

CASE NO. 96,404

PAUL H. EVANS v. STATE OF FLORIDA

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Appellant, defendant in the trial court below, will be referred to as "Appellant", "Defendant", or "Evans". Appellee, the State of Florida, will be referred to as the "State". References to the record will be by the symbol "R", to the transcript will be by the symbol "T", to any supplemental record or transcript will be by the symbols "SR" or "ST", and to Evans' brief will be by the symbol "IB", followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Indictments for the 3/23/91 homicide were handed down in 1997 against Evans and Connie Pfeiffer ("Connie") for the first-degree murder of Alan Pfeiffer ("Pfeiffer"), Connie's husband. Following a mistrial during deliberations, Evans filed a motion to quash the indictment which was denied. After striking one jury panel, the instant trial commenced (R 13-14, 367; T 1796-1800, 1820-21, 2112, 2119-20, 2164). Evans' motions for judgments of acquittal were denied and upon conviction, the jury recommended death (R 411-12; T 4283, 4459).

In a separate trial, Connie was convicted as charged and sentenced to life upon her jury's recommendation. The instant parties filed a supplemental memoranda on whether that sentence was mitigation. Subsequently, Evans was sentenced to death (R 501-12). Following the denial of his motion to correct illegal sentence, this appeal was filed (R 475-85, 501-12, 517; SR 138).

The trial evidence established that near 4:00 a.m. on 3/24/91, the police were summoned to Pfeiffer's trailer due to a complaint of loud music. They found the south door ajar and upon entering, discovered Pfeiffer's body on the living room floor. The interior of the residence was illuminated by a dim kitchen light. In processing the scene, the police discovered the dining area paddle fan light had been disabled. There had been no forced entry or struggle within the trailer, but it was in disarray with electronic equipment and other items stacked by the south door. When found, Pfeiffer wore two gold chains and had \$48 in his wallet. His approximate \$120,000 in life insurance policies were on a table; each listed Connie as beneficiary. Nothing found linked Evans to the murder scene (T 3137-45, 3174-75, 3189-93, 3200-04, 3249-50, 3295, 3301-02, 3310, 3330 3346-48, 3543-45, 3562, 3572).

Recovered from Pfeiffer were three bullets, one from his spine and two from his head. These were identified as .38 special Nyclud bullets fired from the same gun. Spent casings found in Donald Waddell's home were consistent with those which would have held Nyclud bullets. According to Mr. Waddell, on the afternoon of 2/23/91, his .38 special was stolen along with a jar of quarters (T 3219, 3258-59, 3414-17, 3445-48).

The Pfeiffers had a "rather rocky" marriage and a few weeks before the homicide, Connie confided in Susan Cairns and Geneva Williams that she did not want a divorce because she would lose

everything, At one point Connie asked Ms. Williams, "Have you ever known of anybody that's had anybody killed for money?" Leo Cordary, Pfeiffer's next door neighbor testified that approximately eight weeks before the homicide, Connie approached him and asked whether he knew anyone who would take care of Pfeiffer in exchange for \$2000 and her Fiero. When Mr. Cordary offered he knew men who would beat-up Pfeiffer, Connie replied "No, that's not what I'm talking about"; "I want the problem taken care of. I want it done with and over." (T 3316, 3375-79, 3385-87, 3392, 3411).

Early afternoon of 3/23/91, C.J. Cannon, Pfeiffer's next-door neighbor, saw Connie and another woman entering the trailer repeatedly, making a lot of noise. Near 7:00 p.m., Mr. Cannon heard loud music and later ascertained it emanated from Pfeiffer's darkened trailer. Two hours later, the music still played and the trailer remained dark. Mr. Cordary stated that between 8:00 and 8:30 p.m., he had heard gunshots, but did not recall anyone running from the trailer. (T 3388, 3404, 3486-91, 3497-3502).

Between 7:00 and 7:15 p.m. that night, Linda Tustin met Pfeiffer at his store. She observed he was agitated and talking on the phone to Connie. Declining a drink offer, Pfeiffer said he was being cleaned out by his wife and her biker friends and was heading home. He left near 7:30 p.m. for the 30 minute drive (T 3474-83).

Connie was not home when the police discovered Pfeiffer; they did not meet until she arrived that afternoon at the station.

Detective Elliott described her as uncooperative; she never disclosed she had planned to move out. The items reported stolen, a camcorder, VCR, and television, were never recovered. Connie advised them she had been at the fair and restaurant with Evans, Donna Waddell ("Waddell"), and Sarah Thomas Haislip ("Thomas") the prior evening. This alibi was confirmed by each individual (T 3319-21 3549-54). Also, in Evans' statement, he said he had been to the trailer with Connie, Waddell, and Thomas on the night of the fair and described the trailer's broken back door, the lay-out, what he touched, and that he had changed the paddle fan bulb. Eventually, the case grew cold (T 3317-20, 3555-57, 3571, 4019-22 4047).

In 1997, the case was reopened and Detective Cook focused upon Thomas, Waddell, Connie, and Evans. Thomas was the first interviewed; she explained the events surrounding the homicide and agreed to wear a body bug when she contacted Waddell. Eventually, Waddell was arrested, and upon reviewing the transcript of her conversation with Thomas, Waddell gave a statement, after which, a cooperation agreement was signed. Subsequently, Connie and Evans were arrested (T 3593-601, 3604-10, 3618-24).

Greg Hill averred that at 6:30 p.m. on 3/23/91, he met Connie, her children, two women, and a man at the fair. Mr. Hill and Connie remained together until 9:30 p.m. except for a period between 7:10 and 7:30, when Connie may have left to make a call. At 9:30 they met Connie's friends and she left to take her children

home, but agreed to meet Mr. Hill afterwards. When she arrived at 10:30 p.m., she was noticeably shaken stating she feared going home and planned to go to a hotel. It was 11:30 p.m., when Connie left Mr. Hill (T 3656-61).

A few weeks before the murder, Evans told Thomas Connie would give him a camcorder, stereo, and insurance money for Pfeiffer's death. Connie, Waddell, Thomas, and Evans discussed the murder plan, payment, and alibis. During this, Evans would say "We're all in this together. We're all going to get something out of it." The initial plan was to stab Pfeiffer, but it was abandoned because Waddell did not believe she could subdue Pfeiffer for Evans. Hence, Evans conceived the scheme whereby the trailer would be made to look like a robbery, the fair would be the alibi, and Evans would secret himself in the trailer, await Pfeiffer's arrival, and shoot him. The plan required the renting of a GrandAm car so the conspirators' cars would not be seen. On the day of the murder, a camcorder, stereo and/or television were delivered as partial payment (T 3674-81, 3692-94, 3797-808, 3616-17, 3843-44, 3850-51).

On 3/23/91, Waddell, Connie, and Evans went to the trailer and arranged it to look like a robbery; electronic equipment was stacked near the back door. During the staging, Evans wore gloves. Once the trailer was prepared, Waddell and Evans went to Mr. Waddell's home where Evans entered through a window and took a gun and a jar of quarters, then drove out of town to test fire the gun.

That evening, the fair entrances were paid with Mr. Waddell's quarters and Evans was delivered to the trailer' to kill Pfeiffer after dusk; that night the sun set at 6:30 and it was dark by 7:00. At the trailer, Evans changed into dark clothing, and was locked inside (T 3136-37, 3806-10, 3815-19, 3826-30).

Per Waddell, she and Thomas waited for Evans near the trailer park and after Waddell heard a gun shot they went to the rendezvous spot where Evans waited. Getting in the car, he said "It's done," Thomas recalled Evans said, "Hurry up. Let's go. It's done." He told them that while waiting the 60 to 90 minutes for Pfeiffer, he had turned the music up very loud to mask the gunshots, lowered the lights, leaving a dim one in the kitchen or dining area, and hid near a couch. As they drove away, Evans changed out of his dark clothing. Waddell recalled Evans directed her toward Yeehaw Junction and at the second deep canal sign, he threw out the gun² after discharging the remaining bullets; along their return route, he discarded his shirt and shoes (T 3692, 3830-39).

Following the homicide, the three re-entered the fair, again meeting Connie and Mr. Hill. Connie used the GrandAm to take her children home, returning near 11:30 p.m., and the four conspirators

¹ According to Waddell, she, Thomas and Evans went to the fair first to be seen, then to the trailer. Thomas believed Evans was dropped off at the trailer first.

² Thomas recounted it was a few days later, she and Evans drove out Route 60 to dispose of the gun in a deep, mucky canal so fingerprints would be hard to find.

went to Denny's where they discussed the homicide and Connie paid for their meals with a credit card so there would be a record. Evans extolled them to "just stick to the story that we were at the fair ... all together all night at the fair." The next day, he tried to burn his clothes then burned and discarded the gun case. Because he feared the police would be looking for the electronic items, Evans destroyed the camcorder according to Thomas and the television according to Waddell (T 3834-50).

After the murder, Thomas wanted nothing to do with Evans. Recognizing this, he told her he did not do the actual killing, but had hired three black men. Before Thomas was contacted in 1997 by the police, Evans called her and said to "stick to the story." In the years after the murder, Waddell saw Evans twice. During one contact, he threatened her with death if she talked. He also told her that the person who did the actual killing was dead. Waddell's second contact occurred after her 1997 police interview. He asked if the police had talked with her and what she had said. Evans warned her not to talk or she would lose her son. Evans did not speak to Waddell; instead wrote his communications then burned the papers (T 3699-3703, 3843-44, 3851-55, 3862-64).

Upon this evidence, the jury convicted Evans of first-degree murder. Subsequently, he waived the statutory mitigating factors found in Sections 921.141 (6) (a)-(c), (e)-(f), Florida Statutes (1991) (T 4090-93, 4106-08, 4110-13, 4124-25, 4283 4295-97).

In the penalty phase, Paul Evans, Sr. (Evan's, Sr.), Appellant's father and his mother, Sandra Kipp ("Kipp") testified their marriage was troubled and many fights were held in front of the children. Both parents worked long hours often leaving their sons, Evans and Matthew with sitters. Evans was three or four years old when diagnosed as hyperactive and placed on Ritalin. His parents separated in 1977 when he was six and his brother was two, after which, Evans entered therapy. Evans, Sr. moved to Japan and Kipp took her family to Florida where Evans entered a youth camp because of disciplinary problems. This was no help and when he entered school, he could not keep up with the program. Between 1978 to 1984, Evans, Sr. saw his sons once (T 4318-26, 4348-53).

