IN THE SUPREME COURT OF FLORIDA

CHARLES ANDERSON,
Appellant,

CASE NO. 95,773

vs.

L.T. 94-15182 CF-10A

STATE OF FLORIDA,
Appellee.

____________________/

APPELLEE'S ANSWER BRIEF

ON DIRECT APPEAL FROM THE CIRCUIT COURT
BROWARD COUNTY, FLORIDA
DANIEL TRUE ANDREWS, CIRCUIT COURT JUDGE

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TABLE OF CONTENTS

TABLE OF CONTENTS i

AUTHORITIES CITED iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT

POINT I

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUSTAIN A FIRST-DEGREE MURDER CONVICTION (Restated) **3**

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE THAT WAS "INEXTRICABLY INTERTWINED" WITH FINALLY, ANY ALLEGED ERROR WAS HARMLESS. (Restated). 19

POINT III

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY FROM LIEUTENANT KEVIN VAUGHN IN SUPPORT OF THE STATE'S THEORY OF THE CASE (Restated) 31

POINT IV

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY FROM EYEWITNESS AMELIA STRINGER. (Restated) 37

POINT V & IX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING PHOTOGRAPHS OF THE DECEASED INTO EVIDENCE DURING THE GUILT AND PENALTY PHASES (Restated) 45

POINTS VI & VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL. FURTHER, THE UNPRESERVED, ALLEGEDLY IMPROPER COMMENTS DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL AND FAIR SENTENCING HEARING. (Restated) 53

POINT VII

THE TRIAL COURT CORRECTLY ALLOWED THE STATE TO PROCEED ON A THEORY OF FELONY MURDER. (Restated) 78

POINT X

THE EVIDENCE SUPPORTS THE AGGRAVATING FACTORS IN THIS CASE. (Restated) 80

POINT XI

THE DEATH PENALTY IS PROPORTIONAL 90

POINT XII

THE DEATH SENTENCE DOES NOT VIOLATE APPRENDI (Restated) 97

POINT XIII

THE 'FELONY MURDER' AGGRAVATING FACTOR IS CONSTITUTIONAL (Restated). 99

CONCLUSION 100

CERTIFICATE OF SERVICE 100

TABLE OF AUTHORITIES

CASES **PAGES**

FEDERAL CASES

Adams v. U.S., 222 F.2d 45 (D.C.Cir.1955) 76

Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) 97

Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) 97

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 99

Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475,
116 L. Ed. 2d 385 (1991) 49, 52

Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986) 79

Hildwin v. Florida, 490 U.S. 638 (1989) 98

Johnson v. Dugger, 932 F.2d 1360 (11th Cir. 1991) 99

Jones v. United State, 526 U.S. 227 (1999) 97

Lowenfeld v. Phelps, 484 U.S. 231 (1988) 99

Proffitt v. Florida, 428 U.S. 242 (1976) 98

Sheppard v. Rees, 909 F.2d 1234 (9th Cir. 1989) 80

Spaziano v. Florida, 468 U.S. 447 (1984) 98

U.S. v. Barnett, 159 F.3d 637 (C.A.D.C. 1998) 76

U.S. v. Young, 105 S. Ct. 1038 (1985) 76

Walton v. Arizona, 497 U.S. 639 (1990) 98

STATE CASES

Adams v. State, 412 So. 2d 850 (Fla.), cert. denied,
459 U.S. 882, 103 S. Ct. 182, 74 L. Ed. 2d 148 (1982) . . . 46

Alexander v. State, 627 So. 2d 35 (Fla. 1st DCA 1993) . . . 40

Almeida v. State, 748 So. 2d 922 (Fla. 1999) 51

Alston v. State, 723 So. 2d 148 (Fla. 1998) 80

Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied,
428 U.S. 923 (1976) 95

Asay v. State, 580 So. 2d 610 (Fla. 1991), cert. denied,
502 U.S. 895 (1991) 16

Bain v. State, 422 So. 2d 962 (Fla. 4th DCA 1982) 29

Banks v. State, 700 So. 2d 363 (Fla. 1997) 99

Beasley v. State, 25 Fla.L.Weekly S915 (Fla. Oct. 26, 2000) . 4

Boyce v. State, 638 So. 2d 98 (Fla. 4th DCA 1994) 3

Breedlove v. State, 413 So. 2d 1 (Fla. 1982) 54

Brooks v. State, 762 So. 2d 879 (Fla. 2000) 72, 76

Brown v. State, 367 So. 2d 616 (Fla. 1979) 58

Brown v. State, 721 So. 2d 274 (Fla.1998) 96

Bryan v. State, 533 So. 2d 744 (Fla. 1988) 25, 26

Cave v. State, 476 So. 2d 180 (Fla. 1985) 82

Clark v. State, 443 So. 2d 973 (1983), cert. denied,
104 S. Ct. 2400, 467 U.S. 1210, 81 L. Ed. 2d 356 99

Cochran v. State, 547 So. 2d 928 (Fla. 1989) 6

Cole v. State, 701 So. 2d at 856 95

Consalvo v. State, 697 So. 2d 805 (Fla.1996) 81

Coolen v. State, 696 So. 2d 738 (Fla. 1997) 20

Coolen v. State, 696 So. 2d 738 (Fla. 1997) 23

Cox v. State, 555 So. 2d 352 (Fla. 1989) 14

Cox v. State, 764 So. 2d 711 (Fla. 1st DCA 2000) 4

Crump v. State, 622 So. 2d 963 (Fla.1993) 60

Cruse v. State, 588 So. 2d 983 (Fla. 1991), cert. denied,
504 U.S. 976, 112 S. Ct. 2949, 119 L. Ed. 2d 572 (1992) . . 40

Cruz-Sanchez v. State, 771 So. 2d 52 (Fla. 2d DCA 2000) . . 34

Damren v. State, 696 So. 2d 709 (Fla.1997) 22

Delgado v. State, 25 Fla. L. Weekly S79 (Fla. 2000)
(quoting Urbin v. State, 714 So.2d 411, 418 n. 8 (Fla.1998)) 60

Donaldson v. State, 722 So. 2d 177 (Fla. 1998) 87

Douglas v. State, 575 So. 2d 165 (Fla. 1991) 86

Drake v. State, 441 So. 2d 1079 (Fla.1983) 34

Duest v. State, 462 So. 2d 446 (Fla. 1985), cert. denied . . 59

Ellison v. State, 349 So. 2d 731, 732 (Fla. 3d DCA 1977),
cert. denied, 357 So.2d 185 (Fla. 1978) 47

Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA 1990) . . . 21

Escobar v. State, 699 So. 2d 988 (Fla. 1997) 27

Evans v. State, 693 So. 2d 1096 (Fla. 3d DCA 1997) 26

Ferrell v. State, 686 So. 2d 1324 (Fla. 1996) 21, 22

Finney v. State, 660 So. 2d 674 (Fla. 1995) 25

Floyd v. State, 569 So. 2d 1225 (Fla. 1990) 90

Foster v. State, 25 Fla.L.Weekly S667 (Fla. Sept. 7, 2000) . 81

Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992) 81

Garcia v. State, 644 So. 2d 59 (Fla. 1994) 58

Garron v. State, 528 So. 2d 353 (Fla. 1998) 28

Glock v. State, 495 So. 2d 128 (Fla. 1986) 94

Gordon v. State, 704 So. 2d 107 (Fla.1997) 95

Gore v. State, 599 So. 2d 978 (Fla. 1992) 18, 83, 94

Grey v. State, 727 So. 2d 1063 (Fla. 4th DCA 1999) 47

Griffin v. State, 639 So. 2d 966 (Fla. 1994) 20

Gudinas v. State, 693 So. 2d 953 (Fla. 1997) 45

Gunsby v. State, 574 So. 2d 1085 (Fla. 1991) 93

Hall v. State, 614 So. 2d 473 (Fla. 1993), cert. denied,
510 U.S. 834, 126 L. Ed. 2d 74 (1993) 81

Hamilton v. State, 703 So. 2d 1038 (Fla. 1997) 54

Hampton v. State, 549 So. 2d 1059 (Fla. 4th DCA 1989) 6

Heath v. State, 648 So. 2d 660 (Fla. 1994), cert. denied,
115 S. Ct. 2618 (1995) 19

Henderson v. State, 463 So. 2d 196 (Fla.), cert. denied,
473 U.S. 916 (1985) 46, 52, 87

Henyard v. State, 689 So. 2d 239 (Fla.1996) 96

Hitchcock v. State, 413 So. 2d 741 (Fla. 1982) 4

Hodges v. State, 595 So. 2d 929 (Fla. 1992) 81

Hudson v. State, 538 So. 2d 829 (Fla. 1989), cert. denied,
493 U.S. 875 (1990) 93

Hunter v. State, 660 So. 2d 244 (Fla. 1995)(a) 21

Jackson v. State, 575 So. 2d 181 (Fla.1991) 48

James v. State, 695 So. 2d 1229 (Fla. 1997) 86

Jaramillo v. State, 417 So. 2d 257 (Fla.1982) 4

Jones v. State, 648 So. 2d 669 (Fla. 1994) 46, 50

Jones v. State, 748 So. 2d 1012 (Fla. 1999) 93

Jorgenson v. State, 714 So. 2d 423 (Fla. 1998) 27

Kearse v State, Fla. L. Weekly S507, ---, So. 2d -,
2000 WL 854156 (Fla. June 29, 2000) 59

Kearse v. State, 662 So. 2d 677 (Fla. 1995) 78

Kight v. State, 512 So. 2d 922 (Fla. 1987) 43

Kimbrough v. State, 700 So. 2d 634 (Fla. 1997) 87

King v. State, 623 So. 2d 486 (Fla. 1993) 46

Kirkland v. State, 684 So. 2d 732 (Fla. 1996) 17

Knight v. State, 338 So. 2d 201 (Fla. 1976),
sentence vacated on other grounds,863 F.2d 705
(11th Cir. 1988) 78

Knight v. State, 338 So. 2d 201 (Fla. 1976) 78

Lee v. State, 729 So. 2d 975 (Fla. 1st DCA 1999) 41

Lott v. State, 695 So. 2d 1239 (Fla. 1997) 47

Lowder v. State, 589 So. 2d 933 (Fla. 3d DCA 1991) 36

Lowe v. State, 650 So. 2d 969 (Fla. 1994) 35

Lynch v. State, 239 So. 2d 44 (Fla. 1974) 3, 6

Mahn v. State, 714 So. 2d 391 (Fla. 1998) 16

Mansfield v. State, 758 So. 2d 636 (Fla. 2000) 45

Mansfield v. State, 25 Fla.L.Weekly S246 (Fla. 2000) 80

Marshall v. State, 604 So. 2d 799 (Fla.1992) 96

McConnehead v. State, 515 So. 2d 1046 (Fla. 4th DCA 1987) . . . 4

McDonald v. State, 743 So. 2d 501 (Fla. 1999) 60

McIntosh v. State, 424 So. 2d 147 (Fla. 4th DCA 1982), ... 29

Miller v. State, 25 Fla.L.Weekly S469 (Fla. 2000) 80

Mills v. State, 476 So. 2d 172 (1985) 98

Mines v. State, 390 So. 2d 332 (Fla. 1980) 18

Moore v. State, 537 So. 2d 693 (Fla. 1st DCA 1989) 4

Norton v. State, 709 So. 2d 87 (Fla. 1997) 16, 17

Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) 36

O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983),
sentence vacated on other grounds, 542 So. 2d 1324
(Fla. 1989) 78

Oats v. State, 446 So. 2d 90 (Fla. 1984) 30

Occhicone v. State, 570 So. 2d 902 (Fla. 1990) 40

Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994) . . . 60

Pangburn v. State, 661 So. 2d 1182 (Fla. 1995) 45

Paramore v. State, 229 So. 2d 855 (Fla. 1969),
modified, 408 U.S. 935, 92 S. Ct. 2857,33 L. Ed. 2d 751
(1972) 55

Parker v. State, 476 So. 2d 134 (Fla. 1985) 86

Parker v. State, 641 So. 2d 369 (Fla. 1994) 58

People v. Kelley, 370 N.W.2d 321 (Mich. 1985) 70

People v. Pullins, 378 N.W.2d 502 (Mich. 1985) 70

People v. Rowen, 314 N.W.2d 526 (Mich. 1981) 70

People v. Smith, 332 N.W.2d 428 (Mich. 1982) 69

Pooler v. State, 704 So. 2d 1375 (Fla. 1997) 86

Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986) 58

Power v. State, 605 So. 2d 856 (Fla.1992) 54

Preston v. State, 607 So. 2d 404 (Fla. 1992) 45, 47, 86

Purifoy v. State, 359 So. 2d 446 (Fla.1978) 48

Rancourt v. State, 25 Fla. L. Weekly D1450
(Fla. 2d DCA 2000) 18, 83

Ray v. State, 755 So. 2d 604 (Fla. 2000) 38

Reaves v. State, 324 So. 2d 687 (Fla. 3d DCA 1976) 73

Rivera v. State, 561 So. 2d 536 (Fla. 1990) 86

Rolling v. State, 695 So. 2d 278 (Fla.1997) 95

Routly v. State, 440 So. 2d 1257 (Fla. 1983) 82

Rutherford v. Moore, 25 Fla.L.Weekly S891
(Fla. Oct. 12, 2000), citing Larkins v. State,
655 So. 2d 95 (Fla. 1995) 46

Scott v. State, 581 So. 2d 887 (Fla. 1991) 14

Sexton v. State, 697 So. 2d 833 (Fla. 1997) 19

Shiver v. State, 564 So. 2d 1158 (Fla. 1st DCA 1990) 41

Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert. denied,
456 U.S. 984 (1982) 15

Sochor v. State, 619 So. 2d 285 (Fla. 1993) 18, 83

Spencer v. State, 133 So. 2d 729 (Fla. 1961),
cert. denied, 369 U.S. 880, 82 S. Ct. 1155, 8 L. Ed. 2d 283
(1962) 54

Spencer v. State, 645 So. 2d 377 (Fla. 1994) 57, 59

Spinkellink v. State, 313 So. 2d 666 (Fla. 1975),
cert. denied, 428 U.S. 911, 96 S. Ct. 3227,
49 L. Ed. 2d 1221 (1976) 3, 5

State v. Allen, 335 So. 2d 823 (Fla. 1976) 6

State v. Cohens, 701 So. 2d 362 (Fla. 2d DCA 1997) 23

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) 30, 36

State v. Henry, 456 So. 2d 466 (Fla. 1984) 93

State v. Law, 559 So. 2d 187 (Fla. 1989) 4, 5

State v. Mosley, 760 So. 2d 1129 (Fla. 5th DCA 2000) 27

State v. Murray, 443 So. 2d 955 (Fla. 1984) 58

State v. Rivera, 719 So. 2d 335 (Fla. 5th DCA 1998) 3

Steinhorst v. State, 412 So. 2d 332 (Fla. 1982) 38, 97

Straight v. State, 397 So. 2d 903 (Fla.), cert. denied,

454 U.S. 1022, 102 S. Ct. 556, 70 L. Ed. 2d 418 (1981) . . . 45

Strausser v. State, 682 So. 2d 539 (Fla. 1996) 40

Street v. State, 636 So. 2d 1297 (Fla. 1994) 60

Swafford v. State, 533 So. 2d 270 (Fla. 1988) 81

Sweet v. State, 624 So. 2d 1138 (Fla. 1993) 81, 87

T.J.T. v. State, 460 So. 2d 508 (Fla. 3d DCA 1984) 4

T.S. v. State, 682 So. 2d 1202 (Fla. 4th DCA 1996) 21

Taylor v. State, 508 So. 2d 1265 (Fla. 1st DCA 1987) 29

Terranova v. State, 764 So. 2d 612 (Fla. 2d DCA 1999) . . . 14

The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995) . . . 40

Thomas v. State, 326 So. 2d 413 (Fla. 1975) 54

Thomas v. State, 748 So. 2d 970 (Fla. 1999) 19, 31

Thorp v. State, 25 Fla.L.Weekly S1056 (Fla. Nov. 16, 2000) . 44

Tibbs v. State, 397 So. 2d 1120 (Fla. 1981) 4

Tillman v. State, 471 So. 2d 32 (Fla. 1985) 38

Toole v. State, 472 So. 2d 1174 (Fla. 1985) 3, 5

Tumulty v. State, 489 So. 2d 150 (Fla. 4th DCA 1986) . . 21, 23

Urbin v. State, 714 So. 2d 411 (Fla. 1998) 76

Vargas v. State, 751 So. 2d 664 (Fla. 3d DCA 2000) 52

Vasquez v. State, 635 So. 2d 1088 (Fla. 1994) 58

Vasquez v. State, 763 So. 2d 1161 (Fla. 4th DCA 2000) . . . 27

Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) 60

Welty v. State, 402 So. 2d 1159 (Fla. 1981) 15, 45

White v. State, 377 So. 2d 1149 (Fla. 1979), cert. denied,
449 U.S. 845 (1980) 71

Wike v. State, 698 So. 2d 817 (Fla. 1997) 81

Williams v. State, 621 So. 2d 413 (Fla.1993) 26

Williams v. State, 110 So. 2d 654 (Fla.), cert. denied,
361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959) . . . 25, 26

Wilson v. State, 436 So. 2d 908 (Fla. 1983),
citing State v. Wright, 265 So. 2d 361 (Fla.1972) 45

Woods v. State, 733 So. 2d 980 (Fla. 1999) 15

Wyatt v. State, 641 So. 2d 355 (Fla. 1994) 60

Zack v. State, 753 So. 2d 9 (Fla. 2000) 3, 21, 27, 39

Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998) 50

MISCELLANEOUS

FLORIDA STATUTES

Section 90.404(2)(a) 25

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as "Appellant" or "Defendant." Appellee, the State of Florida, was the prosecution below and will be referred to herein as "Appellee" or the "State." Reference to the record on appeal will be by the symbol "R," to the transcripts will be by the symbol "T," reference to any supplemental record or transcripts will be by the symbols "SR[vol.]" or ST[vol.]," and reference to Appellant's brief will be by the symbol "IB," followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Due to space limitations, Appellee accepts Appellant's statements of the case and facts for purposes of this appeal, subject to the additions, corrections, and/or clarifications in the Argument section.

