Dennis contends that the trial court's rejection of this proposed mitigator "is based entirely on non-existent criminal activity." Initial Brief of Appellant at 85. He claims that no one, let alone a family member, saw Dennis "physically abuse" Lumpkins, and that no "family member" observed signs of physical abuse or could say that Lumpkins feared Dennis. However, *family members* (her aunt and uncle) testified that Dennis pointed a gun at Lumpkins and threaten to kill her (87T 4293, 4307-08). The state would characterize this assault as "physical abuse." Further, on two occasions while Lumpkins was separated from Dennis, she was so afraid of Dennis that she ran inside and locked the door, leaving her aunt on one occasion, and her uncle on the other, standing outside with Dennis (87T 4266, 4272, 4293, 4310). The trial court did not err in concluding, on the basis of this testimony, that, during periods of separation following abuse, "Ms. Lumpkins feared the Defendant" (15R 3261). Finally, Dekeisha Williams, who testified that Dennis had given Lumpkins a black eye and had left handprints on her neck shortly before the murders, although not a blood relative, was godmother to Lumpkins' child (95T 5196).

As the trial court noted (15R 3261), criminal activity for which the defendant has not been convicted can be proved to rebut this statutory mitigator where, as here, the defendant does not

waive the mitigator. Lucas v. State, 568 So.2d 18 (fn. 6)(Fla. 1990); Washington v. State, 362 So.2d 658 (Fla. 1978). In this case, the trial court was justified in rejecting the proposed mitigator that Dennis had no significant history of prior criminal activity.

4. The proposed mitigator that the murders were committed under the influence of extreme mental or emotional disturbance. Dennis' only complaint here is that the court gave this factor "little or no weight" in view of Dennis' "well thought out and methodically executed plan to commit these murders." Initial Brief of Appellant at 98-99. Dennis argues that this finding is similar to the "confusing" finding in Morgan v. State, 639 So.2d 6, 13 (Fla. 1994), where the court found, inter alia, that the defendant was in a "rage" but knew what he was doing and that it was wrong. However, the trial court in this case did not find that Dennis committed these murders in a "rage." On the contrary, the trial court rejected Dennis' argument that he committed this crime as the result of "passion that resulted in an uncontrollable rage" (15R 3262). Instead, the court accepted the State's argument that Dennis "did not act on the spur of the moment while overcome by a jealous rage, but rather, he embarked on a carefully thought out plan designed to achieve these murders." The court found:

> This court finds from the evidence that the Defendant's realization that this long relationship with Timwanika Lumpkins, his longtime lover and the mother of one of his children caused him to be affected with

> emotional distress. However, his well thought out and methodically executed plan to commit these murders negate this mitigating circumstance from outweighing the aggravators. The Court gives this mitigating circumstance little or no weight.

(15R 3262).

Dennis also argues that this finding was error because there was insufficient evidence to support a finding of a plan. However, this argument is meritless for reasons stated in the State's argument above. The court did not err in assigning "little or no weight" to this proposed mitigating circumstance. Trease v. State, 25 Fla. L. Weekly S622, S623 (Fla. August 17, 2000).

XIII.

THE DEATH PENALTY IS NOT A DISPROPORTIONATE SENTENCE FOR TWO HEINOUS, PREMEDITATED MURDERS

Dennis contends here that death is disproportionate because this is a crime of passion. In fact, however, it was a planned and cold-blooded execution of two innocent people in the sanctity of a private dwelling. Further, there is no "domestic dispute" exception to the imposition of a death sentence. E.g., Zakrzewski v. State, supra, 717 So.2d at 488. There are four statutory aggravating circumstances in this case, including CCP, HAC and prior violent felony. The last aggravator is established, in essence, because this was a double murder. The State would contend that this is an extremely weighty aggravator because, to put it simply, common sense tells us it is twice as bad to murder two

people as it is to murder one. CCP and HAC are also very weighty aggravators. Against this weighty aggravation, Dennis can offer little more than a statutory mental-disturbance mitigator unsupported by any evidence of serious mental disorder, but only by evidence that he is jealous and possessive, to which the trial court assigned little or no weight. This Court's precedent fully supports and justifies the death sentences imposed in this case. Way v. State, 25 Fla. L. Weekly S309 (Fla. April 20, 2000) (defendant beat to death his wife and daughter and then set them on fire); Zakrzewski v. State, 717 So.2d 488 (Fla. 1998) (defendant murdered his wife and two children); Thomas v. State, 693 So.2d 951 (Fla. 1997) (husband kidnapped and murdered wife); Pope v. State, 679 So.2d 710 (Fla. 1996) (defendant murdered girlfriend); Cummings-El v. State, 684 So.2d 729 (Fla. 1996) (defendant killed ex-girlfriend after relationship ended); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990) (defendant murdered his former lover and her male companion after having stalked her for several days).

CONCLUSION

For all of the foregoing reasons, Dennis's convictions and death sentences should be affirmed.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Louis Campbell, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, this 9th day of October, 2000.

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CURTIS M. FRENCH
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