In 1983, Evans, Sr. was to take custody of Matthew, but before this happened, Matthew was killed. Evans, Sr. admitted there was anger between his sons once the custody change was made known. Kipp had left her sons at a boyfriend's where they found a gun. Although initially Evans said Matthew shot himself, then admitted he was angry when he shot his brother, the killing was ruled accidental. Such was very traumatic, and Evans was put in a mental health facility for a few months followed by a half-way home, but his behavioral problems continued. At 17, Evans spent another three months in a mental health facility. Kipp believed her son never recovered from his brother's death and Evans, Sr. believed his son needed a male authority figure (T 4328-41, 4355-69).

Before they met, clinical forensic psychologist, Dr. Landrum, received Evans' background information including medical, jail, group home, and school records along with information from the prosecutor. Neuropsychological and intelligence tests were given and revealed Evans was in the high average to superior range. While opining Evans would respond well to a structured environment, Dr. Landrum acknowledged Evans had 10 incidents involving violence while in structured homes (T 4371, 4374-81).

Dr. Levine, concurred; Evans has the capacity to respond well to prison. This opinion was based on Evans' psychological tests, records, and interview. Evans' intellectual ability was above average. Also Evans did not have any disciplinary infractions during the approximate 18 months in jail awaiting trial, although, Dr. Levine recognized Evans had disciplinary problems involving violence in the structured homes (T 4386-93, 4396).

By nine to three, the jury recommended death. The judge found pecuniary gain and CCP along with the statutory age mitigator and 12 non-statutory mitigating factors. Concluding the aggravation outweighed the mitigation, Evans was sentenced to death (R 506-12; T 4517-24). After his motion pursuant to Rule 3.800, Florida Rules of Criminal procedure was denied, this appeal followed.

SUMMARY OF THE ARGUMENT

Point 1: The motion to quash the indictment or dismiss the charge was denied correctly.

Point 2: The evidentiary ruling precluding admission of testimony regarding cannabinoids in the victim's blood was proper.

Point 3: The detective's testimony was limited properly to exclude hearsay related to what residents reported during canvass.

Point 4: Individual voir dire was conducted properly.

Point 5: The denial of a statement of particulars was proper and the trial court correctly permitted the State to argue the "principal" theory in this first-degree murder prosecution.

Point 6: There was no prosecutorial misconduct during the State's guilt phase closing argument.

Point 7: The indictment was not obtained upon perjured, material testimony.

Point 8: The State's voir dire was not fundamental error.

Points 9 and 10: Evans' death sentence is proportional.

Point 11: There was no error in the penalty phase closing.

Point 12: There was no error in the trial court's analysis and weighing of Evans' proffered mitigation.

Point 13: Juror unanimity on aggravators is not required in the penalty phase.

Point 14: There was no improper doubling of aggravators.

ARGUMENT

POINT 1

TRIAL COURT DID NOT ERR IN DENYING MOTION TO
QUASH INDICTMENT OR DISMISS CHARGE (restated).

Evans challenges the denial of his request to quash the indictment or dismiss the charge and claims the delay between the 1991 murder and 1997 indictment prejudiced him because: (A) witnesses were lost, and (B) evidence could not be examined or admitted at trial (IB 30). The pre-indictment delay is not a due process violation; the motion to quash the indictment or dismiss the charge was denied properly. This Court should affirm.

A due process challenge to a pre-indictment delay requires a defendant establish actual prejudice resulting from the delay. Rogers v. State, 511 So.2d 526, 531 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988) (approving Howell v. State, 418 So.2d 1164 (Fla. 1st DCA 1982), adopting United States v. Townley, 665 F.2d 579 (5th Cir. 1982)). The prejudice must not be speculative, but must be supported by substantial evidence. Rogers, 511 So.2d at 531. Once this burden is met, the state must prove the need for the delay. Howell, 418 So.2d at 1170. Actual prejudice is insufficient to establish a due process violation; the trial court's duty is to "balance the demonstrated reasons for delay against the gravity of the particular prejudice on a case-by-case basis." Rogers, 511 So.2d at 531. The "outcome turns on whether the delay violates the fundamental conception of justice, decency and fair play...." Id.

See Scott v. State, 581 So.2d 887, 891 (Fla. 1991) (balancing State's need for delay against defendant's actual prejudice). As reasoned in U.S. v. Lovasco, 431 U.S. 783 (1977):

... prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty.... It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.

Lovasco, 431 U.S. at 790-91 (footnote omitted). The Court held "that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." Lovasco, 431 U.S. at 795-96. Under this standard, Evans has shown no violation.

Following a mistrial, Evans filed a Motion to Quash Indictment where he asserted witnesses, Jesus Megia, William Lynch, Christopher Ross, Chris Murdock, Bill Crowley, and Mike Johnson were missing and necessary. The State asserted it too was unable to locate witnesses, but others named by Evans were duplicative of those on his witness list. Also, the first trial established the 1991 investigation yielded suspicions of guilt, but not until 1997 was probable cause developed. The judge concluded actual prejudice had not been shown (R 367-68; T 1808-15, 1817-20).

Given the instant facts, Scott does not mandate reversal. In Scott, near the time of the crime, the State determined it could

not support a conviction because Scott's alibi had been corroborated by the police Id. at 892-93. Only after seven years and destruction or loss of exculpatory evidence did the State charge Scott without justifying the delay. Id. The prejudicial acts in Scott are missing here. Alibi evidence offered by Evans in 1991 was that he was with Connie, Thomas, and Waddell the night of the murder. It was the confessions of Thomas and Waddell which finally permitted the State to discover proof beyond a reasonable doubt as to Evans' guilt. Both women testified and were cross-examined (T 3738, 3872). There has been no allegation the State lost or presented compromised evidence. The facts established in Scott differ significantly from those here and the State's actions here do not rise to the level of negligence found in Scott.

A. Allegedly Missing Witnesses

Actual prejudice regarding Jesus Megia³ and William Lynch has not be shown. Nothing links the noises it is claimed they heard to the homicide. Also, Christopher Ross' absence does not establish actual prejudice. According to Evans, Mr. Ross was intimate with Connie (IB 30). This is immaterial and does not undermine the State's case given the conspirators' confession to the planning and execution of the homicide. The fact Connie may have dated Mr. Ross casts no doubt on Evans' guilt. Marrero v. State, 428 So.2d 304,

³ Below, Evans referenced a report which advised Mr. Megia saw Connie kill Pfeiffer. Evans points to nothing in the record, no report or deposition, backing his claim of an eye-witness.

307 (Fla. 2d DCA 1983) (finding slight prejudice where no showing missing witness was favorable and material).

Evans also points to Chris Murdock, Bill Crowley, and Mike Johnson as those he would have called to testify to his presence at the fair. (IB 30-31). Several witnesses who could have testified about the fair were on his witness list, but were not called in the first trial. In counsel's attempt to explain that decision, he discussed two witnesses only. While he represented the missing witnesses would fill in times Mr. Kovaleski and Ms. Hightower could not cover, it is unclear what periods were not covered by witnesses Evans failed to present, but whom he had listed (T 1808-21), thus, Evans has not established actual prejudice. See Rivera v. State, 717 So.2d 477, 484 (Fla. 1998) (rejecting due process challenge of pre-indictment delay as defendant did not show complete alibi).

Evans alleges prejudice arising from these missing witnesses because it permitted the State to argue he was not at the fair between 6:30 and 9:30 p.m. (IB 34). No objection was raised to the State's argument, thus, it is unpreserved and fundamental error must be shown. Neither Rodriguez v. State, 753 So.2d 29, 38-39 (Fla. 2000) nor Freeman v. Lane, 962 F.2d 1252, 1258-61 (7th Cir. 1992) assist in this endeavor. Both address when an argument is an impermissible comment upon a defendant's right to remain silent and find an argument runs afoul of the constitution when it comments upon the lack of evidence which could have been supplied by the

defendant alone. Rodriguez, 753 So.2d at 38; Freeman, 962 F.2d at 1260 (reasoning state may not comment concerning uncontradicted nature of evidence when it is highly unlikely anyone other than defendant could rebut it). Such is not the case here. According to Evans' argument, others may have heard gunshots at a time later than the evidence reflects and others may have seen him at the fair between 6:30 and 9:30 p.m. Clearly, this evidence was not something only Evans would know; the State's argument was not a comment upon his right to remain silent or failure to present a defense. Having opted to forego presenting alibi witnesses, Evans should not be permitted to complain now.

B. Alleged Inability to Gather and/or Present Evidence

Evans claims he was unable to "examine physical evidence at the scene of the crime." (IB 30). Below he argued:

Anything that we could have located in the [Idlewild] home where Paul Evans, Donna Waddell, and Sarah Thomas lived is long gone or so disturbed at this point it probably wouldn't be able to make it into evidence.

(T 1811). The appellate argument focuses on evidence from the trailer, not Evans' home, thus, it may not be used to support the instant claim. Likewise, the matter of an alleged unavailability of a 911 tape was not presented to the trial court as a basis for quashing the indictment, instead it was an evidentiary issue related to permitting testimony about the report (T 3327-29). It could have been raised as such in this appeal, but was not. Having

chosen not to present these arguments below, they are unpreserved. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (holding except for fundamental error, an issue will not be considered on appeal unless it was presented to lower court; to be cognizable, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below").

Should the merits be reached, no error was committed below, A defense point was that there was no evidence linking Evans to the scene (T 3329-30, 4131-32). The fact there was evidence others may have been in the trailer before the homicide does not undermine the fact Evans did this murder. Defense counsel argued the jury should conclude from the marijuana cigarette near the body that Pfeiffer had a visitor who killed him (T 4132-34). Such evidence does not undermine Evans' guilt because it could not be established when that evidence was left. The trailer was described as in disarray, it was not kept neatly, and drugs were found throughout (T 3204-05, 3294-302). Evans' inability to conduct an analysis does not establish a due process violation from a pre-indictment delay. Also, merely because someone may have been crying in the subdivision at 2:00 a.m. prompting a 911 call, **does** not show prejudice; there is nothing linking that event to the homicide,

C. Basis for Pre-indictment Delay

Even if actual prejudice is assumed, the inquiry does not end; prejudice must outweigh the need for delay. There is no statute of

limitations for first-degree murder section 775.15(1)(a), Florida Statutes. This case was investigated properly, although the initial inquiry was unfruitful as the conspirators asserted the alibi for six years; not until 1997, with Thomas' accounting, did the police have probable cause (T 3703-12, 3592-95, 3599-601, 3604-06, 3741-47, 3850-51, 3863-70). The State did not cause the delay; the compatriots obfuscated, and thwarted the investigation. No due process violation ensued from the time it took to unravel the case. Lovasco, 431 U.S. at 796 (finding due process does not require indictment before evidence exists to establish guilt merely because delay may have prejudicial effect). The Court should affirm.