SUMMARY OF THE ARGUMENT

POINT I- The trial court properly denied Appellant's motion for judgment of acquittal. There was sufficient evidence of identity to send the case to the jury.

POINT II- The collateral crime evidence was properly admitted as "inextricably intertwined" or as evidence of other bad acts.

POINT III- The trial court properly admitted testimony from Lt. Vaughn that the run over was not accidental. It was material to rebutting Appellant's defense.

POINT IV- The trial court properly admitted testimony for eyewitness, Amelia Stringer.

POINT V & IX- The trial court properly admitted five (5) photographs of the victim.

POINT VI & VIII- The unpreserved, allegedly improper comments by the prosecutor do not constitute fundamental error.

POINT VII- The felony-murder theory is supported by the evidence.

POINT X- The five aggravators found by the trial court are supported by substantial, competent evidence.

POINT XI- The death sentence is proportional.

POINT XII- The death sentence does not violate Apprendi

POINT XIII- The felony murder aggravator is constitutional.

ARGUMENT

POINT I

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUSTAIN A FIRST-DEGREE MURDER CONVICTION (Restated).

The trial court properly denied Appellant's motion for judgment of acquittal based on lack of identity. Additionally, the trial court properly denied Appellant's motion for a directed verdict and reduction of the first-degree murder charge to second degree murder based on lack of premeditation or felony murder.

Judgment of Acquittal

The purpose of a motion for judgment of acquittal is to test the legal sufficiency of the state's evidence. See State v. Rivera, 719 So.2d 335, 337 (Fla. 5th DCA 1998). The motion should not be granted unless there is no evidence which could support a guilty verdict. See Zack v. State, 753 So.2d 9, 17 (Fla. 2000) ("A motion for judgment of acquittal should only be granted if there is no view of the evidence from which a jury could make a finding contrary to that of the moving party."); Toole v. State, 472 So.2d 1174 (Fla. 1985); Lynch v. State, 239 So.2d 44 (Fla. 1974). "In moving for a judgment of acquittal, a defendant admits all the facts and evidence adduced at trial, as well as every conclusion favorable to the State that a jury might fairly and reasonably infer therefrom." Boyce v. State, 638 So.2d 98, 99 (Fla. 4th DCA 1994); Spinkellink v. State, 313 so. 2d 666, 670

(Fla. 1975), cert denied, 428 U.S. 911 (1976); Lynch, at 45; T.J.T. v. State, 460 So. 2d 508, 510 (Fla. 3d DCA 1984); McConnehead v. State, 515 So. 2d 1046, 1048 (Fla. 4th DCA 1987). Conflicts in the evidence and the credibility of the witnesses is a matter to be resolved by the jury; the granting of a motion for judgment of acquittal cannot be based on evidentiary conflict or witness credibility. Lynch; Hitchcock v. State, 413 So. 2d 741, 745 (Fla. 1982).

The standard of review of a trial court's denial of a motion for judgment of acquittal is unclear. While this Court has noted that the issue is one of law, see Tibbs v. State, 397 So.2d 1120 (Fla. 1981), the First District has repeatedly held that the standard of review is an abuse of discretion. See Cox v. State, 764 So.2d 711 (Fla. 1st DCA 2000); Moore v. State, 537 So.2d 693 (Fla. 1st DCA 1989). In any event, a special standard of review applies, in cases like this one, where a conviction is wholly based on circumstantial evidence. Beasley v. State, 25 Fla.L.Weekly S915 (Fla. Oct. 26, 2000); Jaramillo v. State, 417 So.2d 257 (Fla.1982). The standard of review to be applied in this case was set out in State v. Law, 559 So.2d 187, 188-189 (Fla. 1989), as follows:

> Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to

> determine, and where there is substantial, competent evidence to support the jury verdict, we will not reverse.
>
> . . .
>
> A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. Consistent with the standard set forth in Lynch, if the state does not offer evidence which is inconsistent with the defendant's hypothesis, "the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state] can be sustained under the law." The state's evidence would be as a matter of law "insufficient to warrant a conviction."
>
> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the State, Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S. Ct. 3227, 49 L. Ed. 2d 1221 (1976). The State is not required to "rebut every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See Toole v. State, 472 So. 2d 1174, 1176 (Fla. 1985). Once that threshhold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt.

State v. Law, 559 So. 2d 187, 188-89 (Fla. 1989)(emphasis supplied) (citations omitted).

Thus, while the State must present evidence that conflicts

with the defendant's hypothesis of innocence, it is not required to completely disprove it. In State v. Allen, 335 So. 2d 823, 826 (Fla. 1976), this court, in language similar to that in Law, stated:

> We are well aware that varying interpretations of circumstantial evidence are always possible in a case which involves no eye witnesses. Circumstantial evidence, by its very nature, is not free from alternate interpretations. The State is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime.

(emphasis supplied).

Where persons might differ as to the inferences that can be drawn from the established facts, the court should submit the case to the trier-of-fact. Lynch, 293 So. 2d at 45. The jury is free to disbelieve the defense's version of the facts on which the State has presented conflicting evidence. Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989); Hampton v. State, 549 So. 2d 1059, 1061 (Fla. 4th DCA 1989).

Taking the evidence in this case in the light most favorable to the State, it is clear that the trial court correctly sent the case to the jury and that there is substantial, competent evidence supporting the jury's verdict. Appellant's theory of defense was

that he didn’t do it--that it wasn’t him or his car that ran over Keinya. The state rebutted that theory by presenting: (1) the testimony of 2 eyewitnesses, John Gowdy and Amelia Stringer, who saw the murder; (2) physical evidence linking Appellant’s car to the murder; (3) testimony establishing Appellant’s motive for killing Keinya; and (4) admissions by Appellant linking him to the murder.

On January 16, 1994, eyewitness, John Gowdy, was driving home to Miami from Clewiston, on U.S. 27, with his girlfriend, Amelia Stringer, when he saw a body in the median of the highway (T 1028-29). It was dark outside, about 7:00 p.m., and there were no lights illuminating the area, except for headlights from on-coming traffic (T 1022-25). Gowdy noticed the car in front of him make a U-turn and decided to also make a U-turn, to go back and help (T 1022-25, 1028-29). They then both made a second U-turn, heading south again (T 1028-29).

Amelia sat up when Gowdy told her what he saw and she noticed the car in front of them making a U-turn (T 2073). While Gowdy was waiting to make the U-turn (second), she looked out the back window and saw a person sitting up in the median (T 2075-76). She then saw the car that had been in front of them run over the person in the median, who was trying to get up (T 2076-77). It shocked her (T 2076). Gowdy also saw the car run over the person-- he saw the car go over the body like it was going over a log (T 1028-29).

Both saw the car speed off after hitting the body (T 1028-29, 2071-80).

Gowdy described the car as a "darker bluish or dark grayish," American made car (T 1032-35). The front end had its bright lights on and all four lights were illuminated, which indicated to him that it was an older model car (T 1032-33). He identified the headlights that he saw as similar to those on Appellant's car (a 1981 medium blue Cadillac) (T 1033-35). He also identified a reflector on Appellant's car as similar to the one that he saw on the car that night (T 1034-35). While Gowdy could not positively identify Appellant's car as the one that ran over the body, he agreed that it was possible that it was the car that ran over Keinya (T 1039-1042).

Gowdy admitted that he initially described the car as "grayish" but explained that it was very dark that night (T 1038-39, 1049-51). Gowdy's initial description could also be explained by the fact that Appellant's car has a stainless steel or metallic roof, which looks silver-gray in color in the dark (T 1392-95). Further, although his initial impression was that it was an accident, Gowdy explained that was because his mindset was to go back and help the person lying in the median so he assumed that is what the car in front of him was doing (T 1046-47). Gowdy agreed that what he saw was also consistent with someone hunting down a body and mowing the person down (T 1049-51).

Amelia described the car as dark, either gray or black. (T 2074-75). Amelia believed that the car intentionally ran over the body because of the way the car got out of traffic to go into the median and then the way it was able to get back into traffic easily, without other cars having to swerve or stop (T 2076). The car never put on its brake lights (T 2079). Like Gowdy, Amelia identified Appellant's car as similar to the one that ran over Keinya, but could not positively identify it as the car that was out there that night (T 2082-83, 2093-94).

The eyewitnesses' testimony cannot be considered in a vacuum, as Appellant suggests. Rather, their testimony must be viewed along with the physical evidence in this case, which clearly connects Appellant's car to the murder. To begin with, Keinya's blood was found on the front passenger seat of Appellant's car (DNA testing matched it to Keinya) (T 1943). The odds of the blood matching someone else was 1 in 8.3 million for Caucasians, 1 in 6.5 million for African-Americans and 1 in 6.7 million for Bahamians (T 1993, 2011-14). Keinya's body was transported 15 miles from where it was run over and dumped; it is reasonable to infer that her blood might have gotten on the car that transported her.

Second, a fiber found on the underside of Appellant's car, in the brake cable (it was stuck up in the brake cable, not visible to the naked eye), is **identical** to the fibers in the navy blue slacks Keinya was wearing when she was murdered (T 2041-47). The slacks

were torn when she was run over. The only reason that fiber expert, Bruce Ayala, could not opine that the fiber definitely came from Keinya’s pants is because he doesn’t know how many pairs of those pants were manufactured (so it is possible it came from another pair), but Ayala did opine that the fiber could have come from Appellant’s car (T 2041-47).

In addition to the fiber, grease marks found on Keinya’s green jacket are “consistent” with two of the coils underneath Appellant’s car, meaning they correspond in design and size (T 1734-36). Again, because he doesn’t know how many identical coils (manufactured car parts) are on the road, pattern impressions expert, James Gerhart, could not state that the coils underneath Appellant’s car positively made the impressions on Keinya’s green jacket; however, he did opine that two (2) of the coils could have made the impression (T 1737-39). Detective Suchomel observed the underside of Appellant’s car and found that some portions looked like they had been wiped free of grease or that something went underneath the driver side portion of the car (T 1392-95).

Finally, the right front tire on Appellant’s car is similar to a tire impression found at the scene where Keinya’s body was dumped (T 1686-89). Tire wear impressions expert, Fred Boyd, explained that Appellant’s car could have made that tire wear impression but that there is nothing unique about the tire in this case to make it a positive identification (T 1700-03).

The physical evidence in this case clearly ties Appellant's car to the murder. The only reason the experts could not make positive identifications is because they were dealing with mass-produced, manufactured items which made it impossible for them to say that a fiber came from a particular pair of pants, or that an impression was made by a particular coil or tire. Nonetheless, co-incidence cannot explain the totality of the physical evidence here--how an identical fiber from Keinya's pants ended up in the brake cable underneath Appellant's car, how her blood ended up on the front passenger seat of Appellant's car, why the grease mark on her jacket is consistent with two coils from underneath Appellant's car and why a tire wear impression found at the scene is consistent with the right front tire on Appellant's car.

Appellant's contention that the only piece of significant physical evidence is the DNA match of the blood (IB 36), but that it could have been made at any time since Appellant constantly gave Keinya rides to and from work, is without merit. Appellant's contention is belied by his statement to the police that Keinya never bled in his car (T 1786-88).

In addition to the physical evidence tying Appellant's car to the murder, his statements to the police tie him to it. Appellant denied loaning his car to anyone that night and told the police that he had the only set of keys (T 1786-88). Further, Appellant admitted to the police that he picked Keinya up from work that

night but that he didn't kill her (T 1780-83). Appellant immediately recanted, however, explaining that he was being facetious. But Detective Thomasevich explained that there was nothing facetious about the situation; Appellant had just been read his rights. The evidence also showed Appellant's motive for killing Keinya. Appellant was on ten (10) years probation for attempted capital sexual battery of Keinya (T 2059-61). A special condition of that probation was that he have no contact with Keinya. Appellant faced a possible life sentence for violating his probation. Nonetheless, he repeatedly violated his probation by continuing to live in the marital home and continuing to have contact with Keinya.

Appellant never feared discovery of his probation violation until two (2) days before Keinya's death. Approximately four (4) days before her murder, on January 12, 1994, Keinya had accepted a ride home from work from Patrick Allen, a co-worker at Publix (T 1578-80). After dropping her off, Allen noticed a black Eldorado following him (T 1578-81). It followed him home to his apartment and he was afraid to get out of his car. He continued driving around until he finally lost the car and was able to go home (T 1580-82). He identified Appellant's car as looking similar to the car that followed him (T 1582).

On Friday, January 14, 1994, Allen again gave Keinya a ride home from work (T 1583-85). As soon as he pulled up to her gate,

he saw the car that had chased him on Wednesday parked in her front yard, with no lights on (T 1585-88). After Keinya exited the car, the black car began rolling out of the yard, full speed toward his car. This time the black car tried to run him off the road by hitting him in the back and pushing him through red lights (T 1585-88). Allen could see that it was a black male driving the car. He had a gun and shot at the car to make it stop (T 1587-88). The black car finally stopped (T 1589-90).

Keinya's cousin, Andronda Brown, testified that Appellant went after the car that dropped Keinya off (T 1848-49). He came back five (5) minutes later screaming that the boy "shoot at him," and accusing Keinya about telling him about them (T 1849). Keinya's next-door neighbor, Dana Turner, also heard Appellant yelling at Keinya "you told them something. You told him. Why was he shooting at me?" (T 1017). Keinya replied "I don't know. He was just shooting. I didn't tell him nothing." (T 1017). Appellant then punched Keinya in the head with his fist (T 1849-54). Keinya retrieved a knife from the kitchen and dialed 911, but hung up before speaking with them (T 1849-54).

The police came to the house, but only Appellant and Keinya's mother, Edwina, spoke with them. Appellant did not tell the police about being shot at (T 1754-55). When they left, Appellant stood in front of Keinya's locked bedroom door and screamed that "he was going to go to Publix and wait 24 hours to get that boy and if he

couldn’t get him, he was coming back to get her” (T 1855-60). Appellant had been living at the marital residence until that night, but Andronda did not see him again until Monday, after Keinya was found dead (T 1888-90). Keinya was too scared to go to work the next day, Saturday, January 15, 1994 (T 1861-63). She went to work on Sunday, January 16, 1994 and was murdered that night. Patrick Allen testified that he saw Appellant and his car parked outside Publix that Sunday night (T 1612-26). Just two (2) days later, on January 18, 1994, Appellant reported to his probation officer’s office and after telling her that Keinya was dead, asked “whether his family could be brought back together since Keinya was dead” (T 2059-61).

The eyewitness testimony, coupled with the physical evidence, Appellant’s admissions and the overwhelming evidence of his motive to kill Keinya are sufficient to prove identity. Thus, there was substantial, competent evidence from which the jury could, and did, reject Appellant’s hypothesis of innocence--that he didn’t murder Keinya.

The cases relied upon by Appellant (IB 36-37), are not factually analogous and are inapplicable here. In Terranova v. State, 764 So.2d 612 (Fla. 2d DCA 1999), the defendant had an unimpeached alibi for the time of the murders. In addition, there was absolutely no physical evidence connecting him to the murders and the evidence showed that it was physically impossible for him

to fit through the door opening the murderer used to gain entry to the victims' trailer. See also Cox v. State, 555 So.2d 352 (Fla. 1989)(no evidence that the defendant knew the victim or that anyone had ever seen them together, coupled with weak physical evidence); Scott v. State, 581 So.2d 887 (Fla. 1991)(physical evidence consisting of hair and a seashell found in defendant's car was insufficient to sustain first-degree murder conviction; defendant's mother explained that she collected seashells and used the defendant's car to transport them and hair comparison was not positive identification).