D. Impact on Penalty Phase

Contending pre-indictment delay carried into the penalty phase, Evans claims he was precluded from showing "he was only an abettor." Not only did he not object below, but he misconstrues the State's argument. The State asked the jury to consider the intricate plan he put into place; his ability to devise and execute such a plan goes to CCP (T 4429-31). Stein v. State, 632 So.2d 1361 (Fla. 1994) (reasoning CCP focuses on manner crime is executed, including advanced procurement of weapon, lack of provocation, killing as matter of course); Stano v. State, 460 So.2d 890, 893 (Fla. 1984) (explaining CCP primarily goes to state of mind, intent, motivation), cert. denied, 471 U.S. 1111 (1985). The State's argument is not a ground for reversal.

POINT 2

THE FOUNDATION OBJECTION TO TESTIMONY OF CANNABINOIDS IN PFEIFFER'S BLOOD WAS SUSTAINED PROPERLY (restated).

Here, Evans seeks a new trial because testimony related to cannabinoids in Pfeiffer's blood was excluded. The judge found Evans had not laid the proper foundation for admission of the blood results. "Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion." Ray v. State, 755 So.2d 604, 610 (Fla. 2000) ; Alston v. State, 723 So.2d 148, 156 (Fla. 1998). The evidence was excluded properly. This Court should affirm.

Dr. Bell testified he ordered a toxicology scan of Pfeiffer's blood. When he stated cannabinoids were found, the State objected on foundation grounds as he had not done the tests and the report was not part of the autopsy. The defense did not seek leave to lay the proper predicate and the objection was sustained (T 3250-52).

While "facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before trial", the information must be of the type reasonably relied upon by the expert in that subject and used to support his opinion. Section 90.704, Florida Statutes. Under this provision, a foundation must be laid for the admission of the opinion. Evans cites to Capehart v. State, 583 So.2d 1009 (Fla. 1991) for the proposition Dr. Bell should have been permitted to report the

results. However, in Capehart, this Court recognized a foundation is necessary for the admission of data not gathered by the expert witness and opined:

... the state properly qualified Dr. Wood as an expert without objection, and that she formed her opinion based upon the autopsy report, the toxicology report ... and all other paperwork filed in the case. We are satisfied that a proper predicate for her testimony was established and that the trial court did not abuse its discretion in overruling the defense objection.

Capehart, 583 So.2d at 1012-13. At no time did Evans seek to establish the toxicology report was of the type reasonably relied upon by Dr. Bell or entered into his opinion regarding the manner, method, and time of death. Hence, the judge did not abuse his discretion in precluding the testimony.

Similarly, even if the report were considered a business record and potentially admissible under section 90.803(6), Florida Statutes, the defense again failed to lay the proper predicate. Hitchcock v. State, 775 So.2d 638 (Fla. 2000) supports the State's position; there was no foundation for the report. In Hitchcock, the expert identified the report at issue; he testified he administered the test, and used the grading performed by another, to formulate his opinion. Hitchcock, 775 So.2d at 641-42. See Baber v. State, 25 Fla. L. Weekly S639 (Fla. Aug. 31, 2000) (finding admission of hospital records permitted based upon testimony of records custodian if predicate established); Love v.

Garcia, 634 So.2d 158, 159-60 (Fla. 1994) (finding once relevancy established and predicate laid, burden shifts to opposing party to prove untrustworthiness; if party is unable to show record untrustworthy, it will be admitted). Here, Dr. Bell did not testify the report was produced in the ordinary course of business nor that it was used in his autopsy evaluation. The predicate was not laid and this Court should affirm. Love, 634 So.2d at 159-60.

Further, there was no reduction in Evans' right to cross-examination. Merely because counsel chose not to lay the proper foundation for the evidence, diminution of the right to cross-examination was not established. As sections 90.704 and 90.803(6) recognize, a predicate must be established before the witness may rely upon or discuss the material. A "trial judge has wide discretion to impose reasonable limits on cross-examination." Geralds v. State, 674 So.2d 96, 100 (Fla. 1996); Jones v. State, 580 So.2d 143, 145 (Fla.), cert. denied, 502 U.S. 878 (1991). Without the proper predicate, Evans did not have the right to discuss matters not covered on direct.

Should this Court conclude otherwise, such was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The jury viewed a video tape of the crime scene which depicted the inside of the unkept trailer. The evidence showed Pfeiffer's store closed at 6:00 p.m. and he left at 7:30 p.m. for the 30 minute drive home. Further, there was ample evidence of drug use found

throughout the trailer. Thus, the jury was aware Pfeiffer was involved with drugs and had the time to use them that night. Also, the State presented evidence Connie was seeking to hire someone to kill Pfeiffer and Evans agreed to undertake the contract. Whether Pfeiffer had taken drugs prior to his death does not overcome the overwhelming evidence Evans killed Pfeiffer for pecuniary gain (T 3136-54, 3174-75, 3192-95, 3200-04, 3292-99, 3316, 3375-92, 3411, 3474-83, 3806-19, 3826-39). This Court should affirm.

Evans also claims the cannabinoids found in Pfeiffer's blood were relevant to Connie's degree of culpability and impacted the penalty phase (IB 37). This is not expounded upon, nonetheless, the evidence established Evans was the shooter, thus, he is the more culpable as the trial court found in its sentencing order (R 506-12). As such, no error was committed.

POINT 3

REVERSIBLE ERROR DID NOT OCCUR WHEN DETECTIVE BRUMLEY'S TESTIMONY WAS LIMITED TO EXCLUDE HEARSAY (restated).

Evans contends the judge erred in granting the State's motion in limine, thereby, precluding him from asking Detective Brumley ("Brumley") whether a neighbor reported hearing a gunshot at 10:30 p.m. on the night of the murder. (IB 38). The State disagrees.

During the first trial, defense counsel discussed the police canvass of Pfeiffer's trailer park. In questioning Brumley about this, counsel asked "How many different people had different times

of when they heard the shots that night?" (T 965-66). The State's hearsay objection was sustained (T966-67). In Brumley's direct examination in the instant trial, the following inquiry occurred:

Q: Now, in regards to the overall crime scene, and we've already talked about that as far as the investigation, how did y'all proceed? Or how did you proceed?

A: Well, we followed up whatever leads we had from the neighborhood canvass and followed up the -- had a detective follow up the background on the deceased and the financial aspect of him.

(T 3316). Based upon this discourse, Evans argued he should be permitted to ask the officer what the witnesses reported during the canvass. Anticipating the defense was attempting to bring out hearsay statements, and to get information before the jury without calling a witness, the State sought a motion in limine (T 3328-29). The State asked that the defense be instructed not to ask Brumley, "Isn't it true that you interviewed witnesses that heard a gunshot at 10:30?" (T 3328). Defense counsel admitted his questions called for hearsay, but argued because he had not objected to the State's elicited hearsay, he should be permitted to put on hearsay evidence. This reasoning was rejected (T 3328-29).

Hearsay is an out-of-court statement offered in evidence for the truth of the matter asserted. Section 90.801(1)(c), Florida Statutes. Such is inadmissible, unless the statement falls within one of the exceptions listed in section 90.803, Florida Statutes. Here, Evans wished to get before the jury that one of Pfeiffer's

neighbors told an officer that a gunshot was heard at 10:30 p.m. and that officer had reported it to Brumley. This is classic hearsay, in fact double hearsay and the Court should conclude the rules precluded Brumley from testifying about the content of each neighbor's statement. See sections 90.604, 90.801(1)(c), 90.802, Florida Statutes. Exclusion of the testimony was proper, even in light of Evans's attempts to re-cast the claim as a violation of his right to cross-examination.

There has been no limitation of cross-examination; Evans merely was precluded from eliciting hearsay. The cases cited by Evans do not further his position, namely, Sweet v. State, 693 So.2d 644 (Fla. 4th DCA 1997) (finding officer should have testified to defendant's complete statement that he committed the robbery and took drugs); Williams v. State, 689 So.2d 393 (Fla. 3d DCA 1997) (reasoning child's hearsay statements to police that after mother's purse was stolen, assailant's gold car ran over his mother were admitted properly); Johnson v. State, 653 So.2d 1074 (Fla. 3d DCA 1995) (finding error not to admit both defendant's formal and informal statements). These cases deal with instances where the admission of one part of a hearsay statement may dictate admission of the balance in order not to leave the jury confused or with a wrong impression. Such is not the case here.

The jury was told the police investigated the crime, canvassed the area, and looked into Pfeiffer's background (T 3316).

This testimony did not open the door to delve into what each neighbor told the police. Moreover, under section 90.803, police reports are hearsay. Brumley did not testify about a partial statement a particular witness gave him which required further clarification, nor was there any indication the canvass produced a statement which fell within a hearsay exception. Brumley did not testify about the results or actions he took in response to the canvass as decried by Postell v. State, 398 So.2d 151, 853 (Fla. 3d DCA 1981) (rejecting "wooden application" of the hearsay rule and confrontation clause where "inescapable inference" was that non-testifying witness had furnished evidence of defendant's guilt - such is hearsay and violative of confrontation clause even though actual statements were not repeated). Had Brumley been permitted to bring out the hearsay statements, the judge would have erred.

Crump v. State, 622 So.2d 963 (Fla. 1993) is on point wherein this Court determine whether excluding the substance of police interviews and investigations as hearsay was error. While the trial court had allowed the defense to inquire of the detective about whether the police had interviewed or focused upon other suspects the judge refused to permit the detective to testify about the substance of those interviews. Specifically, Crump was not permitted to inquire whether the detective had been given information that another suspect had committed a similar rape and murder. This Court held "[t]he evidence here concerning the

detective's interviews is hearsay that does not fall within one of the hearsay exceptions." Crump, 622, So.2d at 969. The same result should be found here. The trial court properly limited the defense attempt to solicit hearsay in the form of what residents may have told the police. This Court should affirm.

POINT 4

INDIVIDUAL VOIR DIRE WAS CONDUCTED PROPERLY
(restated).

Asserting his trial was closed during individual voir dire over his objection, Evans asks this Court to reverse. The State submits voir dire was not closed, however, if this Court finds otherwise, such was only a partial closure limited to trial necessities. No error occurred and this Court should affirm.

The instant trial came after a mistrial and the striking of a panel during voir dire due to prejudicial information disseminated to the panel by a juror. At the commencement of the re-trial, counsel agreed individual questioning would be acceptable. The judge asked preliminary questions then, with the exception of those jurors who indicated knowledge of the case, excused the panel for lunch. Later, during general voir dire, Juror Adams stated, "I tried to tell the Judge Monday that I'm already uncomfortable with it because of the -- I believe that I know the lady by the name of Donna that gave testimony in the first case." Voicing his frustration, the judge noted, "I don't know what else to do. I mean if you have people that can't hear, obviously they're not

going to hear the instruction...." Upon Evans' request, the panel was stricken (T 1800, 1837-38, 2035, 2112-20).