Reduction of the charge to Second Degree Murder

Alternatively, Appellant argues that if this Court finds the evidence of identity sufficient, the charge must be reduced to second degree murder because the evidence is legally insufficient to prove premeditation or felony murder.

> Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues. Premeditation does not have to be contemplated for a particular period of time before the act, and may occur a moment before the act.

Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). See Woods v. State, 733 So. 2d 980, 985 (Fla. 1999).

> Premeditation may be established by circumstantial evidence. . . . Such evidence of premeditation includes 'the nature of the

> weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.’ . . .

(citations omitted) Woods, 733 So. 2d at 985. See Welty v. State, 402 So. 2d 1159, 1163 (Fla. 1981)(manner of commission of murder, including the type of wounds inflicted, may show premeditated intent to kill). Premeditation is proved where there is “such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.” Asay v. State, 580 So. 2d 610, 612 (Fla. 1991), cert. denied, 502 U.S. 895 (1991).

The evidence shows that Appellant had more than the moment required to form premeditation. He had a preconceived plan to murder Keinya, evidenced by the fact that he kidnapped her from work and drove her to a desolate highway, out in the Everglades, 30 miles north of her home, in order to kill her. See Mahn v. State, 714 So.2d 391, 398 (Fla. 1998) (premeditation is shown where defendant had a plan or prearranged design to kill). Appellant’s motive for killing Keinya arose 48 hours earlier when, for the first time, he risked having his violation of probation discovered. See Norton v. State, 709 So.2d 87, 92 (Fla. 1997) (motive becomes important to proving premeditation when proof of a crime rests on circumstantial evidence).

Appellant would potentially face life imprisonment for

violating his probation. He threatened to kill Keinya 48 hours before her murder. Keinya must have known her fate and tried to escape by jumping out of the car and ended up in the highway's median. Appellant then went back to murder her, using his car as the murder weapon. He made two U-turns on the highway, got off the highway to go into the median and ran over Keinya as she was sitting up. She sustained numerous injuries, including a crushing blow to her pelvic area. After running her over, Appellant got back onto the highway and sped away.

Eyewitness Amelia Stringer testified that the car intentionally ran over the person, it never even put its brake lights on. Further, although eyewitness John Gowdy's initial impression was that it was an accident, he explained that was because his mindset was to go back and help the person lying in the median so he assumed that is what the car in front of him was doing. Gowdy agreed that what he saw was also consistent with someone hunting down a body and mowing the person down. There was absolutely no evidence supporting Appellant's contention that the driver lost control of his car. Clearly, the evidence was more than sufficient to support a verdict of premeditated murder.

The cases relied upon by Appellant do not apply here (IB 38-39). In Norton v. State, 709 So.2d 87 (Fla. 1997), there was no proof of any motive, no witnesses to the shooting or the events preceding the shooting, no evidence of a continuing attack

suggesting premeditation, no evidence suggesting the defendant intended to kill the victim, and no evidence that the defendant procured a murder weapon in advance of the murder. See also Kirkland v. State, 684 So.2d 732 (Fla. 1996)(no evidence that the defendant had a preconceived plan to commit murder, that he obtained a murder weapon before the murder, that he possessed an intent to kill the victim before and there were no witnesses to the events preceding the murders).

Finally, there was sufficient circumstantial evidence of kidnapping in this case to support a felony-murder theory. Appellant had punched Keinya in the head 48 hours before her murder and threatened to kill her if he couldn't find Patrick Allen. She was so scared that she didn't go to work on Saturday. It is unlikely that Keinya would have voluntarily gotten into a car with Appellant the very next day, she was either threatened or forced into that car. See Mines v. State, 390 So.2d 332 (Fla. 1980)(circumstantial evidence that the victim had been bound, beaten, and had multiple stab wounds, together with the defendant's conduct and admissions, was sufficient to establish underlying felony of kidnapping).

Moreover, even if Keinya did initially voluntarily accept a ride from Appellant, it became kidnapping when Appellant did not take her home, but instead, to a desolate highway, out in the Everglades, 30 miles north from her home. See Sochor v. State,

619 So.2d 285 (Fla. 1993)(evidence was sufficient to support kidnapping, although the victim may have voluntarily entered the truck, at some point she was held unwillingly; her removal to a secluded area facilitated the defendant's acts and avoided detection); Gore v. State, 599 So.2d 978 (Fla. 1992)(defendant was guilty of kidnapping even though the victim voluntarily left a party to drive the defendant home); Rancourt v. State, 25 Fla. L. Weekly D1450 (Fla. 2d DCA 2000) (fact that the victim voluntarily left the bar with the defendant and did not physically resist when he removed her from the car does not negate the crime of kidnapping; defendant abducted her, within the meaning of kidnapping, once he traveled well beyond her home without offering an explanation as to why and forcibly removed her from the car).

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE THAT WAS "INEXTRICABLY INTERTWINED" WITH FINALLY, ANY ALLEGED ERROR WAS HARMLESS. (Restated).

The trial court did not abuse its discretion by admitting evidence: (1) that Appellant was on ten (10) years probation for attempted capital sexual battery of Keinya at the time of her murder, with a special condition that he have no contact with Keinya; (2) that Appellant assaulted Patrick Allen two days before Keinya's murder, by trying to run him off the road with his car; and (3) that Appellant committed a battery upon Keinya, 48 hours before her death, by punching her in the head. See Thomas v.

State, 748 So.2d 970, 982 (Fla. 1999)(holding that the admission of evidence is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion); Sexton v. State, 697 So. 2d 833 (Fla. 1997) (same); Heath v. State, 648 So. 2d 660 (Fla. 1994), cert. denied, 115 S. Ct. 2618 (1995).

The evidence was admissible under section 90.402, Florida Statutes (2000), because it was "inextricably intertwined," with the crime charged; necessary to prove the entire context within which Keinya's murder was committed. Additionally, the evidence was admissible under section 90.402(2)(a), as evidence of "other crimes, wrongs or acts. In Griffin v. State, 639 So. 2d 966, 968 (Fla. 1994) (citations omitted), the Florida Supreme Court distinguished between evidence admitted under section 90.404(2)(a) of the Florida Evidence Code--so-called Williams rule evidence--and evidence admitted to establish the entire context of the charged crime:

> In the past, there has been some confusion over exactly what evidence falls within the Williams rule. The heading of section 90.404(2) is "OTHER CRIMES, WRONGS, OR ACTS." Thus, practitioners have attempted to characterize all prior crimes or bad acts of an accused as Williams rule evidence. This characterization is erroneous. The Williams rule, on its face, is limited to "[s]imilar fact evidence." § 90.404(2)(a), Fla.Stat. (1991) (emphasis added)." Griffin v. State, 639 So.2d 966, 968 (Fla. 1994). Thus, evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is

> admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. . . . [I]t is necessary to admit the evidence to adequately describe the deed."

(citations omitted). See also Coolen v. State, 696 So. 2d 738, 742-43 (Fla. 1997) ("evidence of uncharged crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence"); Hunter v. State, 660 So.2d 244 (Fla. 1995)(inseparable crime evidence is not admitted under 90.40492)(a) as similar fact evidence but under section 90.402 because it is relevant).

"Inseparable" or "inextricably intertwined" evidence includes evidence that is "inseparably linked in time and circumstance," see Erickson v. State, 565 So. 2d 328, 333 (Fla. 4th DCA 1990), and which is "necessary to fully describe the way in which the criminal deed happened," see T.S. v. State, 682 So. 2d 1202 (Fla. 4th DCA 1996). Admissible "inseparable crime" evidence "explains or throws light upon the crime being prosecuted" and allows the State "to present an orderly, intelligible case . . ." Tumulty v. State, 489 So. 2d 150, 153 (Fla. 4th DCA 1986). See also Ferrell v. State, 686 So. 2d 1324, 1329 (Fla. 1996)(evidence completing the story of the crime on trial is admissible under Florida Statute §90.402).

Here, the fact that Appellant was on probation, that he had committed assaults on Patrick Allen two days before Keinya's murder

and that he also committed a battery on Keinya two days before her murder, were relevant and necessary to adequately describe the murder and to place it in proper context. “Inseparable” crime evidence clearly includes evidence describing the events **prior to** or **leading up to** the crime. In Zack v. State, 753 So.2d 9, 16-17 (Fla. 2000), this Court held that evidence of other crimes the defendant committed during the **two-week period** prior to the murder that he was on trial for-- specifically, the theft of guns and money from the one victim, the theft of a car from another victim, and the murder and sexual assault of a third victim--was admissible in his murder trial (of a fourth victim) because it was a prolonged criminal episode that was relevant to demonstrating the entire context within which the charged murder arose.

In Damren v. State, 696 So.2d 709 (Fla.1997), the defendant and an accomplice entered mining grounds and burglarized a maintenance barn. While doing so, they were accosted by a duty technician, whom the defendant bludgeoned to death. The defendant was subsequently charged with first-degree murder, armed burglary, and aggravated assault. At trial, the state introduced evidence that the defendant **had gone to the mine several weeks earlier and stolen a generator**. This Court held that the evidence was not "similar fact evidence," but was "integrally connected" to the crimes at issue, because it supported the State's theory that the defendant "possessed the specific intent to burglarize the

premises" and refuted the defense theory that the defendant "was too drunk to form the requisite specific intent to commit the burglary."

Similarly, in Ferrell v. State, 686 So.2d 1324 (Fla. 1996), this Court found evidence that the defendant robbed the murder victim **two days** before the murder "inextricably intertwined" with the murder and necessary to adequately describe the crime. See also Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997)(evidence of a knife threat to the victim's step-child by the defendant **on the night of the victim's murder** was admissible because it was relevant and "inseparable" from the crime charged, and necessary to adequately describe the murder and to establish the entire context out of which the crime arose); State v. Cohens, 701 So.2d 362 (Fla. 2d DCA 1997)(evidence of earlier attempted robbery was inextricably intertwined and can be used to show defendant had intent to rob at the murder location); Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986)(evidence of the defendant's drug smuggling transactions was necessary to explain her relationship with the victim and her motive for murder, i.e., that the victim had deprived Tumulty of the use of the airplane necessary for her smuggling activities).

Likewise, here, the evidence that Appellant was on probation for attempted capital sexual battery of Keinya, that he assaulted her co-worker, two days before her murder, by trying to run him off the road with his car because he gave Keinya a ride home from work

and that he battered Keinya, by punching her in the head, that same night and threatened her life, was "inextricably intertwined" with her murder and necessary to explain the entire context of the crime. It explained the circumstances surrounding the crime and allowed the State to present an orderly and intelligible case to the jury. Tumulty, at 153 (evidence necessary to adequately describe the deed).

To admit only the facts surrounding Keinya's run over would have painted an inaccurate and incomplete picture of the events surrounding the crime. Keinya's murder resulted from a chain of events that were so interwoven that extraction of whole blocks of time and conduct would have distorted the events. Appellant had repeatedly sexually battered Keinya, from the ages of 5-14. It was eventually reported to the police and Appellant was placed on probation for ten (10) years-- a special condition of his probation was that he have no contact with Keinya. Appellant violated that probation by continuing to live at the marital residence and having continuous contact with Keinya. He faced life imprisonment for violating his probation.

Approximately four (4) days before Keinya's murder, on Wednesday, January 12, 1994, she received a ride home from work from a co-worker, Patrick Allen. After dropping Keinya off, Patrick noticed that a black Eldorado was following him. Two days later, on Friday, January 14, 1994, Patrick again gave Keinya a

ride home from work. As soon as he pulled up to her gate, he saw the car that had chased him on Wednesday night parked in her front yard, with no lights on. After Keinya exited the car, the black car began rolling out of the yard, full speed toward his car. This time the black car tried to run him off the road by hitting him in the back. Patrick could see that it was a black male driving the car. He had a gun and shot at the car to make it stop.

Appellant returned to the house after this incident and punched Keinya in the head, accusing her of telling Patrick about them. He also threatened to kill Patrick for shooting at him and threatened that if he could not find Patrick, he would kill her. Forty-eight hours later, Keinya was dead. This evidence was clearly intertwined with Keinya's murder and necessary to explain the entire context of it.

Additionally, the evidence is admissible under section 90.402(2)(a), as evidence of "other crimes, wrongs or acts." Section 90.404(2)(a), Florida Statutes (2000), known as the Williams[1] rule, states:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

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[1] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

The rule is not limited to "other crimes, wrongs or acts" with similar facts. See Bryan v. State, 533 So.2d 744, 746 (Fla. 1988); Finney v. State, 660 So.2d 674, 682 (Fla. 1995)("similarity is not always a prerequisite to consideration of such evidence.").

> Our view of the proper rule simply is that **relevant** evidence will not be excluded **merely** because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy.

Williams v. State, 110 So.2d 654, 659 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). Thus, "[s]o-called similar fact crimes are merely a special application of the general rule that all relevant evidence is admissible unless specifically excluded by a rule of evidence . . . . [E]vidence of other crimes which are factually dissimilar to the charged crime is not barred if the evidence of other crimes is relevant." Bryan at 746. See also Williams v. State, 621 So.2d 413, 414 (Fla.1993) (evidence of other crimes or acts may be admissible, even if the facts are not similar, if they are relevant to prove a matter of consequence other than bad character or propensity).

"The only limitations to the rule of relevancy are that the state should not be permitted to make the evidence of other crimes the feature of the trial or to introduce the evidence **solely** for the purpose of showing bad character or propensity, [or] . . . if its probative value is substantially outweighed by undue prejudice." Bryan at 746. Further, while similarity is not

required when the other crimes evidence is offered to prove **motive**, see Finney, a high level of similarity is required when the evidence is offered to prove identity by modus operandi or common plan or scheme. See Evans v. State, 693 So.2d 1096, 1102 (Fla. 3d DCA 1997).

Here, all of the evidence was admissible because it proved **motive**. "While evidence of motive is not necessary to a conviction, when it is available and would help the jury 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 the necessity of evidence, but rather its relevancy." State v. Mosley, 760 So.2d 1129, 1131 (Fla. 5th DCA 2000)(citations omitted).

In Jorgenson v. State, 714 So.2d 423, 424 (Fla. 1998), this Court held that evidence that the defendant was in the business of delivering and selling methamphetamine, that his girlfriend was his delivery person, that she had stolen from the defendant and that he was angered by her abundant use of methamphetamine, was admissible and relevant to proving his **motive** for murdering his girlfriend. See also Zack v. State, 753 So.2d 9, 16-17 (Fla. 2000)(evidence of preceding crimes relevant to show motive); Vasquez v. State, 763 So.2d 1161 (Fla. 4th DCA 2000)(holding that testimony establishing the defendant's drug related activities helped to establish his motive for burglarizing the victim's residence); Escobar v. State,

699 So.2d 988 (Fla. 1997)(holding that evidence that warrants were outstanding against the defendant in California was admissible as relevant to show defendant's motive for participating in charged murder of police officer).

Likewise, in this case, the fact that Appellant was on probation for attempted capital sexual battery of Keinya and was prohibited from having any contact with her as a special condition of that probation, was relevant to proving his motive for killing her. Appellant argues that this "motive" was speculative (IB 41), because he had regular contact with Keinya from the beginning of his probation and therefore, did not have a fear of repercussions. Appellant's argument ignores the fact, however, that Keinya had called the police on him, **for the first time**, just two (2) days before her murder, after he punched her in the head. She dialed 911, but hung up before registering a complaint.

Thus, for the first time, Appellant faced the **real threat** of having his probation violated. This threat was compounded by his assaults on Patrick Allen, which added to the risk that he might be reported to the police. Keinya was 18 years-old, becoming a young adult, and Appellant was losing his total control and domination of her. There was a real threat, for the first time, that Appellant's probation violation would be discovered. As such, the evidence was clearly admissible to prove Appellant's motive.

Appellant's contention that even if his probation status was

relevant, the underlying offense was not, is without merit. The underlying offenses were admitted in Zack, Jorgensen, Vasquez and Escobar. Garron v. State, 528 So.2d 353 (Fla. 1998), relied upon by Appellant (IB 43), is inapposite here because the issue in that case was whether the allegations of previous sexual misconduct were admissible Williams rule evidence, under section 90.404(2)(a). This Court did not consider in Garron whether the testimony was admissible under 90.404 as "evidence of other crimes, wrongs or acts." See also Taylor v. State, 508 So.2d 1265 (Fla. 1st DCA 1987)(nature of the crime was not offered to prove motive and no analysis of whether the evidence was admissible under section 90.404).

Bain v. State, 422 So.2d 962 (Fla. 4th DCA 1982) and McIntosh v. State, 424 So.2d 147 (Fla. 4th DCA 1982), (IB 41-42), are also inapplicable because they are based upon the evidentiary principle that once a defendant takes the stand and answers truthfully about the number of his/her prior convictions, it is improper to delve into the nature of the offense. Here, Appellant did not take the stand and the evidence was admitted under 90.404.