With the commencement of this trial the judge informed the parties he would complete the general questioning, then inquire on an individual basis regarding the jurors' knowledge of the case, parties, witnesses, and possible hardships⁴. Those identified for individual questioning would be asked to remain in the courtroom, while the rest would be excused for the evening. The judge stated:

We're going to keep the rest of the panel here and we're going to go into the jury room and we're going to question them individually with the court reporter there. And that way the bailiffs can keep these jurors isolated and not talking about the case, things of that nature.

The defense had no objection to this procedure (T 2144-47).

Upon further consideration, the trial court announced:

.. the jury room is not set up. It's not conducive to individual questioning. So we're going to go into the hearing room, which is right around the corner. And what we'll do is escort each juror around to the hearing room, and we've set it up where we have the State Attorneys on the other side, we have the Public Defenders and your client on the other side, and the juror at the end of the table. And at the main bench we'll have a clerk and we'll have myself up there and the court reporter will be right around between the juror and the parties. .. We think there's plenty of room in there for that and that's what we're going to use.

⁴ Questions related to strong feelings about the death penalty were included in the general voir dire (T 2145, 2159).

I will have a bailiff in here to make sure that the jurors don't discuss the case among themselves. Basically they're just going to be quiet while they sit in here. They can move around; we're going to let them use the facilities if they need to, but they need to stay here and await their turn at questioning.

(T2159-60). It was at this point the defense asked if Evans' parents could watch the individual voir dire (T 2161). The parties discussed arrangements to permit the parents to hear, but there was no way to employ an intercom system and not have it play in the courtroom where the jurors were sitting. However, the proceedings were not only recorded by a court reporter, but an audio recording was made (T 2161-62). Evans never objected to the procedure.

During the judge's general inquiry, he instructed those who may have knowledge of the case not to share it with anyone because the parties were going to inquire further (T 2164, 2170, 2219-21). After identification of those jurors who needed more questioning, the rest of the panel was excused until 10:30 a.m. and individual questioning commenced in the hearing room (T2216, 2223-2360). Included with those examined individually were Jurors Byrd, Rowe, and Williams. Following individual questioning, each was asked to return at 10:30 the next morning (T 2244-55, 2308-10, 2344-55). Because the parties were unable to question all selected, those remaining were asked to return at 9:00 a.m. (T 2354).

Later, a newspaper reporter asked to witness individual voir dire and was permitted to enter, however, the photographer was

excluded because there was not sufficient room (T 2307-08). After a period of time, the reporter and photographer switched places as noted by the judge when he announced "We're going to have the photographer in here I guess for the next session", then directed the photographer sit in a corner of the room. When the photographer arrived, the defense asked there be no pictures of the jurors' faces (T 2330-31).

The following day, defense counsel's request to have a student "shadowing" him attend voir dire was granted, and as the prosecutor noted, "the jury process is open to the public." (T 2362). The jurors selected to return for individual voir dire arrived and the process recommenced in the hearing room. As the parties completed their questions, those jurors not excused for cause were asked to return to the jury room to await the panel (T 2362, 2377, 2396, 2408). When all had been questioned individually, the need to utilize the hearing room was obviated and the proceedings returned to the courtroom (T 2412-13). At this point, the trial judge recalled additional questions were to be posed to Jurors Rowe and Williams because of issues raised the previous day (T 2413-14). With the jury ordered to meet in the assembly room, Juror Rowe alone was escorted into the courtroom while the bailiffs readied the balance of the panel for general voir dire (T 2414-21). The judge also advised the parties other jurors had asked to bring issues to the judge (T 2422). Jurors Byrd, Roach, Schumann, Cooper

informed the court of their concerns and each was addressed in turn (T 2422-41). Following these discourses, Ms. Williams arrived and reported on her doctor's visit and the additional knowledge she had about the case (T 2441-44). Upon completion of this additional individual voir dire, the judge called for the panel to enter the courtroom, and general voir dire commenced (T 2444).

There is no question, the Sixth Amendment to the United States Constitution guarantees an accused the right to a speedy and public trial, and that the Fourteenth Amendment guarantees the same rights in state prosecutions. Nieto v. Sullivan, 879 F.2d 743 (10th Cir.), cert. denied, 493 U.S. 957 (1989). However, while there is a strong presumption in favor of openness, the right to an open trial is not absolute. Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995). As noted in Estes v. Texas, 381 U.S. 532, 588-89 (1965), "[o]bviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats." Moreover, a judge may impose reasonable limitations on trial access in the interest of the fair administration of justice. Bell; Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 n.10 (1984). To be found appropriate, the courtroom closure must be "necessitated by a compelling governmental interest and [] narrowly tailored to serve that interest." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982). Federal courts have held a defendant's right to

a public trial is not implicated by temporary limitation of ingress and egress to the courtroom to prevent disturbance of the proceedings. Snvder v. Coiner, 510 F.2d 224 (4th Cir. 1975) .

The propriety of a courtroom closure depends upon the case circumstances. Aaron v. Capps, 507 F.2d 685, 687 (5th Cir.), cert. denied, 423 U.S. 878 (1975). When reviewing the propriety and scope of a closure, the court will employ a sliding scale analysis. Ayala v. Speckard, 131 F.3d 62, 70 (2d Cir. 1997), cert. denied, 524 958 (1998). "The burden on the movant [for closure] to show prejudice increases the more extensive the closure sought." United States v. Doe, 63 F.3d 121, 129 (2d Cir. 1995). As recognized in U.S. v. Brazel, 102 F.3d 1120, 1155 (11th Cir. 1997), "... a party seeking total closure of a proceeding would have to show that the measures taken were necessary to serve an overridins interest, and the court would have to consider other alternatives and make findings adequate to support closure....[w]here proceedings are only partially closed,...the test is less stringent; a 'substantial' rather than a 'compelling' reason is required where at least some access by the public is retained." (emphasis supplied).

Evans would have this Court adopt the "compelling reason" analysis followed by the Fourth Circuit Court of Appeals in Bell v. Jarvis, 198 F.3d 432 (4th Cir. 1999). This Court should reject that invitation, and instead follow the Eleventh Circuit Court of Appeals analysis in Douglas v. Wainwrisht, 739 F.2d 531 (11th Cir.

1984), cert. denied, 469 U.S. 1208 (1985) and the "substantial reason" test as it has been cited with approval by several federal appellate courts. See, U.S. v. DeLuca, 137 F.3d 24, 34 (1st Cir. 1998) (following "substantial reason" analysis for partially closed trial); Ayala, 131 F.3d at 70; United States v. Osborne, 68 F.3d 94, 98 (5th Cir 1995); United States v. Farmer, 32 F.3d 369, 371 (8th Cir.1994); United States v. Sherlock, 962 F.2d 1349, 1356 (9th Cir. 1989) ; United States v. Galloway, 937 F.2d 542, 545 (10th Cir 1991), cert. denied, 506 U.S. 957 (1992); Nieto, 879 F.2d at 753.

The basis for adopting the "substantial reason" analysis for review of partially closed trials is made abundantly clear in Douglas. On remand from the United States Supreme Court with directions to reconsider its decision in Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983) in light of Waller v. Georgia, 467 U.S. 39 (1984), the Eleventh Circuit Court of Appeals reconciled the apparent dichotomy between the results reached in Douglas and Waller. As stated in Douglas, 739 F.2d at 532-33:

The different results in Douglas and Waller are thus not attributable to the application of differing legal standards, but to the application of the same legal standards to dissimilar facts. The most important distinguishing factor is that Waller involved a total closure, with only the parties, lawyers, witnesses, and court personnel present, the press and public specifically having been excluded, while Douglas entailed only a partial closure, as the press and family members of the defendant, witness, and decedent were all allowed to remain. Moreover, the closure in Waller was for the

entire seven days of the suppression hearing although the playing of the disputed tapes lasted only two-and-one-half hours, whereas in Douglas the partial closure was limited to the one witness' testimony. Douglas, therefore, presented this court with a fact situation different and unique from that faced by the Waller Court.

Because only a partial closure was involved in Douglas, we relied upon the binding precedent of Aaron v. Capps, 507 F.2d 685 (5th Cir. 1975), which had held that where a partial closure is involved, a court must look to the particular circumstances to see if the defendant still received the safeguards of the public trial guarantee. Id. at 688. In Aaron, the court held that no constitutional violation had occurred because, inter alia, members of the press and the defendant's relatives and clergymen were present at the trial. As in Aaron, the Douglas panel found that the impact of the closure was "not a kind presented when a proceeding is totally closed to the public," 714 F.2d at 1544, and therefore only a "substantial" rather than "compelling" reason for the closure was necessary. Id. The panel further found that a substantial reason--protection of the witness from unnecessary insult to her dignity--existed that justified the partial closure. Id. at 1544-45.

Douglas thus involved an application of the general sixth amendment public trial guarantee to the specific situation of a partial closure, a situation not addressed in Waller. We do not read Waller as disapproving of Aaron's adaptation of the general standards governing closures, standards on which Douglas and Waller are in accord, to a case where only a partial closure is involved and at least some access by the public is retained.

Douglas, 739 F.2d at 532-33 (footnotes omitted). Based upon this, the "substantial reason" standard applies to partially closed

hearings and the "compelling reason" standard should be rejected. The "substantial reason" test, protects defendants' rights, while giving courts flexibility to respond to individual circumstances.

Initially, it should be noted there was no objection to the procedure the trial court employed for conducting individual voir dire. While there was a request for Evans' parents to be able to observe, the defense did not push the issue, nor offer to alternate the parents during the individual voir dire such as the members of the media suggested. In fact, on the second day of voir dire, when the defense asked for a student to watch the voir dire, the judge did not refuse; however, for some reason, counsel did not make a second request to have Evans' parents enter the hearing room either individually or together. In light of the manner in which Evans sought to have his parents in the hearing room, it appears he has waived his right to complain now. Levine v. United States, 362 U.S. 610, 619 (1960) (failing to object to continued closure of courtroom during contempt hearing is waiver of right to public trial). However, in an instance where there had been a total closure of the courtroom, the defendant was permitted to raise the issue for the first time on appeal. Williams v. State, 736 So.2d 699, 701 (Fla 4th DCA 1999). There was no total closure here.

Should the merits be reached, the review will reveal neither the courtroom nor hearing room was closed to the public. Even during individual questioning, the hearing room was open as is

evident from members of the press and the "shadow" student gaining entry (T 2307, 2362). Clearly, the judge was concerned with the ability to segregate those identified jurors from the balance of the panel, and that the separated jurors not contaminate each other with prejudicial information. Hence, bailiffs were to remain with those chosen. Additionally, the judge recognized that space in the hearing room was limited as was clear by the fact that the newspaper reporter and photographer were unable to remain in the room at the same time, but had to alternate. Balancing the competing concerns of an open trial against the need to segregate identified jurors, the judge developed the procedure to keep the jurors in the courtroom and move the parties to a separate location which happened to be a smaller room, one unable to accommodate all who wished to attend (T 2144, 2159). Such does not establish a closure of the proceedings or a violation of the right to a public trial. Estes, 381 U.S. at 588-89 (finding public trial guarantee is not violated on mere fact an individual cannot gain admittance).

Assuming arguendo the courtroom was closed, such was not total as the press and a student were present and neither the clerk's recording nor transcript was sealed. The entire voir dire was not closed; the alleged partial closure was limited to questioning of those requiring inquiry into their knowledge of the case and hardships. Once those jurors were questioned, general voir dire continued in open court and the jury was selected based upon this

inquiry(T 232, 1837, 2095, 2144, 2159, 2161, 2164, 2307, 2362, 2443). Given the fact, at best, Evans could argue there was a partial closure, his right to a public trial was not violated; the closure was based upon a substantial reason and no prejudice has been proven. Ayala, 131 F.3d at 70-73; Douglas, 739 F.2d at 532-33.

Evans points to Williams, 736 So.2d at 700 and People v. Taylor, 612 N.E.2d 543 (Ill. App. 1993) to establish that exclusion of a defendant's family is unconstitutional. The Court should find Williams distinguishable and reject the test approved in Taylor. In Williams, voir dire was held in the courtroom, but the defendant's family⁵ was excluded because there were no seats in the gallery, and the judge refused to permit anyone to sit in the jury box. Williams, 736 So.2d at 700. In Evans' trial, the press was in the hearing room during individual voir dire, thus, all but four areas of inquiry (knowledge of case, witnesses, parties, and hardships) were held in open court before all who wished to attend. The rationale for conducting individual voir dire was to maintain control of the jurors to ensure they did not "contaminate" others with their knowledge as had happened previously (T 2159-64). In contrast to Williams, the procedure here was limited in scope and tailored to the needs of this case.

The appellate court in Taylor, considered the actions of the trial court in excluding all members of the defendant's family

⁵ The opinion was silent on the presence of other persons.

during voir dire as a partial closure as there was no indication the press or spectators were denied access. Taylor, 612 N.E. 2d at 546. In adopting the "overriding interest" test for such review, Taylor followed prior Illinois decisions which relied upon Waller v. Georaia, 467 U.S. 39 (1984). However, as analyzed above, in Doualas, a case from the Eleventh Circuit Court of Appeals, it was the "substantial reason" test found appropriate. This Court should follow the "substantial reason" test as explained above, and find Evans' trial constitutionally sound.

POINT 5

DENYING MOTION FOR STATEMENT OF PARTICULARS
AND PERMITTING STATE TO ARGUE PRINCIPAL THEORY
WERE PROPER (restated).

Evans challenges his conviction on two fronts: the denial of a statement of particulars and the use of "principal" and "actual shooter" theories (IB 45). He claims these theories are mutually exclusive. This Court should reject this and find no abuse of discretion in denying the motion for a statement of particulars. All the pertinent facts adduced in the instant trial were brought out in the first trial, thus, Evans was not hindered or embarrassed in his defense. Further, a valid conviction could be obtained under either theory. Not only did the evidence show Evans actively planned the murder, shot Pfeiffer, and benefitted from the death, but he claimed he had gotten others to pull the trigger and defended on the theory others had the opportunity to kill.

A trial court's denial of a statement of particulars is reviewed under an abuse of discretion standard. Winslow v. State, 45 So.2d 339, 340 (Fla. 1949) ("granting of a bill of particulars in a criminal case is not founded upon a legal right but is a matter resting within the sound discretion, depending entirely upon the nature and circumstances of each particular case, of the trial court."); Miller v. State, 764 So.2d 640, 644 (Fla. 1st DCA 2000) (same); Harrison v. State, 557 So.2d 151, 151 (Fla. 4th DCA 1990) (same). "When an indictment or information charges a crime substantially as defined in the statute denouncing it, it is generally sufficient, where the statutory language and the descriptive details state the nature and the cause of the accusation without misleading the accused in concerting his defense." State v. Covinston, 392 So.2d 1321, 1323 (Fla. 1981). A statement of particulars "may be necessary when the statute defines the offense in general terms and the accusation using the statutory language does not clearly and specifically apprise the accused of what he must defend against." Id. at 1324.

Charged with first-degree murder, Evans indictment provided:

.. PAUL HAWTHORNE EVANS, on or about March 23, 1991, at and in the County of Indian River ... did unlawfully, with a premeditated design to effect the death of any human being, kill and murder Alan F. Pfeiffer, a human being by shooting with a firearm....

(R 13-14). Following a mistrial, and prior to voir dire in this trial, Evans moved for a statement of particulars or a motion in

limine asking the State choose between seeking a conviction under the "principal" and "actual shooter" theories. His argument that presentation of both theories had created a conflict between the "principal" and "alibi" instructions was rejected (T 1796, 2137, 2148-50, 2156). This was appropriate.

Not only did the indictment apprise Evans of the charge, but he had the benefit of a full airing of the State's case in the first trial; in essence he had his statement of particulars. In the first trial, Thomas and Waddell testified they, along with Evans and Connie, carried out Pfeiffer's planned killing. Evans planned the murder, shot the victim, disposed of the weapon, and received electronics in return (T 1256-381, 1385-493). Thomas testified Evans, had told her he had not done the actual shooting, but had gotten others to kill Pfeiffer (T 1302-03). As such, Evans was fully aware of the State's case, and the need for a statement of particulars was unwarranted. Also, that he had gotten others to do the killing, supported the giving of the principal instruction.

The defense's true intent was to limit the State from arguing Evans' involvement as a principal because Evans wanted to rely upon an alibi defense (T 2147-56). Now, Evans resorts to the common law and tries to draw a distinction between a "principal" and an "accessory" by mis-characterizing the State's trial argument. The issue is unpreserved as it is not the same grounds raised before the trial court. Steinhorst, 412 So.2d at 338 (holding "for an

argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). However, assuming the merits are reached, Evans' argument should be rejected.

The jury need not agree on the method used in the homicide, only that there was a homicide for which the defendant was responsible. Schad v. Arizona, 501 U.S. 624, 644-45 (1991) (rejecting contention general verdict which fails to differentiate between premeditated and felony murder is inadequate; jury need not agree on precise theory of murder). Evans misapplies Schad and Richardson v. United States, 526 U.S. 813 (1999) in his attempt to elevate a defendant's method or participation in securing a death to an element of the crime. The elements of first-degree murder are: "(a) the unlawful (b) killing (c) of a human being (d) when perpetrated from a premeditated design to effect the death of the person killed or any human being." State v. Baker, 456 So.2d 419, 422 (Fla. 1984). The shooter's identity is not an element as is evident from the fact a co-assailant may be convicted of first-degree murder even though he was not the actual killer. San Martin v. State, 705 So.2d 1337 (Fla. 1997). The person who hires another to kill is culpable for the murder just as is the person who killed. Barfield v. State, 402 So.2d 377 (Fla. 1981).

Here, Evans asserts, that in common law terms, one State theory was that he was a "principal in the first degree", i.e., the

actual shooter and the other theory was that he was an "accessory", i.e., one who merely participated in the planning and enjoyed the benefits of the crime, but was not present at its commission (IB 49-50). However, the State proceeded under the present statutory scheme, not the common law, and as such used the terms and definitions currently recognized by Florida Law. The State presented evidence Evans was the shooter, but in response to the testimony Evans had told Thomas and Waddell, a period of time after the murder, he had gotten others to kill Pfeiffer, and the defense argument Connie or Waddell had the opportunity to kill Pfeiffer, the State offered Evans could be viewed as a principal. These arguments are not violative of the constitution.

Pursuant to section 777.011, Florida Statutes (1991):

Whoever commits any criminal offense . . . or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed ... is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

"In order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime." Staten v. State, 519 So.2d 622, 624 (Fla. 1988). "One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime." Lovette

v. State, 636 So.2d 1304, 1307 (Fla. 1994) (quoting Jacobs v. State, 396 So.2d 713, 716 (Fla. 1981)). Florida has largely sub-planted the common law in this area. Staten draws the distinction between "principal" and "accessory after the fact."

Reading section 777.011 against its common law background, we do not believe the legislature intended [to punish accessories after the fact more severely than the principal]. Although Florida has abolished the common law distinctions between principals, aiders and abettors, and accessories before the fact, accessory after the fact remains as a separate offense. The accessory after the fact is no longer treated as a party to the crime but has come to be recognized as the actor in a separate and independent crime, obstruction of justice. Thus, the culpability of the accessory after the fact is substantially different from that of a principal, reflecting an intent to punish as an accessory after the fact only those persons who have had no part in causing the felony itself but have merely hindered the due course of justice.

Staten, 519 So.2d at 626 (citations omitted). At no time did the State argue Evans was an accessory after the fact; it asserted he was a principal, either as the shooter or one who planned, committed acts to further the homicide, and benefitted from it.

One may be convicted of first-degree murder as a principal and not be the "shooter." Barfield, 402 So.2d at 377 (affirming conviction of contract murder middle-man); San Martin v. State, 705 So.2d 1337 (Fla. 1997) (affirming conviction under both premeditated and felony-murder based on evidence showing numerous shots fired by defendant and co-perpetrators into vehicle killing victim); State

v. Robv., 246 So.2d 566 (Fla. 1971) (reasoning person may be convicted on proof he aided or abetted crime); Fratello v. State, 496 So.2d 903, 910 (Fla. 4th DCA 1986) (affirming instruction which permitted jury to convict defendant as aider and abettor if it did not believe he shot victim as it was supported by evidence in spite of defense someone else shot victim). Whether Evans pulled the trigger or planned the crime and received a benefit, he was a principal. It was proper to argue this point to the jury. This Court should affirm.

POINT 6

THE STATE DID NOT COMMIT FUNDAMENTAL ERROR IN
ITS GUILT-PHASE CLOSING ARGUMENT (restated).