Appellant's contention that the "other crimes" evidence became a "feature" of the trial is likewise without merit. The trial court went to great lengths to ensure that the collateral crime evidence in this case would not become a "feature" of the trial. The state was prohibited from going into the details of any of the

sexual batteries and the number of witnesses it could introduce was limited. The collateral crime evidence took up only 200 pages of the 2100 page trial transcript (guilt phase) and was admitted through only 6 of 27 witnesses. Moreover, since the jury was given a limiting instruction on the use of the collateral crime evidence before it was introduced, any undue emphasis upon the collateral crimes evidence was corrected. Oats v. State, 446 So. 2d 90, 94 (Fla. 1984).

Finally, even if error, the admission of the collateral crime evidence was harmless beyond a reasonable doubt and there is no reasonable probability that the alleged error affected the outcome of this case. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). There was eyewitness testimony in this case establishing that a car intentionally ran over Keinya. While it was too dark for the eyewitnesses to positively identify Appellant's car, both agreed that Appellant's car looked similar to the one that murdered Keinya and that it could have been the car.

In addition, there was substantial physical evidence tying Appellant's car to the murder. A fiber, identical to those in Keinya's navy blue slacks, was found in the brake cable underneath Appellant's car. Keinya's slacks were torn when she was run over. A grease mark on her jacket was also consistent with 2 coils located underneath Appellant's car. Portions of the underside of Appellant's car looked like they had been wiped free of grease or

that something had gone underneath it, wiping it free of grease and debris in certain areas. Moreover, the right front tire of Appellant's car matched a tire impression found at the scene where the body was dumped. Finally, Keinya's blood was found on the front passenger seat of Appellant's car and Appellant told the police that Keinya had never bled in his car.

Appellant's admission to the police tied him to the crime. He told the police that he had not loaned his car out to anyone and that he had the only set of keys to his car. He also told the police at one point that he had picked Keinya up from work that night but that he didn't kill her; however, he immediately recanted, stating that he was being facetitious. Detective Thomasevich testified that there was nothing funny about the situation; Appellant had just been read his rights. Further, Patrick Allen testified that he saw Appellant and his car parked outside Publix that Sunday night.

In sum, there was substantial evidence connecting Appellant to the crime without the collateral crime evidence. All it did was establish Appellant's motive for murdering Keinya. As such, even if the admission of such evidence is deemed error here, it was harmless.

POINT III

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY FROM LIEUTENANT KEVIN VAUGHN IN SUPPORT OF THE STATE'S THEORY OF THE CASE. (Restated).

The trial court did not abuse its discretion by allowing Lieutenant Kevin Vaughn, Florida Highway Patrol, to testify that, in his experience, it is not typical to find evidence of a hit and run on both sides of a roadway, separated by ninety feet and on both the southbound and northbound lanes. The testimony was relevant to proving a material fact-- that Keinya's death was not the result of an accidental hit and run, but rather, was premeditated murder-- and to rebutting Appellant's defense that the run over was accidental. See Thomas v. State, 748 So.2d 970, 982 (Fla. 1999)(holding that "the admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion.").

Lt. Kevin Vaughn was one of the Florida Highway Patrol officers who responded to the scene after eyewitness John Gowdy reported that a body had been run over in the median. On the southbound lanes of U.S. 27, he found blood spots (DNA matched it to Keinya), an earring, a tennis shoe, a Publix name tag with the name "Keinya" on it, and a button stating "we check ID." (T 1146-50). After describing the evidence that he found in the southbound lanes, Lt. Vaughn explained how he discovered other evidence in the northbound lanes (part of Keinya's scalp and hair from when she jumped out of the car, another shoe, a watch, and a bow tie), stating:

> PROSECUTOR: How is it that the northbound items were found? Tell the jury.

LT. VAUGHN: It's kind of embarrassing. I finished up the crime scene southbound and I opened up my trunk to get out a plastic bag to put my biohazardous plastic gloves in. I didn't have one, so I started looking. So I walked over to the northbound side, looked across the guard rail, hoping I could find a trash bag or something to put them in.

I go to the Everglades quite frequently. I don't like to litter. I don't leave biohazard stuff on the scene. As I was looking for something to put this stuff in, I found the evidence northbound.

PROSECUTOR: Tell us what happened next.

LT. VAUGHN: After I was northbound I looked -- I had already picked up all the evidence southbound and was getting ready to clear the scene essentially.

PROSECUTOR: You mean leave?

LT. VAUGHN: Sir?

PROSECUTOR: Leave?

LT. VAUGHN: Leave, yeah, clear the scene, leave. Everybody was getting ready to leave when I found another tennis shoe, a watch, a bow and a tennis shoe that looked identical to the other one except it was a right tennis shoe instead of the left. **So I knew I had another crime scene on my hands and it wasn't --it is not typical that you would find evidence on both sides of the road.**

(T 1151-52). Defense counsel objected to what is typical or not typical and the state was asked to lay a foundation for the testimony.

PROSECUTOR: All right. Do you have any training in traffic homicide investigations?

LT. VAUGHN: Yes, I do.

> PROSECUTOR: How much training do you have in that area?
>
> LT. VAUGHN: I attended a -- I have all the certificates everywhere I attended schools at.
>
> PROSECUTOR: Would you just tell me what those are?
>
> LT. VAUGHN: Okay. Besides having the basic forty hour traffic accident investigation in the Florida Highway Patrol Academy I also attended an advanced traffic homicide investigation school. Excuse me just a minute while I go through these.

(T 1152). Defense counsel again objected, stating that **his objection was based on relevancy, not on any lack of a predicate.** "I think it is irrelevant what is typical or atypical. [Appellant's] on trial here for his life. It doesn't matter what is going on in this -- this case." (T 1152-53). The trial court overruled the objection (T 1153).

> LT. VAUGHN: **It is not typical we would find evidence of a hit and run on both sides of the road ninety feet apart, and essentially where the evidence is all southbound, there is evidence also that is north of the southbound evidence. So how would that evidence get there unless something had transpired previously? And it appeared that the evidence that we located and found was connected with the evidence that we found southbound. So at that time I felt that maybe that this was not a traffic hit and run, a traffic case. I thought it was** ---
>
> DEFENSE COUNSEL: I object to opinions he formed on that, or what he thinks. It is irrelevant. It is a final determination to be made by the jury. It is not up to him to tell the jury what the final conclusions are.

> THE COURT: Overruled. He can testify to that.
>
> PROSECUTOR: Go ahead, sir.
>
> LT. VAUGHN: So I-- it was a-- not a traffic homicide at this point. I didn't think it was a traffic homicide, because of the circumstance of the evidence being in different locations so far apart in different directions. So I felt that we needed the assistance of the Broward Sheriff's Office homicide unit to see if we could get a homicide detective out there.

(T 1153-54).

The trial court did not abuse its discretion by admitting the foregoing testimony from Lt. Vaughn. Relevant evidence is evidence that tends to prove or disprove a material fact. See Cruz-Sanchez v. State, 771 So.2d 52 (Fla. 2d DCA 2000); Drake v. State, 441 So.2d 1079, 1082 (Fla.1983) (evidence is relevant if it has a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action). Appellant's theory of defense was that he didn't commit the crime; however, he has also argued that whoever did run over Keinya did so accidentally. Obviously, testimony establishing that Keinya's death was not the result of an accidental hit and run was logically and legally relevant to rebutting Appellant's defense and proving the crime charged, first-degree murder. Thus, it was important for the state to present evidence that the run over was not accidental.

Appellant failed to preserve his alternative argument, that the probative value of the testimony was outweighed by its

prejudicial impact, for appellate review. Defense counsel's objection was limited to relevancy, he did not contend that the testimony was inadmissible under section 90.403, Florida Statutes (2000). As such, appellant's argument is procedurally barred absent fundamental error. See Lowe v. State, 650 So.2d 969, 974 (Fla. 1994)(holding that an objection to physical evidence on a relevancy ground did not preserve for appeal the prejudicial effect of the evidence, which must be pointed out specifically).

Even if the argument were preserved, it is clear that the probative value of this evidence outweighs any prejudicial effect. Appellant relies upon a line of cases holding that "[t]estimony concerning past crimes that did not involve the defendant cannot be introduced to demonstrate that the defendant committed the crimes at issue in the present case." Nowitzke v. State, 572 So.2d 1346, 1355 (Fla. 1990) (citations omitted); Lowder v. State, 589 So.2d 933 (Fla. 3d DCA 1991). In Nowitzke, this Court held that it was improper for the state to elicit testimony from a police officer, over defense objections, about the criminal behavior patterns of drug addicts. The officer testified that he knew drug addicts who both stole from their families to support their drug habits and who committed homicides in connection with narcotics deals.

This case is immediately distinguishable from the line of cases relied upon by Appellant. Lt. Vaughn was not testifying about past crimes to demonstrate that Appellant committed the crime

here. Rather, he was giving his opinion, based on his 14 years experience as a traffic homicide investigator, that hit and runs are not normally found on both sides of a highway.

Finally, even if the trial court erred by admitting the testimony, it was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Lt. Vaughn's testimony was relevant to proving that the run over was not an accident. As already noted under Point I, there was sufficient evidence of premeditation without this testimony, ensuring that it did not contribute to the verdict and therefore, was harmless.

POINT IV

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY FROM EYEWITNESS AMELIA STRINGER. (Restated).

Appellant failed to preserve his argument, that the trial court improperly admitted lay opinion testimony from eyewitness Amelia Stringer, for appellate review. During direct examination, Amelia Stringer was asked to describe what she saw after the car in front of them made the U-turn and headed back towards the person trying to sit up in the median:

> PROSECUTOR: What did you see next?
>
> STRINGER: Well, while John was waiting to get . . . back onto U.S. 27 to go south [to make a U-turn], I looked out the back window and I saw -- I didn't know who it was. But I saw this person kind of sitting up, like they are -- like if you were laying down and you are sitting yourself up--
>
> PROSECUTOR: Okay.

STRINGER: --you don't have anything to hold onto. So I saw that out of the back passenger window. And then as we were getting ready to get in line next to -- you know, get in between traffic, like waiting for no cars to come, is when I saw this car in front of us run over whoever that was that was there trying to get up. And that surprised me. It shocked me. And I -- I said, you know, "they ran over them." And the car that ran over that person continued. And again, traffic is still going, so that the car got off of-- out of traffic and ran over this person and then got back in traffic. And that is what was shocking, because the other cars didn't blow -- or they didn't have to swerve or stop. And to me that --that made it that it wasn't an accident, that it was intentional, because-- and I am only using myself as an example--

DEFENSE COUNSEL: **I object as non-responsive.**

PROSECUTOR: I asked her what happened next.

DEFENSE COUNSEL: **A narrative answer.**

PROSECUTOR: She is telling us what happened next.

THE COURT: I am going to allow it.

(T 2075-76, emphasis added). Defense counsel did not object on the ground that the testimony was improper lay opinion, and therefore, Appellant cannot raise this argument for the first time on appeal. See Tillman v. State, 471 So.2d 32 (Fla. 1985)(specific legal argument presented on appeal must have been presented to the trial court below); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Even if this Court decides to address the issue, it is without merit. To begin with, the trial court did not abuse its discretion by overruling the "non-responsive" objection and admitting the

testimony. See Ray v. State, 755 So.2d 604, 610 (Fla. 2000)(admissibility of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion.). Ms. Stringer's answer was responsive--she was asked to explain "what happened next" and recounted those facts. The last part of her answer cannot reasonably be read as an "opinion" about the perpetrator's intent or motive, as Appellant asserts. All Ms. Stringer said was that the **car's actions**, after it ran over Keinya, (i.e., its ability to get back into traffic without other cars having to swerve or stop), made it appear that it was not an accident, but intentional. That was a description of the events she perceived, not an opinion about the perpetrator's intent or motive.

Moreover, even if this Court deems Ms. Stringer's response to be an "opinion," it was permissible lay opinion testimony pursuant to section 90.701, Florida Statutes (2000). Section 90.701 permits a lay witness to testify in the form of an inference and opinion where:

> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

Both prongs of section 90.701 are satisfied in this case. Ms. Stringer's testimony did not require specialized skill, training or knowledge. Further, she could not have readily, and with equal accuracy and adequacy, communicated to the jury what she perceived-- that the car's actions after running Keinya over showed that it was not an accident-- without testifying in terms of inferences or opinions. There was no other way for Ms. Stringer to adequately convey the information to the jury. Merely describing that the car got back onto the road and that other cars didn't have to blow their horns, swerve or stop, does not adequately convey what Ms. Stringer perceived. Only by telling the jury that the car's actions showed that the run over was not an accident, could Ms. Stringer adequately convey what she perceived. See Zack v. State, 753 So.2d 9 (Fla. 2000) (holding that it was proper, under section 90.701, for witness to testify as to her "impression" of the defendant's relationship with his step-father because witness had observed them interact over a period of time); Alexander v. State, 627 So.2d 35, 42 (Fla. 1st DCA 1993) (holding that trial court should not have summarily denied defense counsel's request to call witnesses to testify that the shooting appeared to them to be accidental without first determining whether the prerequisites of section 90.701 were present).

Additionally, lay opinion testimony is admissible under section 90.701 to prove mental state or condition. See Strausser

v. State, 682 So. 2d 539, 541 (Fla. 1996) (affirming admission of lay witness' opinion relating to defendant's mental state); The Florida Bar v. Clement, 662 So.2d 690, 697 (Fla. 1995)(holding that a non-expert witness may testify to an opinion about mental condition if the witness had adequate opportunity to observe the matter or conduct); Cruse v. State, 588 So.2d 983, 990 (Fla. 1991), cert. denied, 504 U.S. 976, 112 S.Ct. 2949, 119 L.Ed.2d 572 (1992) (holding it was error to exclude the testimony of a neighbor concerning defendant's mental condition); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990) (affirming admission of lay witnesses' opinions relating to defendant's state of intoxication or lack thereof). Consequently, even if Ms. Stringer's description about the car's activities after it ran over Keinya is somehow deemed to be an "opinion" about Appellant, it would be a permissible opinion about Appellant's mental state or condition.

Appellant argues that it is an impermissible opinion because, while lay opinion about a defendant's mental state or condition is allowed, lay opinion about a defendant's mental intent or motive is inadmissible, relying upon Shiver v. State, 564 So.2d 1158 (Fla. 1st DCA 1990), and Lee v. State, 729 So.2d 975 (Fla. 1st DCA 1999). In Shiver, the police were called to a bar where the defendant and his girlfriend were having an altercation. A bar patron told the police that the defendant was manhandling his girlfriend. The defendant overheard this and later knifed the man's friend to

death.

The First District held that it was permissible, under section 90.701, to admit lay opinion testimony from witnesses about the defendant's mental state after the police left and as he was re-entering the bar. One witness testified that he "knew there was going to be trouble." Id. at 1159. Another stated that he "had a feeling that, you know, something was going to happen." "It wasn't a friendly feeling. It was more like we was [sic] going to get revenge on somebody." Id. A third witness testified that the defendant "looked like he was going to get revenge on somebody." Id. A fourth witness answered "yes" when asked whether he "perceive[d] or form[ed] an impression in [his] mind . . . that there might be trouble and that [he] had better get back inside the bar." Id.

In holding that the opinion testimony was properly admitted, the First District noted that "a witness may testify that a person was angry, threatening, or pretty mad," because "it is practically impossible to describe another's appearance in such a manner as to convey to a jury an accurate picture of the emotions shown by him at the time." Id. at 1160. However, the court also noted that "it has been stated that a witness should not testify to the **undisclosed intention or motive of a third person**," and that the distinction between the two principles "is fine indeed, as shown by comparing the 'permissible' testimony that someone was threatening,

to the 'impermissible' testimony of someone's future intentions." Id.

Comparing the statements that were admitted to the principles above, the First District noted that it was concerned that the statement that the defendant "looked like he was going to get revenge on somebody," could be characterized as one about the defendant's intent or motive when he reentered the bar, but ultimately concluded that it was admissible because it described the witness's factual observation of the defendant's mental state at the time.

Like Shiver, the alleged "opinion" testimony by Ms. Stringer here is also simply a description of her observation of Appellant's mental state at the time, based on how he drove the car, not an opinion about his undisclosed or future intentions. Ms. Stringer was an eyewitness to the murder, and therefore, there could not be any "undisclosed" intention-- Appellant's intention was unfolding before her eyes. As such, her observation could only be of his mental state at the time.

The other cases relied upon by Appellant, Lee and Kight v. State, 512 So.2d 922 (Fla. 1987), are inapplicable because they involve statements about an undisclosed intention or motive. In Lee, a police officer testified that the defendant "appeared to have something on his mind that he appeared to want to talk to somebody about," before giving his taped statement. The First

District held that was testimony relating to an undisclosed intention or motive of a third person. In Kight, defense counsel sought to elicit the victim's "interpretation" of what the co-defendant meant when he was talking to the defendant. Defense counsel wanted to show that the co-defendant was urging or encouraging the defendant to cut the victim's throat and that the co-defendant's ambiguous statement to the defendant was interpreted by the victim as a dare to kill him.