Evans claims the prosecutor in closing (A) offered personal opinions and utilized the phrase "we know", (B) referenced facts not in evidence, (C) termed evidence "uncontroverted"; (D) argued for guilt under the actual shooter and principal theories, and (E) shifted the burden of proof to the defense (IB 53-55, 59-60). Evans admits he did not object to all the statements⁶ and the judge corrected others, but Evans submits he was deprived a fair trial. The State disagrees. The comments objected to were addressed

⁶ Evan asks this be overlooked because counsel should not have to object repeatedly (IB 53 n. 25). However, the State's closing commenced on page 4168 and the defense lodged its first objection on page 4200. Here, Evans cites to nine pages and eleven comments before page 4200. Wilson v. State, 294 So.2d 327, 329 (Fla. 1974) was not designed to circumvent the requirement for at least one objection to preserve the matter.

appropriately and the those unpreserved were either not improper or not prejudicial. This Court should affirm.

"Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). In arguing to a jury "[l]ogical inferences from the evidence are permissible. Public prosecutors are allowed to advance to the jury 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, 731 (Fla. 1961), cert. denied, 372 U.S. 904 (1963). Control of prosecutorial argument lies within the trial court's sound discretion, and will not be disturbed absent an abuse of discretion. See, Esty v. State, 642 So.2d 1074, 1079 (Fla. 1994), cert. denied, 514 U.S. 1027 (1995). To preserve a claim of prosecutorial misconduct "the defense must make a specific contemporaneous objection at trial." San Martin v. State, 717 So.2d 462, 467 (Fla. 1998); Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982) (finding defendant failed to preserve for review prosecutorial misconduct where only general objection made, followed by motion for mistrial). Where an objection to a comment is sustained, and the defense does not seek a curative instruction or mistrial, the matter is not preserved. Riechmann v. State, 581 So.2d 133, 138-39 n.12 (Fla. 1991). See, Holton v. State, 573 So.2d 284 (Fla. 1990).

Absent a contemporaneous objection, an appellate court will not review closing argument comments unless they constitute fundamental error. See Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996) ; Wyatt v. State, 641 So.2d 355, 360 (Fla. 1994). Where alleged misconduct is unpreserved, the conviction will not be overturned unless a prosecutor's comment is so prejudicial it vitiates the entire trial. State v. Murray, 443 So.2d 955 (Fla. 1984). "Any error in prosecutorial comments is harmless, however, if there is no reasonable possibility that those comments affected the verdict." King v. State, 623 So.2d 486, 488 (Fla. 1993) (citing Watts v. State, 593 So.2d 198 (Fla.), cert. denied, 505 U.S. 1210 (1992)) . Reversal is not required for comments which do not vitiate the whole trial or "inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985). Harmless error analysis applies to prosecutorial misconduct claims. Murray, 443 So.2d at 956.

... prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." [Cobb v. State, 376 So.2d 230 232 (Fla 1979)]. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), and its progeny.... Reversal of the conviction is a separate matter; it is the duty of

appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

Murray, 443 So.2d at 956. In determining whether an error is harmless, the court must determine beyond a reasonable doubt that the comment did not contribute to the guilty verdict. Id.

Here, with the exception of two objections on the basis of facts not in evidence (T 4200, 4219) and the proof necessary under the principal and alibi theories (T 4207-10), Evans failed to preserve the alleged instances of prosecutorial misconduct raised here. He either failed to object or for those where his objection was sustained, seek a curative and mistrial (T 4168-70, 4176, 4178-79, 4181, 4195-96, 4202, 4205, 4206, 4219-20, 4215, 4225, 4228-29; IB 53-59). As such, fundamental error must be shown.

A. Offering of Personal Opinion and Using Phrase "We Know"

Evans complains the State's use of the first-person plural in arguing to the jury was improper. He cites several instances where the State addressed the jury by prefacing the facts with, "we know" (IB 54-56, 58-61; T 4170, 4178, 4181, 4202, 4215, 4228-29). This he combines with a claim that the prosecutor injected her personal belief into the argument (IB 59-60). Not one instance where the State used the word "we", and several where the State used the word "I", drew an objection. Fundamental error, undermining the integrity of the entire trial must be established. Kilgore, 688 So.2d at 898; Murray, 443 So.2d at 956. Where the prosecutor

utilized the word "I" (T 4206, 4225-26), the judge sustained the objection, but Evans failed to seek a curative or a mistrial. As such, this matter also is unpreserved and fundamental error must be shown. Kilaore, 688 So.2d at 898; Murray, 443 So.2d at 956.

Evans cites Hill v. State, 477 So.2d 553 (Fla. 1985), apparently for the proposition the use of "we" is "especially improper" as it tends to ally the prosecutor with the jury (IB 60). However, Hill is unlike the situation at bar. In Hill, the prosecutor asked the jury to consider him a "thirteenth juror", Id. at 556-57, while here, the State was merely reminding the jury of what was seen and heard in the courtroom. Clearly, when two or more people are aware of and are discussing a fact, it is reasonable to say "we know" the fact. None of the instances where "we know" was used indicates the State was pointing to a fact not in evidence or a reasonable inference drawn from that fact.

Also, there is no support for the theory the State asked the jury to believe it because of its position as prosecutor. Evans' reliance upon Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984); DeFreitas v. State, 701 So.2d 593 (Fla. 4th DCA 1997), Gianfrancisco v. State, 570 So.2d 337 (Fla 4th DCA 1990), and Martinez v. State, 761 So.2d 1074 (Fla. 2000) does not further his position. In Ryan, the prosecutor had asked the jury to consider whether it believed law enforcement would spend time and money on the case if it did not believe the defendant guilty. Ryan, 457

So.2d at 1090. The appeals court in DeFreitas, 701 So.2d at 600-02, reversed a conviction where the prosecutor referred to inadmissible evidence as well as an unrelated case and, asked the jurors to put themselves in the position of the victim. Similarly, in Gianfrancisco, 570 So.2d at 338, the improper comment used to bolster another witness' testimony required reversal. In Martinez, 761 So.2d at 1080-81, the use in closing argument of an officer's attested belief in the defendant's guilt lent support to finding the error prejudicial. Here, the State made no such comments or asked the jury to draw such inferences.

In response to Evans' general challenge to the State's use of "we know" in its closing, the State submits the mere use of the phrase "we know" is not prejudicial. As has been recognized in State v. Lewis, 543 So.2d 760 (Fla. 2d DCA 1989), a prosecutor's use of phrases such as "we know" and "we saw" does not equate to an injection of his personal beliefs nor misconduct.

„ In delivering his closing argument, the prosecutor adopted a conversational tone for reviewing the evidence with the jurors by saying "we saw" and "we heard" various evidence. In light of this style, we think it would be obvious to any reasonable juror that the prosecutor's statement that "we know through other testimony the story is a lie" was merely the state's interpretation of the evidence presented at trial. Given the context of the statement, we find no error on this point.

Lewis, 543 So.2d 768. The State's argument here was appropriate.

Specifically, Evans challenges the State's argument related to

stealing Mr. Waddell's gun, whether it was the murder weapon, and the number of people involved in the killing (IB 61). In Evans' 1991 statement, he admitted being with Waddell on 3/23/91 at her parent's home (T 4069-70). Waddell admitted she went with Evans to her father's home to get the gun which was used to kill Pfeiffer. The forensic evidence established Pfeiffer was killed with a .38 caliber gun using Nyclad bullets; Mr. Waddell's gun was the same caliber and he had used Nyclad ammunition. Thomas, Waddell, Connie, and Evans were involved in the planning and executing of the homicide. From this, the State argued properly "we know" Evans was involved with the theft of the murder weapon and his compatriots were Thomas, Waddell, and Connie. There was no misconduct, much less, fundamental error. Breedlove, 413 So.2d at 8 (reasoning logical inferences and legitimate arguments may be advance); Spencer, 133 So.2d at 731 (same).

Turning to those instances where Evans claims the prosecutor gave personal opinions, the State submits those instances where no objection was raised should not be considered. Sims v. State, 681 So.2d 1112, 1116-17 (Fla. 1996) (refusing to consider comments where prosecutor called defendant liar, accused counsel of misleading jury, and bolstered attacks on defendant's credibility by expressing personal views and knowledge of extra-record matters, because defense failed to object contemporaneously); Craig v. State, 510 So.2d 857, 864 (Fla. 1987), cert. denied, 484 U.S. 1020

(1988); Murray, 443 So.2d at 956 (reasoning unpreserved challenges to comments require showing of prejudicial error which vitiates entire trial). Where the defense objections to two comments were sustained, but no curative sought, the comments are unpreserved and not reviewable. Riechmann, 581 So.2d at 138-39 n.12 (finding comments unpreserved where objection was sustained, but neither curative nor mistrial requested).

The first challenged comment relates to the closeness of the accounts given by Waddell and Thomas (IB 56). After identifying the similarities and inconsistencies between the two versions of events the prosecutor stated "Now are these contrived stories? Because if they're contrived or fabricated, I would expect them to match perfectly." (T 4195). Also, the State asserted, "And if they [Thomas and Waddell] had come in here after six and a half years, two individuals, one of them being an alcoholic, and told you the exact same story, then you should be worried. Then I would say there's a chance they fabricated the story." (T 4196). Neither statement drew an objection and neither is an improper personal opinion. The State was presenting reasonable inferences which could have been drawn from the inconsistencies and similarities in the accounts which could help the jury determine credibility. Such is proper and well within a prosecutor's forensic abilities. Breedlove, 413 So.2d at 8 (finding counsel may assert all logical inferences which may be drawn from evidence); Spencer, 133 So.2d at

731 (same). Such comments were not personal opinions nor fundamental error.

The objection to the comment, "...and I seriously doubt [Pfeiffer] was smoking..." (T 4206, IB 57) was sustained, but no further judicial action sought. This hardly could be deemed of such a prejudicial nature to vitiate the entire trial. No reasonable juror would convict on the mere hearing of an opinion as to whether the victim had been smoking just before his death.

The second sustained objection relates to the comment "Now, what about the fact that we have no physical evidence? What I think is more uncanny about this entire event is . . ." (T 4225). Again no curative instruction or mistrial was requested; this Court should find the matter unpreserved and decline to consider it. Sims, 681 So.2d at 1116-17. However, should the merits be reached, the comment did not render Evans' trial unfair. Following the objection, the State continued with its argument, removing the objectionable word "I". (T 4225-26). Such argument merely drew attention to the lack of fingerprint evidence even though Evans had admitted to touching numerous items within the trailer. This was supported by Waddell who explained Evans wore gloves the entire time he staged the scene showing his planning and forethought (T 3806-08, 4012-77). Breedlove, 413 So.2d at 8 (finding all logical inferences may be drawn from evidence).

B. Allegations of Facts not in Evidence

Asserting error, Evans claims the State "began with an imaginative reconstruction" of Pfeiffer's last acts (IB 53-54). However, no objection was raised. Fundamental error vitiating the entire trial, must be established before he may obtain relief. Kilgore, 688 So.2d at 898; Murray, 443 So.2d at 956.

Here, the record reflects that at 7:30 p.m., leaving for the 30 minute drive home, Pfeiffer rejected an after-work drink with his girlfriend because Connie was cleaning him out. When his body was found, there was mail at his feet, cigarettes near the dead-bolted door, and no signs of a struggle. The illumination within the trailer came from a dim light. Between 6:30 and 7:00 p.m. Waddell, Thomas, and Evans left the fair for the nine mile drive to drop Evans at the trailer. After waiting 60 to 90 minutes for Evans, he entered and claimed "it's done." (T 3137-45, 3174-75, 3189-204, 3249-50, 3295-310, 3330, 3346-48, 3474-83, 3543-45, 3562-72, 3806-39, 3927) A reasonable inference is that Pfeiffer's stated purpose for leaving for home would have dissuaded him from stopping for lottery tickets, and because the paddle-fan light had been disabled, he may have turned the porch light on in its place. Moreover, the lack of signs of a struggle suggest the killing took place immediately upon Pfeiffer's entry. The State's un-objected to argument was not improper and not fundamental error. Breedlove, 413 So.2d at 8 (finding counsel may assert logical inferences).

With respect to the argument on the respective positioning of Evans and Pfeiffer during the shooting (IB 57), the judge overruled the objection properly. The State argued Evans bumped into a table, knocking some items, as he stepped from a corner where a beanbag chair was located, and shot Pfeiffer. The judge did not abuse his discretion in denying the objection as the evidence supports the facts and inferences presented. See, Esty, 642 So.2d at 1079 (recognizing control of argument lies within judge's sound discretion); Breedlove, 413 So.2d at 8 (reasoning logical inferences may be drawn and argued by counsel).

Evans admitted he hid behind furniture then emerged to shoot Pfeiffer. The police found items disturbed on an end table near Pfeiffer's head and near a beanbag chair. According to Dr. Bell, the shots were fired from a distance of more than two feet and Pfeiffer could not have been sitting with his back to the sofa when shot in the back; Pfeiffer was most likely leaning forward. Also, the bullet which entered the top of Pfeiffer's head traveled down through the brain, lodging in his tongue; it was unlikely he was in the sitting position when he received this wound. The bullet to the back of Pfeiffer's ear was inflicted when he was prone (T 3219-44, 3249-61, 3299, 3830-39). Together this supports the State's argument on the positioning of Pfeiffer and Evans during the crime.

C. Commenting that Evidence Was Uncontroverted

Contending the State should not have termed the evidence

"uncontroverted", Evans points to two portions of the State's closing (IB 54-56). The first relates to the fact there was no testimony Evans was at the fair between 6:30 and 9:30 the night of the murder (IB 54-55, T 4176) and the second involves the lack of evidence of shots heard after 9:30 p.m. (IB 56; T 4205). Neither comment drew an objection, thus, they are unpreserved and should be rejected. Sims, 681 So.2d at 1116-17. Should the merits be reached, there is no basis to reverse.

The record reflects Mr. Hill saw Evans at 6:30 and again at 9:30 p.m. Waddell and Thomas established Evans was at the trailer near 7:00 p.m. and for 60 to 90 minutes lay in wait (T 3692, 3827-39, 3907). Merely because Evans chose not to put on witnesses alleged to have seen him at the fair, does not preclude the State from arguing the uncontroverted nature of the evidence. As analyzed in Point 1 and reincorporated here, the delay in obtaining an indictment in this case was not a due process violation, therefore, there was no State action in excluding evidence. Neither Rodriguez, 753 So.2d at 38-39 nor Freeman, 962 F.2d at 1260 further Evans' position. Based upon the facts, the prosecutor fulfilled her responsibility to argue her case based upon the facts and reasonable inferences therefrom. Such was proper. Breedlove, 413 So.2d at 8 (reasoning logical inferences may be advanced).

Turning to the comment about the lack of gunshots heard after 9:30 p.m., the State did not preclude the defense from putting on

testimony from those who may have heard gunshots at a later hour than Messrs. Cannon and Cordary. The State merely raised the legitimate hearsay objection to such alleged evidence being brought out through an officer who had not taken the statement' (T 3316, 3328-29). When this argument is considered in light of all the evidence of planning, preparation, cover-up, and payment for the crime in addition to Evans' admission, "it's done" (T 3690-92, 3834-35), it cannot be said the State's argument was not a valid commentary on the evidence or rendered the trial unfair. Breedlove, 413 So.2d at 8; Spencer, 133 So.2d at 731. The argument did not undermine Evans' constitutional rights, nor did it mislead the jury. This Court should affirm.

D. Guilt as "Actual Shooter" or "Principal"

Evans contends the State argued premeditation need not be proven (IB 53), but he does not identify where in the record this argument was made. Assuming it relates to the comment "[s]ix of you may agree that [Evans] is the actual shooter. Six of you may agree he's a principal. Under either theory, he is guilty of first degree murder" (T 4229), the State submits the issue is unpreserved as prosecutorial misconduct as no objection was raised. Sims, 681 So.2d at 1116-17. However, should the Court reach the merits, the State relies upon the analysis presented in Point 5 establishing the propriety of the principal instruction and argument presented.

¹ The State incorporates its argument presented in Point 2.

E. Burden Shifting

As his final claim of misconduct, Evans asserts the State shifted to him the burden of proof when it argued "... if you don't believe anything that the State has presented to you, let him go. . . But if you believe anything that Sarah Thomas or Donna Waddell have to say because of the corroboration . . . then find the Defendant guilty of first degree murder." (IB 59, 61; T 4229) (emphasis supplied) . Here again the matter is unpreserved and should be rejected. Sims, 681 So.2d at 1116-17.

Evans points to Freeman v. State, 717 So.2d 105 (Fla. 5th DCA 1998), Kniht v. State, 672 So.2d 590 (Fla. 4th DCA 1996), and Northard v. State, 675 So.2d 652 (Fla. 4th DCA 1989) to establish the comment shifted the burden of proof to the defense. These do not support that conclusion. In Freeman, 717 So.2d at 106, the argument involved the state telling jurors they should believe the officers because they were police and it was a matter of who the jurors wanted to believe. Similarly, in Kniaht, 672 So.2d at 591, the improper comments related to the prosecutor asking the jury to question why defense counsel objected to certain testimony, referred to a witness as a "criminal", and argued that unless the jury believed the officer was a perjurer and liked to accuse innocent people the verdict should be guilty. Lastly, in Northard, 675 So.2d at 653, it was impermissible to tell the jury that if they believed the defendant then the police could not be telling

the truth; in order to acquit the jury would have to believe the police fabricated evidence and lied. In the case at bar, the State did not make such impermissible arguments.

Here, the State argued that if its presentation was not believable, i.e., that it did not carry its burden of proof, then the jury should acquit. Conversely, if looking at the testimony of the conspirators, which was corroborated by others, then the finding should be guilty (T 4229). At no time did the State place the credibility of one witness over another merely because of his status, ask the jury to decide which witnesses were lying, or suggest it was just a matter of whom they wished to believe. When read in its entirety, the argument relates to the evidence presented and requests the jury to determine guilt from it. Such complies with Breedlove, 413 So.2d at 8 and is proper.

Clearly, either individually or in combination, the State's comments were proper and did not render the trial unfair. The State confined itself to discussing the facts, their reasonable inferences, and how those facts related to the instructions. Breedlove, 413 So.2d at 8; Murray, 443 So.2d at 956 (reasoning unpreserved challenges to comments requires prejudicial error which vitiates entire trial). At no time did the State ask the jury to disregard the law, suggest a less than guilty verdict would be irresponsible, advance a "golden rule" argument, make ad hominem attacks, or ask the jury to show the same mercy to the defendant as

he showed the victim as decied in Urbins v. State, 714 So.2d 411, 420-21 (Fla. 1998). No prosecutorial misconduct has been established. This Court should affirm.

POINT 7

ANDERSON v. STATE, 574 So.2d 87 (Fla. 1991)
DOES NOT REQUIRE REVERSAL (restated).

Pointing to the "Complaint Affidavit" ("Complaint") Evans claims it differs materially from the trial and his conviction should be reversed under Anderson v. State, 574 So.2d 87 (Fla. 1991), cert. denied, 502 U.S. 834 (1991). He argues the differences involve (A) time of murder, (B) which door was ajar when police arrived, and (C) whether he was at the fair and a Denny's on that night (IB 65-66). The State disagrees.

Although Evans requested the grand jury testimony (T 42-50), the alleged variances between the Complaint and trial testimony were not presented below for consideration of whether a constitutional error occurred. There has been no finding of perjury or materiality and the matter is not preserved. Steinhorst, 412 So.2d at 338 (holding for issue to be cognizable, "it must be the specific contention asserted as legal ground for the objection, exception, or motion below."). Assuming the Court reaches the merits, the variances identified by Evans do not require reversal.

In Anderson, this Court agreed that "due process is violated if a prosecutor permits a defendant to be tried upon an indictment which he or she knows is based on perjured, material testimony

without informing the court, opposing counsel, and the grand jury." Anderson, 574 So.2d at 91. It is the existence of and reliance upon perjured and material testimony which violates due process. As the facts of Anderson establish, the witness gave perjured testimony to the grand jury, yet, reversal was not required because the variations were not material to the conviction. Id., at 92.

Similarly, in Keen v. State, 25 Fla. L. Weekly S754 (Fla. Sept. 28, 2000), this Court concluded the motion to dismiss the indictment was denied properly. Initially, this Court recognized there had never been a finding that the witness' statements were perjured, only that the witness had given inconsistent statements in an official proceeding. Moreover, the witness' perjury conviction was based upon the recantation, not that the original statement was false. Id., at S760. Under, Keen there must be proof the challenged testimony is perjured irrespective of materiality.

As such, Evans must show the grand jury received perjured testimony and such was material. However, Evans does not state that the grand jury received perjured testimony; instead, he points to variances between the Complaint and the trial testimony. A complaint is not evidence. See Dougan v. State, 470 So.2d 697, 701 (Fla. 1985) (finding "[a]n indictment or information is not evidence against an accused, but, rather, is nothing more or less than the vehicle by which the State charges that a crime has been committed"). Based upon this inadequacy, Evans has failed under

the reasoning in Keen and Anderson. There have been no findings of perjured testimony before the grand jury, but if the Court elects to review the variances between the Complaint (not grand jury testimony) and the trial, it will find no constitutional violation.