This Court held that the testimony was inadmissible under section 90.701 because the defendant failed to establish that the victim could not have otherwise communicated his perceptions concerning the co-defendant to the jury. To the contrary, this Court held, the record showed that the victim adequately explained that the co-defendant placed his hand over the defendant's hand and pressed the knife against the victim's throat while making the statement, which adequately conveyed the victim's opinion to the jury and therefore, there was no need for the victim's interpretation of the statement. See also Thorp v. State, 25 Fla.L.Weekly S1056 (Fla. Nov. 16, 2000).

Kight is inapplicable here because Ms. Stringer was not asked to give her "interpretation" of what someone said. Similarly, she was not describing what Appellant "appeared" to have on his mind, as in Lee. Rather, Ms. Stringer, as an eyewitness to the murder, was describing the events that unfolded before her eyes, which

necessarily included Appellant's mental state as he was committing the murder. His mental state was evidenced to her by the way he drove the car.

Finally, even if error, it was harmless. As under Point III, the objected to testimony here went to establishing that the run over was intentional and there was more than sufficient evidence of premeditation without this testimony, demonstrating that it could not have contributed to the verdict. See Point I.

POINTS V & IX

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING PHOTOGRAPHS OF THE DECEASED INTO EVIDENCE DURING THE GUILT AND PENALTY PHASES (Restated).

The trial court did not abuse its discretion by admitting two (2) photographs of Keinya's deceased body into evidence during the guilt phase and three (3) additional photographs during the penalty phase. See Rutherford v. Moore, 25 Fla. L.Weekly S891 (Fla. Oct. 12, 2000)(the admission of photographs is within a trial court's discretion and its ruling on the issue will not be disturbed on appeal unless there is a clear showing of abuse); Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Wilson v. State, 436 So.2d 908, 910 (Fla. 1983). The test of admissibility of photographs is relevance. Mansfield v. State, 758 So.2d 636, 648 (Fla. 2000); Gudinas v. State, 693 So.2d 953, 963 (Fla. 1997).

"This Court has held on numerous occasions that photographs

will be admissible into evidence '**if relevant to any issue required to be proven in a case**.'" Wilson v. State, 436 So.2d 908, 910 (Fla. 1983), citing State v. Wright, 265 So.2d 361, 362 (Fla.1972); Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); Welty v. State, 402 So.2d 1159 (Fla.1981); Straight v. State, 397 So.2d 903 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). The fact that a photograph is gruesome does not render it inadmissible. Gruesome photographs are admissible if they fairly and accurately represent a fact that is at issue. Wilson; Preston v. State, 607 So. 2d 404, 410 (Fla. 1992).

This Court has found gruesome photographs to be relevant and admissible when they show the condition and location of the body when it was found or where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted or the cause of death. See Rutherford v. Moore, 25 Fla.L.Weekly S891 (Fla. Oct. 12, 2000), citing Larkins v. State, 655 So. 2d 95, 98 (Fla. 1995)("[w]e have upheld the admission of photographs to explain a medical examiner's testimony, to show the manner of death, the location of wounds, and the identity of the victim); Jones v. State, 648 So. 2d 669 (Fla. 1994)(relevant to show the condition and location of the body when discovered, or to assist the medical examiner in explaining the condition of the victim's clothing or the nature of his injuries and the cause of

death); King v. State, 623 So. 2d 486 (Fla. 1993).

Photographs have also been held relevant where they illustrate the testimony of a witness, assist the jury in understanding the testimony or bear on issues of the nature and extent of the injuries, nature and force of the violence used, premeditation or intent. See Henderson v. State, 463 So. 2d 196, 200 (Fla.), cert. denied, 473 U.S. 916 (1985).

Applying those principles to the challenged photographs here, it is clear that they were relevant and admissible. Regarding the guilt phase, the first photograph, State's exhibit I, admitted into evidence as State's exhibit 9, is a photograph showing the location and condition of Keinya's body when it was discovered (T 1070-74), and therefore was admissible based upon Jones. It also helped establish that the run over was not accidental because it showed that Keinya's body was transported 15 miles south from U.S. 27 to the Holiday Park area. See Lott v. State, 695 So.2d 1239 (Fla. 1997)(no abuse of discretion where admitted photographs were probative of the premeditated murder charge). The photograph was admitted into evidence through Mr. George Jobes, the man who discovered Keinya's body.

The fact that Keinya's buttocks were exposed in the picture does not render it unduly prejudicial. In Preston v. State, 607 So.2d 404, 410 (Fla. 1992), photographs revealing numerous wounds on the victim's body, including injuries to her breasts and vagina,

were held admissible. See also Grey v. State, 727 So.2d 1063 (Fla. 4th DCA 1999)(photograph showing the injuries to the victim's head which extended down to include her naked breasts was admissible). Further, the stipulation relied upon by Appellant (IB 53), is inapplicable because it does not include the fact that Keinya's body was moved 15 miles to the Holiday Park location. More importantly, the stipulation had not been entered into at the time this photograph was admitted into evidence; it was not until five (5) days after this photograph was admitted that the stipulation was entered into and read to the jury.

The record also indicates that Appellant "invited" any alleged error regarding this photograph. See Ellison v. State, 349 So. 2d 731, 732 (Fla. 3d DCA 1977), cert. denied, 357 So.2 d 185) (Fla. 1978) ("invited error" rule means that a defendant may not take advantage of an error which he has induced). Prior to admitting the photograph, the state had asked Mr. Jobes to describe for the jury what he saw the morning he discovered Keinya's body, but defense counsel **objected, arguing that there were photographs showing that** (T 1070). However, once the state offered the photographs into evidence, defense counsel objected to them too, as irrelevant.

The defense cannot have it both ways. Due process requires that the state prove every element of a crime beyond a reasonable doubt, and that a defendant has no obligation to present witnesses.

See Jackson v. State, 575 So.2d 181, 188 (Fla.1991); Purifoy v. State, 359 So.2d 446, 449 (Fla.1978). The prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. See Estelle v. McGuire, 502 U.S. 62, 69-70, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). An essential element of proving murder is to prove that a person is dead. That is what the state was trying to establish through Mr. Jobes, the man who found Keinya's dead body. Defense counsel had the option of having Mr. Jobes describe for the jury what he saw that morning, but did not want that and did not ask for that, even after the court decided to allow the photograph. Any error on this point was invited by Appellant.

The second photograph (State's M-7), admitted into evidence as State's 72 (T 1364-65), was also properly admitted. It was taken at the crime scene (where Keinya's body was discovered) after the medical examiner arrived and turned her body over (T 1364). It shows the condition of Keinya's clothes after she was run over, including tears in her pants and bra. This photograph was vitally important to the State's case because it connected the blue fiber found on the underside of Appellant's car to Keinya, proving that he committed the crime. The State needed to show that Keinya was wearing those particular pants at the time she was murdered and that there were tears in those pants, accounting for the blue fiber

found on the underside of Appellant's car. Similarly, the tear in the red bra was needed to show how a red fiber got on the underside of Appellant's car.

The stipulation relied upon by Appellant (IB 53) does not apply because it does not cover this element of the State's case. The parties tried to enter into a stipulation about the fibers but could not (T 1341-46). Defense counsel admitted that he did not want to stipulate to anything about the fibers (T 1348).

The three (3) photographs admitted during the penalty phase were likewise relevant and admissible. The first photograph, exhibit F, admitted into evidence as exhibit 12, is a photograph showing Keinya's skull, which was admitted during the guilt phase to show the injuries to Keinya's skull (T 2601-06, 2615-17). The second photograph, exhibit E, admitted into evidence as exhibit 11, is a photograph showing the injuries to Keinya's back and thighs (T 2601-06, 2615-17). It shows Keinya's buttocks. The last photograph, exhibit C, admitted into evidence as exhibit 10, is a photograph showing the injuries to Keinya's knee, pelvic area, hands and stomach (T 2601-06, 2615-17).

"Section 921.142(2) . . . which describes the procedure for the penalty phase of a capital case, states '[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence . . . .'" Zakrzewski v. State, 717 So.2d 488, 494 (Fla.

1998)(rejecting an argument about gruesome photographs in the penalty phase based on the statute). Thus, the arguments advanced by Appellant against the penalty phase photographs (IB 72-73) fail. Moreover, it is clear that these photographs were relevant and admissible because they helped the medical examiner (who testified during the penalty phase) explain the nature and extent of Keinya's injuries, see Jones (photographs are admissible when they are relevant to assist the medical examiner in explaining the nature of the injuries and the cause of death), and helped to prove the HAC and felony-murder aggravators (injuries to scalp showing that she jumped out of the car establish kidnapping). See Rutherford (no abuse of discretion in allowing three morgue photographs during the penalty phase because they were relevant to show the circumstances of the crime and the nature and extent of the victim's injuries); Kearse v. State, 770 So.2d 1119 (Fla. 2000) (photographs of victim's body admissible through medical examiner during penalty phase to show the nature of the crime and injuries).
The stipulation relied upon by Appellant does not cover the nature of the injuries Keinya sustained.

Relying upon Almeida v. State, 748 So.2d 922, 929-30 (Fla. 1999), Appellant argues that photographs of the deceased are admissible only when they are probative of **an issue that is in dispute**, and that the photographs in this case are inadmissible because they do not go to the disputed issues in this case--

identity of the perpetrator and identity of the car. The State disagrees. The second photograph (guilt phase, State's 72) clearly goes to the disputed issue of identity. It was admitted to connect the fibers found on the underside of Appellant's car to Keinya, proving that Appellant and/or his car committed the murder. Similarly, the first photograph (guilt phase) went to the disputed issues of premeditation/non-accidental by showing that Keinya's body was moved 15 miles after she was murdered. It also helped the state to prove that there was a dead body, a necessary element of murder. The penalty phase photographs were relevant to proving the disputed aggravators of HAC and felony-murder because they showed the nature of the crime and injuries Keinya sustained.

As already noted, the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. See Estelle v. McGuire, 502 U.S. 62, 69-70, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). As such, Appellant cannot limit the disputed issues in this case to those that he has outlined in his brief. Almeida must be read to include the elements of the crime which the State is required to prove.

"Almost any photograph of a homicide victim is gruesome." Vargas v. State, 751 So.2d 664 (Fla. 3d DCA 2000). Here, the trial judge viewed the photographs and determined that their probative value outweighed any prejudicial effect. The trial judge limited

the number of photographs that were admitted and excluded repetitious photograph. The photographs were not given undue emphasis. "Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Henderson v. State, 463 So.2d 196, 200 (Fla. 1985).

Finally, even if the photographs were improperly admitted, any error was harmless. See Rutherford. Considering the evidence establishing that Appellant committed the crime, the two (2) photographs admitted during the guilt phase could not have contributed to the verdict. The State relies upon the harmless error argument set forth under Point II (pages 30-31), in support of this argument. Further, the admission of the three (3) photographs during the penalty phase, even if deemed error, was harmless. The state presented overwhelming evidence establishing five (5) aggravators in this case--prior violent felony, felony-murder, avoid arrest, CCP and HAC. The only testimony Appellant presented was from relatives and neighbors that knew him during the first half of his life, not as an adult when he committed this horrific crime. No statutory mitigation was found and very little weight was given to the non-statutory mitigation.

POINTS VI & VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL. FURTHER, THE UNPRESERVED, ALLEGEDLY IMPROPER COMMENTS DID NOT DEPRIVE APPELLANT OF A FAIR

TRIAL AND FAIR SENTENCING HEARING. (Restated).

The trial court did not abuse its discretion by denying Appellant's motion for a mistrial based upon a comment made by the prosecutor during closing argument (guilt phase). See Hamilton v. State, 703 So.2d 1038, 1041 (Fla. 1997) (a ruling on a motion for mistrial is within the trial court's discretion). A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial. Power v. State, 605 So.2d 856, 861 (Fla.1992). Stated another way, a mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial. Hamilton at 1041.

This Court has repeatedly recognized that wide latitude is permitted in arguing to a jury. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982); Thomas v. State, 326 So.2d 413 (Fla. 1975). Logical inferences may be drawn, and prosecutors are allowed to advance all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws. Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962). The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). Each case must be considered on its own merits, however,

and within the circumstances surrounding the complained of remarks. Id.

The prosecutor's comments must be examined in the context within which they were made. Defense counsel "sandwiched" closing arguments (guilt phase) in this case; thus, he had the opportunity to speak to the jury first and also to get the last word. Addressing the testimony of each and every witness, defense counsel argued that the State failed to meet its burden of proof in this circumstantial evidence case (T 2186-2265). Defense counsel attacked the testimony of the witnesses and the inferences to be drawn therefrom. He also pointed to the fact that Appellant voluntarily spoke with the police and consented to having his car searched (8 days after Keinya's murder) as proof that he lacked consciousness of guilt and was not guilty:

> **[Appellant] comes to BSO voluntarily. He has nothing to hide. He agrees to talk. He is informed of his rights. Imagine that you just killed your step daughter by running over her with your car. It's a bloody mess. You transport the body fifteen miles away. You got all this in your head, this guilt, this horror, this fear of being caught. And a detective tells you "you have a right to remain silent. Why don't you let me get you a lawyer?"**
>
> **"I don't need one. I didn't do anything." He waives his rights. He consents to a search of the car.**
>
> **Detective Thomasevich told us "well, that is what I use as an investigative tool. I like to ask suspects to consent. See if they have**

anything to hide, see if they consent, or see if they resist."

He didn't need [Appellant] to consent. He consented . . . . And it is important because it points to [Appellant's] lack of consciousness of guilt. He didn't do anything wrong. He had nothing to hide.

. . .

If any one of us, using your common sense, had done this, . . . the first thing we would have done, is clean that car.

. . .

Second thing we would have done is, we would have never have consented to the search of the car. We wouldn't have said "I have nothing to hide." We wouldn't have agreed.

(T 2240-41, 2203-04).

In response, the prosecutor tried to explain that guilty people often agree to speak to police and have their cars searched to not look suspicious:

> PROSECUTOR: The problem becomes, if you refuse to go to the police station, more attention is drawn to you, because as we try to analyze the situation, "[w]ell, that is how a guilty person would act, so I got to go. Oh, they want to look at my car." How many drug traffickers have you heard about that say "[g]o ahead, search my car, as they are driving kilos of cocaine out of Miami --

(T 2295).

Defense counsel objected on the ground that the comment was outside the evidence and the trial court sustained the objection (T 2295). Defense counsel requested a curative instruction and

reserved a motion for mistrial (T 2295). The trial court instructed the jury to disregard the statement. "You are to look to the evidence that you have in this case. That is what you make your decision on." (T 2295). The prosecutor continued that his comment was a direct response to defense counsel's statement that a guilty person would not say go ahead, look in my car, I have nothing to hide (T 2296). The prosecutor explained that is not true, that guilty people often say go ahead, look in my car, because they do not want to raise any more red flags, and do not want the police to look at them any closer (T 2296).

The trial court later denied Appellant's motion for a mistrial, noting that he had given both counsel a lot of leeway and that both of them had used analogies-- defense counsel talked about biting his fingernails, riding over a curb, etc. (T 2318). Defense counsel noted that he understood the Court's ruling (T 2318).

The trial court correctly denied Appellant's motion for a mistrial based on this single, isolated comment by the prosecutor. See Spencer v. State, 645 So.2d 377, 382-83 (Fla. 1994)(motion for mistrial denied even though the prosecutor referred, in closing argument, to a fact that was not in evidence and that had been ruled inadmissible by the court; prosecutor's single comment that the victim was carrying a rifle around her house because she was afraid of the defendant did not deprive the defendant of a fair trial); Pope v. Wainwright, 496 So.2d 798, 803 (Fla. 1986)(comment

outside the evidence--that the defendant had a preference for death--was clearly improper, but standing alone or read in combination with other improper comments cannot be said to have unduly affected the jury's weighing process).

Unlike Spencer and Pope, the prosecutor's comment here was "fair reply" to defense counsel's argument that a guilty person would not voluntarily agree to speak with the police and consent to have his car searched. See Parker v. State, 641 So. 2d 369 (Fla. 1994)(no abuse of discretion in court's ruling that prosecutor's reference to defense theory as "fantasy" constituted fair comment or was invited by defense argument); Garcia v. State, 644 So. 2d 59 (Fla. 1994) (defendant not deprived of fair trial by comments of prosecutor which were response to defense counsel's comments); Vasquez v. State, 635 So. 2d 1088 (Fla. 1994); Brown v. State, 367 So. 2d 616 (Fla. 1979).

Further, even if deemed error, considering the evidence in this case, as outlined under Points I-V, it was harmless and could not have contributed to the jury's verdict. See State v. Murray, 443 So.2d 955, 956 (Fla. 1984)(automatic reversal of a conviction on the basis of prosecutorial error is not warranted, unless the errors are so basic to a fair trial that they can never be considered harmless; the standard of review is whether "the error committed was so prejudicial as to vitiate the entire trial.").

Appellant next argues that the cumulative effect of several

other comments made during closing argument (guilt phase) deprived him of a fair trial and that the cumulative effect of several comments made during penalty phase closing argument deprived him of a fair sentencing hearing. The State submits that the comments in question are procedurally barred because they were not preserved for appellate review, are not improper, or if improper, do not constitute fundamental error.

Appellant failed to preserve any of these allegedly improper comments for appellate review. The proper procedure to preserve review of an alleged improper comment is to object, request a curative instruction, and/or move for a mistrial. Kearse v. State, 25 Fla. L. Weekly S507, --- So.2d ----, 2000 WL 854156 (Fla. June 29, 2000); Spencer v. State, 645 So. 2d 377, 383 (Fla. 1994); cert. denied, -- U.S. --, 118 S. Ct. 213 (1997); Duest v. State, 462 So. 2d 446 (Fla. 1985), cert. denied, -- U.S. --, 113 S. Ct. 1857 (1993).

Here, Appellant failed to object to any of the comments and did not move for a mistrial based on any of them. As such, he failed to preserve the alleged errors for appellate review. This Court has long held that absent a showing of fundamental error, the failure to object to an alleged improper comment bars review. See Brooks v. State, 25 Fla.L.Weekly S417 (May 25, 2000); McDonald v. State, 743 So.2d 501, 505 (Fla. 1999); Wyatt v. State, 641 So.2d 355 (Fla. 1994); Street v. State, 636 So.2d 1297 (Fla. 1994);

Waterhouse v. State, 596 So.2d 1008 (Fla. 1992).

"Fundamental error has been defined as the type of error 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.'" Delgado v. State, 25 Fla. L. Weekly S79 (Fla. 2000)(quoting Urbin v. State, 714 So.2d 411, 418 n. 8 (Fla.1998)). See also Crump v. State, 622 So.2d 963, 972 (Fla.1993) (holding that since prosecutorial comments did not constitute fundamental error, absence of preservation of issue by defense counsel precluded appellate review); Pacifico v. State, 642 So.2d 1178, 1182 (Fla. 1st DCA 1994).

GUILT PHASE

The unpreserved comments in the guilt phase closing argument do not constitute fundamental error. Appellant alleges that the prosecutor made disparaging remarks about the defense (IB 55) when he stated:

> [Defense counsel] would have you believe poor [Appellant] is just a victim of circumstance, everybody looked at him. Look away from [Appellant]. He would like to sort of shroud you in a fog, as we did every morning we came down here as we had to do our respective jobs to get up this week. As you are getting out on the road Monday or Tuesday, I don't know if you experienced it. I am looking and driving for more than twelve years. Yet when that fog is there, gosh, this doesn't look like my neighborhood, this doesn't look like the path I take every single day to get to work. Then as I get in on the fog, get up on objects, . . . now I can see it for what it is, as opposed to being enshrouded in fog every morning this

week.

(T 2269-70). The comment cannot reasonably be read as disparaging defense counsel. The prosecutor merely used an analogy to remind the jury to stay focused on the facts and to not be swayed by defense counsel's assertion that the circumstantial evidence did not constitute proof beyond a reasonable doubt. It was "fair reply" to defense counsel's suggestion that the jury should decide the case by taking every witness and item of evidence, separately, and seeing whether each piece, independently, established proof beyond a reasonable doubt. Defense counsel attacked each witness, separately, during his closing, arguing that because each individual piece did not conclusively establish Appellant's guilt, there was not proof beyond a reasonable doubt. Defense counsel never told the jury that circumstantial evidence must be viewed as a whole, but instead, focused on whether each circumstance was susceptible of two or more interpretations (T 2261-64). It was also "fair reply" to defense counsel's argument that Appellant was a victim of circumstance, unfairly targeted by the police.

Further, as the trial court noted, defense counsel was allowed to use analogies during his closing argument, including how he bit his nails as an innocent explanation for the blood in Appellant's car and how he ran over a concrete slab in a parking spot as an innocent explanation for the portions of the underside of Appellant's car being wiped free of grease (T 2318). Because

defense counsel used analogies in his closing, it was fair to allow the prosecutor to use some analogies. Finally, in rebuttal, defense counsel responded to the comment by attacking the prosecutor--stating that the prosecutor was trying sway the jury with emotion, by personalizing the case because he is a likeable fellow and was trying to win over the jury (T 2304).

Similarly, the prosecutor did not shift the burden of proof (IB 56) when he explained to the jury, again by using the analogy of an aircraft carrier, how circumstantial evidence fits together to become proof beyond a reasonable doubt. As already noted, defense counsel did not explain to the jury that circumstantial evidence should be considered as a whole. Instead, his strategy was to take each witness, separately, and attack his/her testimony, arguing that the circumstantial evidence did not rise to proof beyond a reasonable doubt because no single piece of evidence was a "smoking gun." The prosecutor rebutted that argument by reminding the jury, via the analogy of an aircraft carrier, that the circumstantial evidence must be viewed together, as a whole:

> When you look at things individually and think it is quite innocent to attack each and every one of them, it is like divided you fall and are conquered and together you are strong.
>
> My son loves aircraft carriers. Every time the JFK is here in Port Everglades we have to go down to see it. I was reminded as [defense counsel] was talking about "[w]ell, I went through every single witness, all twenty-seven of them and I attack each one, so that is not proof beyond a reasonable doubt." But if you

> look at it this way, I think you will see how it all fits together.
>
> [The aircraft carrier is] anchored by a rope, that has a strand wrapped around a strand wrapped around a strand; and if you take the time and you start sawing, saw one and it pops, saw another one it pops, but the reason it is done that way is so that you have to go through every single one in order to break that ship free.
>
> This case is similar in that fashion.

(T 2273-74). The prosecutor was explaining to the jury, in an interesting way that he thought the jurors would understand, how circumstantial evidence must be considered as a whole and how it builds, layer upon layer, to establish proof beyond a reasonable doubt. It is a mischaracterization to say that the prosecutor's comment shifted the burden of proof. Further, defense counsel came back in rebuttal and explained very clearly that he had no burden of proof, that only the state had a burden of proof and again gave the jury his explanation of circumstantial evidence (T 2305-06). Defense counsel also told the jury a story about when his 14 year-old son was young how he used to think he could change red lights to green by saying "change to green," (T 2310) to explain to the jury that "coincidence" does not constitute proof beyond a reasonable doubt.

Likewise, the prosecutor did not put the onus on the defense to prove or disprove anything during his discussion about the verdict forms (IB 58). The prosecutor explained to the jury that it would have four (4) choices on the verdict form (T 2281-83).

Choice "A" if it found the Appellant guilty of first-degree murder and the prosecutor explained the three ways that it could prove that (T 2281-82). The prosecutor then noted that choice "D" went without explanation. "If you find that I didn't prove anything to you, then mark that box." (T 2283). This comment cannot reasonably be read as putting any onus on the defense. It makes no explicit or implicit reference to the defense and is clearly talking about the state's burden. The comment was basically a generalized way of saying that if the state hadn't met its burden of proof, the jury should find Appellant not guilty. Again, during rebuttal, defense counsel made it clear that only the State had the burden of proof and that it had failed to meet that burden in this case.

Similarly, the prosecutor did not shift the burden to the defense to prove that there were "probable" doubts regarding the case (IB 58). Again, the prosecutor's comments do not make any mention of the defense and do not assert that it has to prove or disprove anything. Rather, the prosecutor's comments were "fair reply" to defense counsel's argument that there were other possible explanations for the incriminating evidence. For example, regarding defense counsel's assertion that the swipe mark on the bottom of the front driver door was "possibly" caused by one of the detectives wiping his hand across it during the search, the prosecutor asked the jury whether that was "probable." (T 2290). The prosecutor went through the other incriminating evidence and

asked if defense counsel's "possible" innocent explanation was probable (T 2290-91). Defense counsel came back on rebuttal and again argued that the circumstantial evidence was insufficient because each individual piece had other "possible" explanations, there was no proof beyond a reasonable doubt.

Appellant's allegation that the prosecutor engaged in personal epithets (IB 57) is also without merit. Rebutting defense counsel's argument that Appellant had been honest and forthright with the police, the prosecutor noted that Appellant did not tell the police, who responded to the 911 hang-up, that he had punched Keinya in the head or that he had followed Patrick Allen home and been shot at. Appellant also lied to Detective Thomasevich, denying that he lived at the marital home. The prosecutor also pointed to the fact that Appellant was concerned whether the police had spoken to Troy Vernon, the next-door neighbor and asked him what the police had asked about Appellant. He then noted that criminals generally get caught when they start opening their mouths:

> It is a good thing that all criminals aren't as smart as Albert Einstein. I suggest to you we would never get convictions. They are like fish. They only get caught when they start to open their mouth. "I have nothing to hide."

(T 2270-73).

This comment cannot reasonably be read as likening Appellant to an animal, as Appellant suggests. The prosecutor was rebutting

defense counsel’s repeated assertion that Appellant’s innocence was shown by the fact that he had been candid and forthright with the police. The prosecutor pointed out that Appellant had not been candid and that his questioning of Troy Vernon, the fact that he was worried enough to open his mouth and ask Troy what the police wanted to know about Appellant, evidenced his guilt.

Appellant next argues that the prosecutor trivialized the case and suggested to the jury that it could convict Appellant based on his propensity by telling them a story about how his mother always knew it was him stealing the sugar cookies out of the cookie jar and not his brothers or sisters (IB 57-58)(T 2279-80). Again, the prosecutor was explaining how circumstantial evidence works to the jury. His mother was able to narrow down who had been in the sugar cookies by knowing that he was the one who loved sugar cookies. She then combined that fact with the fact that he would always forget to clean up the crumbs on the floor, to determine that he had taken the sugar cookies. The prosecutor explained that circumstantial evidence works the same way, you take the facts that you know and couple them together (T 2281). Defense counsel came back on rebuttal and ridiculed the story, telling the jury that the story did not prove this case (T 2310-11).

Likewise, the prosecutor’s comment to the jury about having to take the case as it comes (IB 59), was not improper. Again, it was “fair reply” to defense counsel’s assertion that the witnesses,

specifically the eyewitnesses and experts should not be believed because of differences or variations in their testimony and because they could not positively identify the car, fiber, coils, etc. The prosecutor noted that he doesn't get to select how the crime occurs and who is there witness it, only Appellant does (T 2298). The prosecutor further noted that the fact that the eyewitnesses couldn't say positively that it was Appellant's car or that he was behind the wheel doesn't make him any less guilty (T 2299).

Finally, the prosecutor's story about a riddle posed to him by a neighborhood child was not improper. Again, Appellant has mischaracterized what the prosecutor said. The prosecutor did not tell the jury to not over-analyze the evidence and instead, base its verdict on the fact that Appellant was the only person with a motive to kill Keinya (IB 60). The point of the story was for the jury to "see [the evidence] for what it was." (T 2302). Defense counsel used his own "riddle" during rebuttal to show the jury how "dangerous" circumstantial evidence is (T 2311-12).

In sum, all of the unpreserved comments are procedurally barred because Appellant failed to object and has failed to demonstrate that any of them constitute fundamental error. The prosecutor's closing argument, taken as a whole, was not overly emotional or intended to arouse the jury's passions. Rather, it was a dispassionate account of what the evidence showed. Any isolated comments that may be improper do not constitute

fundamental error given the overwhelming evidence of guilt, as outlined under Points I-V. The comments, either individually or combined with the one objected to comment, do not constitute fundamental error.

PENALTY PHASE

The unpreserved comments made during the penalty phase also do not constitute fundamental error. The prosecutor began his closing argument by acknowledging the gravity of the situation and the enormous responsibility that had been placed in the jurors' hands (T 3152-53). He mentioned that there are times in all of our lives when we have to do something that is unpleasant or make a difficult decision and that this was one of those times:

> Remember in voir dire when you said you know it is easy to talk at a cocktail party, perhaps as we watch the nightly news -- "but that person deserves the death penalty." Yet I suggested to you that day, oh so long ago, that when you are faced with that, it is one of those things where you go "God, I don't want to do that. I don't want to be put in that position." Unfortunately, you are.
>
> It has been said that the death penalty is reserved for those murders which had the most aggravating circumstances. That is the law. We wholeheartedly agree with that. But sometimes defense attorneys like to take it a step further. I doubt that you will hear it here, but they like to take it a step further and they say that is only for the Dahmers and of the person, Danny Rollins . . . or the Ted Bundys of the world. Yet, in the instructions that the judge is going to give you . . . it is not going to say only Ted Bundy and Gacey and Dahmer, . . ., only those people deserve the death penalty. Because that is not the

> law and that is not the way it is.
>
> You see, in this case one of the aggravators is that . . . [Appellant] has been convicted of a felony involving violence or a threat of violence. He's been convicted eleven times of that type of crime. But that is only one aggravator.
>
> Danny Rollins killed and killed and killed. But that is only one aggravator. Do you see how that applies? You look at the aggravators, you weigh them against the mitigators and then you come -- you come to a well reasoned decision.

(T 3153-54).

Read in context, the prosecutor was merely explaining to the jury that the death penalty is not limited to only the most vile of criminals, like the serial murderers listed, whose horrific crimes have been widely documented and highly publicized, but also applies to cases like this one where the aggravating factors outweigh the mitigating circumstances. The prosecutor went on to explain that an aggravating factor like prior violent felony is weighed only once, even if the defendant has committed 100 prior violent felonies. The prior violent felony aggravator would count only once against Appellant, even though he committed eleven acts of attempted capital sexual battery. It counted only once against Danny Rollings, even though he killed and killed.

It is a complete mischaracterization to say that the prosecutor "likened" Appellant to Danny Rollings. The prosecutor never compared Appellant to Danny Rollings either explicitly or

implicitly. He didn't talk about Appellant or the facts of his crime and try to him to Danny Rollings. Rather, the prosecutor spoke, in general terms, about how you weigh an aggravator like prior violent felony and explained to the jury that you only weigh it once, no matter how many prior violent felonies were committed by the defendant. Further, as the prosecutor anticipated, defense counsel did argue, during his closing, that the death penalty was reserved for only the most evil and wicked of first-degree murderers (T 3197).

This case is like People v. Smith, 332 N.W.2d 428 (Mich. 1982), where a prosecutor's reference to Charles Manson during closing argument was held to not be reversible error because, examined in the context within which it was made, it was clear that the prosecutor was trying to point out that the police in his case, unlike those in the Manson investigation, had not made any mistakes. See also People v. Rowen, 314 N.W.2d 526 (Mich. 1981)(prosecutor's comment, while in the course of explaining the presumption of innocence to the jury, that Jack Ruby had the same presumption of innocence as the defendant even though he shot Lee Harvey Oswald on television in front of millions of people, **was not fundamental error**-- a curative instruction would have cured any prejudice). Similarly, here, the prosecutor's reference to Danny Rollings, while explaining to the jury how the "prior violent felony" aggravator is weighed, was not fundamental error.

People v. Kelley, 370 N.W.2d 321 (Mich. 1985), and People v. Pullins, 378 N.W.2d 502 (Mich. 1985), relied upon by Appellant, are not applicable here. In Kelley, the prosecutor, in discussing the defendant's friends who testified on his behalf as character witnesses, stated:

> They obviously think highly of the defendant. Well, that's good, but the mere fact that they think highly of him does not mean that he didn't commit this act.
>
> . . .
>
> You may remember a few years ago in Chicago there was a man who many people thought very highly of. Everyone in the neighborhood thought he was a great guy.

Id at 322.

Defense counsel in Kelley **objected** to the comparison with facts outside the record. The trial court overruled the objection and the prosecutor continued:

> You may recall hearing the facts of this case from Chicago, that the man's name was John Wayne Gacey, that everybody thought he was a very nice man. It's only when they started digging up all the bodies from the house that they realized it was a problem. People don't always see someone's true nature. It's only when the evidence comes out that they see that.

Id.

The Michigan court held that the error was reversible because there was a great likelihood that the jury would compare defendant's character with Gacey's based on the prosecutor's

comments. <u>See also</u> <u>Pullins</u> (holding that it was error to equate the defendant with Sirhan Sirhan and Charles Mason but not listing exactly what was said). Unlike <u>Kelley</u> and <u>Pullins</u>, the prosecutor here did not equate Appellant with John Wayne Gacey or any other serial murderer.

Similarly, it was not error for the prosecutor to state that he understood that this was a decision that the jury didn't want to make and that in 99% of the cases, it is not the appropriate decision, but that it was the right decision in this case because of what Appellant did as an adult (T 3163). This was merely a comment on the evidence and the law applicable to this case. <u>See</u> <u>White v. State</u>, 377 So.2d 1149, 1150 (Fla. 1979), <u>cert. denied</u>, 449 U.S. 845 (1980) ("[i]t is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue."). The State bore the burden of proving that the death penalty was applicable in this case and that's all that the prosecutor was saying-- that the death penalty was appropriate here based on the evidence presented. Defense counsel responded to this argument, stating that Apellant did not fall into the top 1% of horrible, despicable human beings and horrendous, unthinkable crimes (T 3197). He opined that the death penalty was a horrible thing and that they jury would sleep better if it recommended life (T 3194, 3200). <u>Brooks v. State</u>, 762 So.2d 879, 901-02 (Fla.

2000), relied upon by Appellant, is inapplicable because the statement in that case was objected to by defense counsel, and therefore, analyzed by this Court under a different standard.

The prosecutor's statement about Appellant's testimony sending a chill down his spine (IB 66-67, T 3170-71), was nothing more than a comment upon the evidence. White. The prosecutor was discussing the CCP aggravator and the heightened premeditation required for it. He argued that Appellant's testimony showed that it was met in this case. Appellant had no idea why Keinya would be out in the Everglades in the dark of night. He agreed that there were no houses, phones, or stores out there for Keinya to be going to. Appellant then noted that he used to take her fishing "past there," -- the spot where she was murdered (T 3170-71). It was that testimony that sent a chill down the prosecutor's spine.

Appellant next objects to several comments which he claims dehumanized him and improperly bolstered Keinya's character (IB 66-68). In discussing mitigation, the prosecutor argued that the first statutory mitigator-- that Appellant committed the crime while he was under the influence of extreme mental or emotional disturbance-- had not been met (T 3166).

> I agree he is disturbed. I would suggest that he is meaner than mean. But I also suggest that there was no extreme mental or emotional disturbance going on when he murdered Keinya Smith that night in the darkness out in the Everglades.

(T 3166). Read in context, the prosecutor was merely explaining to

the jury that even though Appellant is disturbed and "meaner than mean," he did not meet the first statutory mitigator. The comment cannot reasonably be read as attempting to "dehumanize" Appellant. The prosecution is permitted to comment upon the essential unbelievability of testimony. Reaves v. State, 324 So. 2d 687, 688 (Fla. 3d DCA 1976).

Further discussing mitigation, the prosecutor noted that Appellant wanted the jury to consider his character and then pointed out what the jury knew about Appellant's character:

> [Appellant was the aggressor during that Friday night/early Saturday morning incident and Edwina had to hold him back from continuing to go after Keinya, even after she got a knife]
>
> And that is when this 18 year-old -- who would be comparable to William Braveheart, but only in that little home in Carol City-- put her foot down and said "I am not going to take this anymore." And said "I am going to call the police." He no longer had absolute control over her.
>
> See, in life there are takers and there are givers. [Appellant] is a taker. He takes from people. He stole Keinya's virginity. He stripped her of her safety. And he took away her life. Because she held the keys to the jail where he was looking at life in prison if he violated any of the terms and conditions. He eliminated her. He snuffed her out, because she was an impediment.

(T 3173-74).

Regarding whether there was violence used during the rapes

(which went to the "prior violent felony" aggravator) the prosecutor noted that Keinya said there was violence but Appellant said there wasn't and then asked the jury who it believed. The prosecutor asked the jury whether Appellant was the type of person that it would rely upon in its most important affairs and then stated that he would check outside if Appellant said that it was raining (T 3177). On the same issue, the prosecutor noted that Appellant's denial of threats was "baloney." (T 3178).

Section 921.141(1), Florida Statutes (2000), provides that during the penalty phase "[e]vidence may be presented as to any matter that the court deems relevant to the nature of the crime and character of the defendant . . . ." Here, Appellant put his character at issue when he took the stand. The prosecutor was allowed to comment on Appellant's lack of credibility.

The prosecutor's comments about Keinya do not constitute improper bolstering (T 67, 69-70). Again, this was merely comment on the evidence and intended to show that there was no legitimate mitigation here. The prosecutor's imaginary conversation with Keinya also was not fundamental error. The prosecutor was responding to Appellant's assertion that he wished he could put Keinya on as a witness. See Brooks at 899(narrative by the prosecutor describing the death of Darryl Jenkins, which included statements that "[Jenkins] did nothing, nothing to deserve being shot like a rabid dog on the driveway in front of his own home";

"[Jenkins] fell down to this cold cement, life flowed out of him"; "blood flowed onto that cold concrete"; "life flowed out of him, flowed out of him"; and "[Jenkins] died there on that cold slab of cement," was not improper, even though it had a slight emotional flow because it was properly confined to inferences based on record evidence and was therefore proper).

Appellant's final objection is to comments "that the jury knew what it must do," and that it would "do the right thing," as impermissible appeals to the jury to "do its duty" or "do the right thing." (IB 70-71, T 3182-84). Appealing to the jury to "do the right thing" is not clearly erroneous when it is coupled with reference to the record. See U.S. v. Barnett, 159 F.3d 637 (C.A.D.C. 1998); Adams v. U.S., 222 F.2d 45, 46 n. 1 (D.C.Cir.1955). Here, both statements asked the jury to "do the right thing" based upon the evidence and testimony before it. As such, they were not improper appeals and cannot constitute fundamental error. See U.S. v. Young, 105 S.Ct. 1038 (1985)(prosecutor's urging that the jury "do its job", although error, did not constitute "plain error" under Federal Rule of Criminal Procedure 52(b), because it did not undermine the fundamental fairness of the trial or amount to a miscarriage of justice).

Brooks v. State, 762 So.2d 879, 901-02 (Fla. 2000), and Urbin v. State, 714 So.2d 411 (Fla. 1998), relied upon by Appellant, are

distinguishable. First, objections were lodged in both Brooks and Urbin. Thus, those case were not analyzed under the fundamental error standard applicable here. Second, reversal in both those cases was premised upon the cumulative effect of several errors. In Brooks, for example, the prosecutor used the word "executed" or "executing" 6 times, and characterized the defendants as persons of "true deep-seated, violent character"; "people of longstanding violence"; "they commit violent, brutal crimes of violence"; "it's a character of violence"; "both of these defendants are men of longstanding violence, deep-seated violence, vicious violence, brutal violence, hard violence ... those defendants are violent to the core, violent in every atom of their body." Id. at 900.

Additionally, the prosecutor impermissibly used a "mercy" argument, impermissibly argued "prosecutorial expertise" to the jury, misstated the law regarding the jury's recommendation of a death sentence, misstated the law regarding the merged robbery and pecuniary gain aggravating circumstances, personally attacked defense counsel and asked the jury to not take the easy way out and recommend life.

Similarly, in Urbin, the prosecutor invited the jury to disregard the law, asserted that a vote for life would be irresponsible and a violation of the juror's lawful duty, emotionally created an imaginary script demonstrating that the victim was shot while pleading for his life, attacked the character

of the defendant’s mother, used the word “executing” or “executed” about 9 times and made an impermissible mercy argument, among other things. This Court found that the prosecutor’s argument was full of “emotional fear” and efforts to dehumanize and demonize the defendant. The prosecutor cast the defendant as showing his "true, violent, and brutal and vicious character", as a "cold-blooded killer, a ruthless killer": exhibiting "deep seeded [sic] violence. It's vicious violence. It's brutal violence"; and that Urbin was "violent to the core, violent in every atom of his body." Id. at 420, f.n. 9.

In sum, all of these unpreserved comments are procedurally barred because Appellant failed to object and has failed to demonstrate that any of them constitute fundamental error. The prosecutor’s closing argument, taken as a whole, was not overly emotional or intended to arouse the jury’s passions. Rather, it was a dispassionate account of what the evidence showed. Any isolated comments that may be improper do not constitute fundamental error given the fact that five (5) aggravating factors were proved beyond a reasonable doubt and only non-statutory mitigation was shown, which did not outweigh the aggravators.

POINT VII

THE TRIAL COURT CORRECTLY ALLOWED THE STATE TO PROCEED ON A THEORY OF FELONY MURDER. (Restated).

Appellant urges this Court to recede from Knight v. State, 338 So. 2d 201, 204 (Fla. 1976), sentence vacated on other grounds, 863

F.2d 705 (11th Cir. 1988), without offering any valid reason why it should. In Kearse v. State, 662 So. 2d 677, 682 (Fla. 1995), this Court reaffirmed the long-standing principle that "[t]he State need not charge felony murder in an indictment in order to prosecute a defendant under alternative theories of premeditated and felony murder when the indictment charges premeditated murder." 662 So. 2d at 682. The element of premeditation is presumed when a homicide is committed in the commission of one of the enumerated felonies. Knight, 338 So. 2d at 204.

Relying upon a case from the Ninth Circuit, Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986), Appellant argues that it violates his Sixth Amendment right to be informed of the charges against him to allow the State to argue felony murder and to instruct the jury on felony murder when only premeditated murder had been charged in the indictment. Appellant fails to acknowledge that this due process claim has been repeatedly rejected by this Court. See Knight v. State, 338 So.2d 201, 204 (Fla. 1976); O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983), sentence vacated on other grounds, 542 So. 2d 1324 (Fla. 1989); Kearse. Since Appellant has failed to establish any valid reason why this Court should recede from its long line of precedent, his claim should be denied.

Moreover, the facts of this case do not suggest that it was improper for the State to proceed on a felony murder theory. The

prosecutor explained that he didn't bring up the felony murder theory during voir dire because judges in his circuit, in the past, have refused to allow him to do so (T 2169-79). The prosecutor noted that the evidence supporting his theory of an underlying kidnapping, which suppored felony-murder. Keinya was either forced into Appellant's vehicle or voluntarily entered but was abducted once he took her to a desolate highway, out in the Everglades, 30 miles north of her home, in order to murder her. Either scenario supports kidnapping and a felony murder theory. As such, the trial court did not err in allowing the state to proceed on that theory.

Sheppard v. Rees, 909 F.2d 1234 (9th Cir. 1989), relied upon by Appellant, is inapplicable because the prosecutor did not ask for the felony murder instruction during the charge conference, but instead, waited until right before closing arguments to request such an instruction. Here, in contrast, the state requested the instruction during the charge conference and defense counsel had ample opportunity to argue it and prepare its closing argument accordingly.

POINT X

THE EVIDENCE SUPPORTS THE AGGRAVATING FACTORS IN THIS CASE. (Restated).

There is competent, substantial evidence supporting the five (5) aggravators found here--avoid arrest, felony murder, CCP, HAC, and prior violent felony. See Mansfield v. State, 25 Fla.L.Weekly S246 (Fla. 2000); Miller v. State, 25 Fla.L.Weekly S469 (Fla.

2000); Alston v. State, 723 So.2d 148, 160 (Fla. 1998)(when reviewing aggravating factors on appeal, it is not the appellate court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-- that is the trial court's job; rather, the appellate court's task is to determine whether competent, substantial evidence supports the trial court's finding).

AVOID ARREST

In finding this aggravator, the trial court concluded that based on the evidence it was clear that "[t]he defendant did not want to go to prison and the sole or dominant motive for killing Keinya was that she held the keys to his freedom." (R 937).

> He was attempting to transport her to a remote, deserted area to kill her when she jumped from his moving car. He ran over and killed her to forever silence her and eliminating her as a potential future witness. He returned to hide the body and remove her Publix vest in hopes of not getting caught.

(R 937-38). The testimony adduced at trial (guilt and penalty phase) fully supports the finding of the presence of this aggravator. This Court has held that the avoid arrest aggravator can be shown by circumstantial evidence through inference from the facts shown. Foster v. State, 25 Fla.L.Weekly S667 (Fla. Sept. 7, 2000); Hall v. State, 614 So.2d 473, 477 (Fla. 1993), cert. denied, 510 U.S. 834, 126 L.Ed.2d 74 (1993); Wike v. State, 698 So.2d 817, 822-823 (Fla. 1997); Swafford v. State, 533 So.2d 270,

276 (Fla. 1988)(approving factor on the basis of circumstantial evidence) finding is satisfied by circumstantial evidence).

Although this aggravator is typically applied to the murder of law enforcement personnel, it has also been applied to the murder of a witness to a crime. Additionally, it applies to the elimination of a potential witness to an antecedent crime and it is not necessary that an arrest be imminent at the time of the murder. Foster, citing Consalvo v. State, 697 So.2d 805, 819 (Fla.1996)(a motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance; and it is not necessary that an arrest be imminent at the time of the murder).

In Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), this Court found the "avoid arrest" aggravator based on the circumstantial evidence showing that the dominant reason why the victim was killed was because of his knowledge of the defendant's alleged involvement in counterfeiting activities. See also Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993) (finding that defendant's motive was to eliminate victim as a witness to defendant's prior robbery of her); Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992) (finding that defendant's motive was to eliminate victim as a witness to defendant's prior indecent exposure to her); Swafford v. State, 533 So.2d 270, 276 (Fla. 1988)(approving "avoid arrest" aggravator on the basis of circumstantial evidence); Cave v. State, 476 So.2d 180 (Fla. 1985); Routly v. State, 440 So.2d 1257 (Fla. 1983).

Similarly, here, there is competent, substantial evidence demonstrating that Appellant's sole or dominant motive for murdering Keinya was to avoid going to jail for the rest of his life for violating his probation. As the trial court found, Keinya held the keys to Appellant's freedom and for the first time she threatened to end that freedom when she dialed 911 that Friday night/early Saturday morning. Appellant was losing his total control and domination of her. Proof of his fear that Keinya might turn him in is evidenced by the fact that he did not come back home after the incident. Keinya's cousin, Adronda, testified that Appellant was living at the marital home everyday until the incident with Keinya. The next-door neighbors agreed that Appellant was living there. Appellant left that night and did not return until after Keinya was found murdered.

Appellant did not want to go to jail. That is evidenced by the fact that he signed that plea agreement. Appellant told Edwina that night that "he would be going to jail and someone was going to be dead." He told Edwina on Sunday that "he could not be where the f-- he wanted to be," meaning living at home with her and their three children. Appellant then kidnapped Keinya, drove her 30 miles north of her home, to a desolate area, out in the Everglades, with which he was familiar, to murder her. After running her over, he transported her body 15 miles south and removed her green Publix vest (Mitzy Clark testified that Keinya was wearing the vest when

she tried to flag her down) to avoid easy identification of Keinya. Thus, the trial court correctly found that Appellant's sole or dominant motive for murdering Keinya was to avoid spending the rest of his life in prison.

FELONY MURDER

There is substantial, competent evidence supporting the "felony-murder" aggravator in this case. Appellant had punched Keinya in the head 48 hours before her murder and had threatened to kill her if he couldn't find Patrick Allen. She was so scared that she didn't go to work on Saturday. On Sunday, Appellant asked Edwina whether Keinya had gone to work and what time she was getting off. He indicated to Edwina during that phone conversation that he "couldn't be where the f--- he wanted to be," living at the marital home with his children. Patrick Allen testified that he saw Appellant outside Publix that Sunday night, waiting to pick Keinya up.

Given the foregoing, it is unlikely that Keinya would have voluntarily gotten into a car with Appellant, she was either threatened or forced into that car. Even if Keinya did initially voluntarily accept a ride from Appellant, it became kidnapping when Appellant did not take her home, but instead, to a desolate highway, out in the Everglades, 30 miles north from her home. See Sochor v. State, 619 So.2d 285 (Fla. 1993)(evidence was sufficient to support kidnapping, although the victim may have voluntarily

entered the truck, at some point she was held unwillingly; her removal to a secluded area facilitated the defendant's acts and avoided detection); Gore v. State, 599 So.2d 978 (Fla. 1992); Rancourt v. State, 25 Fla. L. Weekly D1450 (Fla. 2d DCA 2000).

As the trial court noted, further evidence of the kidnapping was the fact that Keinya jumped out of the car, hitting her head on the pavement with such force as to leave her scalp and hair on the pavement. Trying to get away from Appellant, she made her way to the southbound side of the median and tried to flag down Mitzi Clark's van. Contrary to Appellant's assertions, the only reasonable inference is that Keinya jumped from the car. Appellant's plan could not have been to push Keinya out of the car, into the median, and then have to make two (2) U-turns on the highway to finish her off. That risked detection, eyewitnesses and Keinya possibly getting away. Keinya's jumping out of the car foiled whatever Appellant's plans were but he was determined to not let her get away.

CCP

There is substantial, competent evidence supporting the CCP aggravator here. The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage. Appellant threatened to murder Keinya 48 hours before carrying out his plan. He told her that he was going back to Publix to wait 24 hours for Patrick Allen and that if he couldn't

get him, he was coming back for her. Edwina testified that Appellant said that "he was going to prison, but someone was going to be dead, I bet you that."

Appellant had a careful plan or prearranged design to murder Keinya and exhibited heightened premeditation. On Sunday, during a telephone conversation with Edwina, Appellant asked whether Keinya had gone to work that day and what time she would be getting off. Appellant went and picked Keinya up (Patrick Allen testified that he saw Appellant waiting for Keinya outside Publix), to execute his plan to murder her. Appellant took her out to the Everglades, a desolate area which he admitted he was familiar with, that was approximately 30 miles north of her home. Knowing her fate, Keinya jumped from the car to try and save her life. Determined to go through with his plan, Appellant made two (2) U-turns on the highway, hunted her down and ran her over. He then went back after murdering her to transport her body 15 miles south to avoid detection.

Appellant's contention that CCP does not apply here because the evidence supported the contention that Appellant and Keinya had gotten into an argument during the car ride, that she either jumping or was pushed out, and that he struck her with his vehicle in rage, lacks merit. Appellant's argument completely ignores that fact that it is unlikely that Keinya would have voluntarily gotten into the car with Appellant after he punched her in the head and

threatened to kill her, making her too afraid to go to work on Saturday. Moreover, even if Keinya did accept a ride home from Appellant, she would not have consented to go 30 miles north of her home with him to a desolate highway in the Everglades. Appellant's contention that an argument arose is premised on Keinya agreeing to go the Everglades with Appellant, which is not supported by the evidence.

HAC

There is substantial, competent evidence supporting the heinous, atrocious and cruel (HAC) aggravating factor in this case. This Court has repeatedly stated that fear, emotional strain, mental anguish or terror suffered by a victim before death is an important factor in determining whether HAC applies. See James v. State, 695 So.2d 1229, 1235 (Fla. 1997)(fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel"); Pooler v. State, 704 So.2d 1375, 1378 (Fla. 1997); Preston v. State, 607 So.2d 404, 410 (Fla. 1992).

Further, the victim's knowledge of his/her impending death supports a finding of HAC, even if the death itself was quick or instantaneous. See Douglas v. State, 575 So.2d 165 (Fla. 1991); Rivera v. State, 561 So.2d 536, 540 (Fla. 1990); Parker v. State, 476 So.2d 134 (Fla. 1985). In evaluating the victim's mental state, common-sense inferences from the circumstances are allowed

to be drawn. Pooler, 704 So.2d at 1378 (citing Swafford v. State, 533 So.2d 270, 277 (Fla.1988)).

In Parker, the 18-year-old victim was abducted from the convenience store where she worked, placed in the defendants' car, taken on a 20 minute ride, during which she pled for her life and was dragged out of the car by her hair, in a deserted location, where she was stabbed and shot. This Court found that HAC applied because the victim was told by the defendants that they were going to kill her so she could not identify them and, in a 13-mile death-ride, she continued to plead for them not to hurt her. The victim knew her execution was imminent, was forcibly removed from the car with such force that large chunks of her hair were torn out by the roots, and was stabbed in the stomach and then shot. See also Henderson v. State, 463 So.2d 196 (Fl. 1985)(HAC applicable because the victims experienced extreme fear and panic before their deaths, they were bound and gagged before they were shot and could see what was happening, i.e., anticipated their fate).

Here, as the trial court found, Keinya was abducted from work and taken on a 30 mile death ride. She was so terrorized about her impending fate that she jumped out of the car, hitting her head on the pavement and leaving part of her scalp and hair on the pavement. The force was also enough to make her lose her watch, one of her tennis shoes, and her bow tie. Keinya managed to make her way across the median to the southbound lanes and frantically tried

to wave down Mitzi Clark, to no avail. As the trial court found, Keinya then laid down in the median, either because she was trying to hide from Appellant as he made his U-turn or because of her injuries. "When she attempted to get up as described by Amelia Stringer, one can imagine her horror and mental anguish as she saw the defendant's car's four headlights head directly toward her, realizing she was going to die." (R 939).

PRIOR VIOLENT FELONY

Finally, there is substantial, competent evidence supporting this aggravator. The crime of attempted capital sexual battery has been held sufficient to support the "prior violent felony" aggravator when the circumstances surrounding the crime show violence. See Kimbrough v. State, 700 So.2d 634, 636 (Fla. 1997) (circumstances surrounding sexual battery or attempt to commit sexual battery were sufficient to support "prior violent felony" aggravator); Sweet v. State, 624 So.2d 1138, 1143 (Fla. 1993)(even if offense is not a per se a crime of violence, the circumstances of a particular crime may show that the crime is violent).

Donaldson v. State, 722 So.2d 177 (Fla. 1998), relied upon by Appellant, is inapplicable because, in that case, the state was trying to use a conviction for accessory after the fact to a crime of violence as a vehicle to implicate the defendant as a principal in the crime of violence. This Court held that was

impermissible.

Here, the evidence showed that Appellant committed numerous acts of capital sexual battery and that they were accompanied by violence. Keinya told both her mother and Detective Estopinan that Appellant would undress her, forcefully pin her to the bed and insert his penis in her vagina. He warned her to not tell anyone. Appellant admitted to penetrating Keinya on numerous occasions from the time she was 11 years-old and admitted that eleven counts was just a number that they settled on for the plea bargain.

HARMLESS ERROR

Even if this Court finds that it was error to apply any one or more of these aggravators, it is clear that any error was harmless. The trial court gave great weight to the five (5) aggravators that he found in this case: (1) prior violent felony; (2) avoid arrest; (3) felony-murder; (4) CCP; and (5) HAC (R 932-956). The trial court found no statutory mitigating factors, gave medium weight to one (1) non-statutory mitigator--that Appellant confessed to his sexual relationship with Keinya during drug counseling-- and gave little or minimal weight to twelve (12) other non-statutory mitigators (listed under Point XI). As such, it is clear that the trial court's weighing process would not be different if one or more of the aggravating factors were eliminated.

POINT XI

THE DEATH PENALTY IS PROPORTIONAL (Restated).

The State submits that Appellant's sentence of death is proportional. The trial court found the existence of five (5) aggravating factors in this case and applied great weight to all five (5) of them: (1) prior violent felony; (2) felony-murder; (3) avoid arrest; (4) HAC and (5) CCP (R 932-956). The trial court found no statutory mitigating factors, gave medium weight to one (1) non-statutory mitigator--that Appellant confessed to his sexual relationship with Keinya during drug counseling-- and gave little or minimal weight to twelve (12) other non-statutory mitigators:

> (1) that Appellant may have, at some point in his life suffered from sexual dementia, a form of mental illness, evidenced only by the fact that he was ordered into a sex offender program
>
> (2) that Appellant suffered from an addiction to illegal drugs and that it changed his personality and his life for the worse
>
> (3) that Appellant comes from a good family, seven brothers and sisters
>
> (4) that Appellant was a good child, obedient and helpful
>
> (5) that Appellant helped Edwina (Keinya's mother) take care of their three natural children
>
> (6) that Appellant loves his children
>
> (7) that Appellant sends gifts to his kids while in custody
>
> (8) that Appellant is a very caring person

> (9) that Appellant enlisted in the U.S. Coast Guard and served for 5 years
>
> (10) that society would be protected by Appellant serving a life sentence
>
> (11) that since Appellant earned money in the stock market while in custody, he could still be a productive member of society
>
> (12) that Appellant has a gift for poetry and an insight into the dilemma that faces many young men who end up in prison and that he can help those men turn their lives around

(R 932-56).

As this Court has repeatedly held, the weighing process is not a numbers game. Rather, when determining whether a death sentence is appropriate, careful consideration should be given to the totality of the circumstances and the weight of the aggravating and mitigating circumstances. Floyd v. State, 569 So.2d 1225, 1233 (Fla. 1990). Here, the evidence established that Appellant murdered Keinya, by mowing her down with his car, to avoid going to jail for the rest of his life for violating his probation. Appellant admitted at the penalty phase that he had sexual intercourse with Keinya numerous times since age 11. He agreed that the eleven counts was just a number that they settled on for the plea agreement. He further admitted that he signed the plea agreement just to avoid going to jail. Appellant also testified that he knew he could go to prison for violating his probation.

Edwina testified at the penalty phase and corroborated Adronda Brown's (Keinya's cousin) testimony that Appellant

threatened Keinya 48 hours before her murder, stating that he would be in prison and someone was going to be dead, "I bethcha that." She stated that Appellant asked her, during a telephone conversation on Sunday, whether Keinya had gone to work that day and what time she was getting off. Patrick Allen testified that he saw Appellant's car waiting outside Publix to pick up Keinya. Appellant kidnapped Keinya, taking her out to the Everglades, on a deserted highway, about 30 miles north of her home. Knowing her fate, Keinya jumped out of the car on U.S. 27, injuring her scalp, among other things. She desperately tried to flag down Mitzy Clark, a passing motorist, who was too afraid to stop out on that dark highway. Determined to go through with his plan, Appellant made two (2) U-turns on the highway, hunted her down and went into the median and run her over. Afterwards, Appellant went back to the scene and transported Keinya's body 15 miles south to avoid detection. He also took her Publix vest to prevent easy identification of her body.

To mitigate this senseless murder, Appellant presented the testimony of his current girlfriend, his mother, his brothers and sisters and the couple who lived next-door to him while he was growing up. Additionally, Appellant took the stand in his own defense, denying that he murdered Keinya. With the exception of his current girlfriend, all of Appellant's witnesses testified about his character during the first half of his life. They talked

about what a good and obedient child Appellant was, that he did well in school, particularly high school, where he excelled both academically and in sports and that at age 18, he voluntarily entered the Coast Guard to serve his country.

All of these witnesses, however, admitted that they had not had much contact with Appellant since he entered the Coast Guard and that they would only see him periodically when he came back to Tampa for a visit. Only Appellant's current girlfriend testified about Appellant's character as an adult. Prior to the penalty phase, defense counsel noted and Appellant agreed, that he had been examined by mental health experts and would not be seeking the statutory mitigator that the murder was committed while he was under the influence "of extreme mental or emotional disturbance." Additionally, he noted that he would not be seeking any mitigation based on his addiction to drugs or alcohol. After Appellant testified, however, defense counsel sought three (3) statutory mitigators-- no significant prior criminal history, that the murder was committed while Appellant was "under the influence of extreme mental or emotional disturbance," and Appellant's ability to understand the criminality of his conduct. The trial court allowed the jury to consider the mitigators.

The trial court found that none of the statutory mitigators existed and Appellant has not challenged that finding on appeal. The trial court gave medium weight to one (1) non-

statutory mitigator--that Appellant confessed to his sexual relationship with Keinya during drug counseling-- and gave little or minimal weight to twelve (12) other non-statutory mitigators

It is well-established that this Court's function is not to reweigh the facts or the aggravating and mitigating circumstances. Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991); cert. denied, 116 L.Ed.2d 102 (1992); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989), cert. denied, 493 U.S. 875 (1990). Rather, as the basis for proportionality review, this Court must accept, absent demonstrable legal error, the aggravating and mitigating factors found by the trial court, and the relative weight accorded them. See State v. Henry, 456 So.2d 466 (Fla. 1984). It is upon that basis that this Court determines whether Appellant's sentence is too harsh in light of other decisions based on similar circumstances. Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976).

The state relies upon Jones v. State, 748 So.2d 1012 (Fla. 1999), in support of proportionality. In that case, the victim was abducted from a parking lot and her body was found abandoned in a wooded area in a neighboring county. The most likely cause of death was ligature strangulation. Only three aggravators were found in that case:(1) felony-murder (kidnapping); (2) prior violent felony (murder); and (3) HAC. There were (2) statutory mitigators, given "some weight": (1) that the defendant's

capacity to appreciate the criminality of his conduct was substantially impaired; and (2) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

The court also found the following nonstatutory mitigators, which it gave "some weight": (1) that defendant was a crack addict; (2) that defendant is the father of a teenaged son and was a good worker and good provider when he was not using drugs on a regular basis; and (3) that jail records indicate that the defendant exhibited signs of a "psychotic episode." Similarly, in Gore v. State, 599 So.2d 978 (Fla. 1992), the victim voluntarily left a party to drive the defendant home and was supposed to return, but never did. The victim's skeletal remains were discovered two (2) months later in an isolated, wooded area. Only three (3) aggravators were found in that case: prior violent felony; felony-murder (kidnapping); and pecuniary gain. In mitigation, the defendant's poor childhood and anti-social personality were considered, but found to not outweigh the aggravators.

In Glock v. State, 495 So.2d 128 (Fla. 1986), the victim was kidnapped at a shopping mall, forced back into her car, and taken to an orange grove outside Dade City where she was robbed and killed. The trial judge found no mitigation and three aggravating circumstances: (1) the murder was committed to avoid arrest; (2)

the murder was committed for pecuniary gain; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. See also Brown v. State, 721 So.2d 274 (Fla.1998)(affirming death penalty with four aggravating factors--prior violent felony, felony-murder (robbery merged with pecuniary gain), HAC, and CCP, and two nonstatutory mitigating circumstances involving defendant's family background and drug and alcohol abuse); Gordon v. State, 704 So.2d 107 (Fla.1997)(affirming death penalty where with four aggravating factors--felony-murder (burglary), pecuniary gain, HAC, and CCP, and only minimal evidence in mitigation for the drowning murder and robbery of victim).

POINT XII

THE DEATH SENTENCE DOES NOT VIOLATE APPRENDI (Restated).

Relying upon Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), and Jones v. United State, 526 U.S. 227 (1999), Appellant argues that the jury was required to make a separate finding regarding the existence of aggravating factors and their weight. Appellant also alleges that a simple majority is not sufficient to vote for the death penalty under Apprendi. The standard of review is de novo.

The State's first argument is that Appellant has failed to preserve this issue for appellate review. Appellant did not raise the Apprendi claim below. Steinhorst, 412 So.2d at 338.

However, if the merits are reached, Apprendi does not invalidate Florida's sentencing scheme. In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the United States Supreme Court held that due process and the right to a jury trial require that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Apprendi does not apply to this case. The death penalty is not an increase in the statutory maximum for first-degree murder, but is within the stated statutory maximum. Because death is a statutory sentence, the judge may determine the facts relating to a death sentence just as a judge does with other sentences within the statutory maximum.

Apprendi concerns what the State must prove to obtain a conviction not the penalty imposed for that conviction. Also, Apprendi does not effect prior precedent with respect to capital sentencing schemes such as Florida's. Apprendi, 120 S. Ct at 2366, citing, Walton v. Arizona, 497 U.S. 639 (1990). In Walton, the United States Supreme Court noted that constitutional challenges to Florida's capital sentencing have been rejected repeatedly. See, Hildwin v. Florida, 490 U.S. 638 (1989)(stating case "presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida and concluding that the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the

jury"); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976).

Further, the requirement of a simple majority vote does not need to be re-examined in light of Apprendi. Apprendi does not apply to the issue of whether a jury recommendation should be unanimous. Apprendi requires that a fact that is used to increase the statutory maximum be treated as an element of the crime; it did not change the jurisprudence of unanimity. Moreover, Apprendi concerns what the State must prove to obtain a conviction not the penalty imposed. Additionally, the Apprendi Court, specifically addressing capital sentencing schemes such as Florida's, stated that the holding did not effect their prior precedent in this area. Thus, a unanimous jury recommendation is not required.

POINT XIII

THE "FELONY MURDER" AGGRAVATING FACTOR IS CONSTITUTIONAL (Restated).

Both this Court and the federal courts have repeatedly rejected claims that the "felony-murder" aggravator is unconstitutional because it constitutes an "automatic" aggravating factor. See Banks v. State, 700 So.2d 363, 367 (Fla. 1997); Mills v. State, 476 So.2d 172, 178 (1985) (concluding that the legislature's determination that a first-degree murder committed in the course of another dangerous felony was an aggravated capital felony was a reasonable determination); Lowenfeld v. Phelps, 484 U.S. 231 (1988); Blystone v. Pennsylvania, 494 U.S. 299 (1990);

Johnson v. Dugger,932 F.2d 1360 (11th Cir. 1991).

Relying upon the Wyoming and Tennessee state supreme courts, Appellant raises essentially the same argument, which should be rejected. Even if Appellant's argument is read as based upon the constitutional guarantees of the Eighth and Fourteenth Amendments, this Court has already rejected those arguments in Clark v. State, 443 So.2d 973 (1983), cert. denied, 104 S.Ct. 2400, 467 U.S. 1210, 81 L.Ed.2d 356 ("felony-murder" aggravator comports fully with the constitutional requirements of equal protection and due process as well as the prohibition against cruel and unusual punishment). Further, as there is sufficient evidence of premeditation, see Point I, Appellant's as applied argument fails.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this honorable Court to **AFFIRM** Appellant's conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “Answer Brief,” prepared with 12 point Courier New type, has been furnished by U.S. mail, postage prepaid, to: RICHARD B. GREENE, Assistant Public Defender, 15th Judicial Circuit, 421 Third Street/6th Floor, West Palm Beach, Fl., 33401 on February 9, 2001.