A. Time of Homicide

The Complaint listed the time of the murder as occurring on 3/23/91 between 20:30 and 22:30 hours (8:30 and 10:30 p.m.), identified Mr. Cordary as having heard shots, but unsure of the time, and noted four neighbors had heard or possibly heard shots between 9:00 and 10:30 p.m. (IB 65; R 2-3). First, it must be noted the Complaint is a synopsis of what evidence the police believed they had. In both of Evans' jury trials, Mr. Cordary testified he had informed the police he heard shots near 8:00 p.m. on 3/23/91. On cross-examination in the first trial, Mr. Cordary explained that in his 1998 deposition he had given a different time frame (10:30 - 11:00 p.m.) for the shots because he had not had an opportunity to review his police report (T 1014, 3390, 3402-04). When an objection was raised on re-direct, defense counsel argued Mr. Cordary should not be permitted to testify that his police statement confirmed he had heard shots near 8:00 p.m. because it is a "prior consistent statement" (T 1018) (emphasis supplied). In the instant trial, Mr. Cordary reiterated he heard shots near 8:00 p.m. and had told the police shots were heard at "8:00, 8:30, sometime like that." (T 3390, 3401). Clearly, even if the

Complaint misstates what Mr. Cordary may have told the police, his testimony proved the police were given the same time as Mr. Cordary told the jury. Moreover, defense counsel did not attempt to impeach Mr. Cordary with his police statement, thus, it may be assumed the statement was consistent with the 8:00 p.m. time frame as admitted by counsel when he attempted to keep such testimony from the jury (T 1018). Merely because the police identified a larger time frame in their Complaint than what was proven at trial does not establish a due process violation as there is no evidence such time frame was perjurious. Under Keen, 25 Fla. L. Weekly at S760, this variance does not require reversal.

Similarly, if this Court assumes the grand jury was informed of witnesses who allegedly told the police of shots fired between 9:00 and 10:30 p.m., there is no evidence, let alone an allegation, it is perjured. Such is within the Complaint time frame (R 2). Also, the indictment was handed down even on this expanded window of opportunity. Evans' argument that testimony related to later gunshots was excluded as hearsay does not create a due process violation as it cannot be shown the testimony was admissible or that it was perjured and material. Keen, 25 Fla. L. Weekly at S760 (affirming denial of motion to quash indictment where there is lack of proof perjured testimony employed).

B. Whether the North or South Trailer Door Was Found Ajar

The next variance involves trial testimony establishing the

front door to the trailer was locked when the police arrived, and the Complaint indicated it was "cracked open." (IB 66; R 3). The trailer had two doors, one facing north (front), the other south (back) (T 3140-41). According to Officer Allen, upon his arrival "the door on the south side was standing slightly ajar" (T 3190). Continuing, he explained he found electronic equipment stacked near the open door. This Court should find any variance between identification of the open door as either the north/front or south/back is immaterial when coupled with the testimony a door was ajar and stacked near it was electronic equipment. Such variance would have no bearing on the indictment; what was important was that a door was ajar, permitting police entry. Anderson, 574 So.2d at 92 (finding no due process violation even though perjured testimony presented to grand jury, but not material to indictment).

C. **Whether Evans Ever Went to Fair or Denny's**

Identified here is a statement charged to Thomas which implies Evans had not gone to the fair the night of the murder (IB 66). It has not been established the Complaint reflects Thomas' statement accurately or establishes perjured testimony. Evans has failed to satisfy his burden that perjured, material testimony was used. Keen, 25 Fla.L.Weekly at S760; Anderson, 574 So.2d at 92.

With respect to the alleged variation related to whether Evans went to a Denny's that night, this Court should similarly conclude there is no proof of perjury and find the issue immaterial. Taking

the latest time listed in the Complaint for the occurrence of the murder, namely 10:30 p.m., in conjunction with the time given for the Denny's meal, it is clear the restaurant visit would not have altered the decision to indict. As reflected in the Complaint and at trial, the four conspirators went to Denny's after the fair closed (R 4-5; T 3693, 3841-42). Taking it to its logical conclusion, the trip to Denny's occurred after the murder, thus, would not have altered Evans' culpability. This Court should find it immaterial. Anderson, 574 So.2d at 92 (finding no due process violation where perjured grand jury testimony not material).

D. Whether Evans Remained With His Friends at the Fair

The final challenge involves the Complaint statement: "Evans did state that when they arrived at the fair he went his own way and met up with the other three when it was time to leave." (IB 66; R 5). Again, it should be noted the Complaint is a recounting by the police; not actual testimony. Furthermore, at this stage there has been no finding the Complaint was presented as perjured fact. Keen, 25 Fla. L. Weekly at 5760 (finding no due process violation without finding challenged testimony was perjured). Even without this statement, there was sufficient evidence contained in just the Complaint to indict Evans for the murder. The Complaint allegations establish Evans stole a .38 caliber gun and Pfeiffer was shot with the same caliber weapon. Thomas places Evans at Pfeiffer's trailer within the time frame for the murder and there

are admissions from Evans that he would receive money for the homicide and killed Pfeiffer in the darkened trailer. Also, Evans destroyed the clothes he wore and disposed of the weapon (R 2-8). Together, this was sufficient to obtain an indictment. Evans' claim of constitutional error must be rejected. Cummings v. State, 715 So.2d 944, 947 (Fla. 1998) (determining denial of motion to dismiss indictment proper where there was sufficient evidence to obtain indictment absent challenged testimony).

From the foregoing, there is no proof the State knowingly presented perjured, material testimony to the grand jury. In fact, Evans has not identified which statements are in actuality false. This alone precludes the granting of relief. Keen, 25 Fla. L. Weekly at S760. Further, the statements have not been shown to be material Anderson, 574 So.2d at 92 or of such necessity that an indictment could not have been obtained. Cummings, 715 So.2d at 947. This Court should affirm.

POINT 8

VOIR DIRE REGARDING CO-CONSPIRATORS' TESTIMONY
WAS NOT FUNDAMENTAL ERROR (restated).

It is Evans' position the State, through voir dire, vouched for the credibility of witnesses which amounted to prosecutorial misconduct (IB 68). The State disagrees. Instead, the State's inquiry helped ensure a fair and impartial jury.

"The scope of voir dire questioning rests in the sound discretion of the court and will not be interfered with unless that

discretion is clearly abused." Vinins v. State, 637 So.2d 921, 926 (Fla. 1994). Whether voir dire should have been permitted on a subject by the judge is viewed under an abuse of discretion standard. Davis v. State, 698 So.2d 1182, 1190 (Fla. 1997); Farina v. State, 679 So.2d 1151, 1154 (Fla. 1996), overruled on other grounds, Fransui v. State, 699 So.2d 1312 (Fla. 1997). Challenges to misconduct during voir dire questioning must be preserved for appeal by the making of a specific, contemporaneous objection at trial. San Martin, 717 So.2d at 467; Ferguson, 417 So.2d at 641.

While Evans' objection to one part of the State's voir dire, i.e. the question, "Do you understand why the State would do -- make a plea agreement with an individual?", was sustained, neither a mistrial nor other objection was made (T 2493-94). He points to other portions of the State's voir dire and complains of error. However, without a contemporaneous objection, the matter is not preserved. San Martin, 717 So.2d at 467 (requiring specific, contemporaneous objection to voir dire questions to preserve issue). As this issue is unpreserved it should be rejected.

The balance of the voir dire on the subjects of co-conspirators and plea agreements related to juror impartiality when faced with this type of evidence. The State's questions were intended to identify jurors with biases who would not consider all the evidence. Such is clear from the following:

MS. ROBINSON [Prosecutor]: Mr. Russell,
would you have any problem with the fact that

the State made a plea agreement with a witness?

""

MR. JOHNSON: Well, I think that if a person has plea bargained and will testify, I would definitely listen to everything that person has to say. But if I would be aware that the plea bargain was involved, it might color my opinion of his testimony.

MS. CARLSON: I agree you have to listen to everything with an open mind.

MS. ROBINSON: And Mr. Murtaugh?

MR. MURTAUGH: Yeah, I agree. I mean they don't make deals unless they fully collaborate (sic) what they're saying; right? I mean they would have to collaborate (sic) what they're saying before they would make a deal with them to testify; correct? I'm asking you.

MS. ROBINSON: That's normally the case, yes. And I think, again, the evidence will bear some of these concerns out for you all as far as, you know, what you all are aoina to have to determine as far as the credibility of the witnesses.

Yes, Mr. Combs?

MR. COMBS: Isn't a plea bargain like you take a lesser criminal and have him more or less tell you what the bigger guy did so you can get the bigger guy?

MS. ROBINSON: That could be the case. And again I think the evidence will bear out a lot of answers to your questions concerning that.

Yes, sir. Mr. Murtaugh?

MR. MURTAUGH: Reasonable doubt, going back to that again. You've got somebody in crime,

(sic) he's got a reason to lie.

MS. ROBINSON: And again, this all goes back again to the State proving its case beyond and to the exclusion of a reasonable doubt and common sense.

(T 2494-96).

Voir dire is necessary to ensure a fair and impartial jury is empaneled. "The purpose of the voir dire proceeding is to secure an impartial **jury**, and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias against the prosecution and for the accused." Moody v. State, 418 So.2d 989, 993 (Fla. 1982), cert. denied, 459 So.2d 1214 (1983). Questions propounded to the jury must not seek to have the panel prejudge a witness's credibility. Id. The venire should not be questioned in such a way as to solicit a commitment to render a particular verdict under a given factual scenario. Smith v. State, 253 So.2d 465, 470-71 (Fla. 1st DCA 1971). Trial counsel "should be permitted to inquire as to a juror's ability to discern what their role will be in weighing the evidence and law in addition to inquiry regarding possible bias." Gunn v. State, 641 So.2d 462, 464 (Fla. 4th DCA 1994). In order to select a fair, impartial jury, voir dire must be meaningful, thus, the scope of the questions propounded depends upon the issues raised in each case. Lavado v. State, 492 So.2d 1322, 1323 (Fla. 1986) (finding court erred in restricting request to question potential jurors about their willingness and ability to accept the defense of

voluntary intoxication). See, Perry v. State, 675 So.2d 976, 979 (Fla. 4th DCA 1996) (finding voir dire related to issues of case must be allowed).

Here, the State was not preconditioning jurors or lending credibility to its witnesses. Inquiry into how the jurors viewed the presentation of a conspirator who had been given a plea was an appropriate topic in this case as Waddell was given a plea and Thomas was not indicted. Lewis v. State, 377 So.2d 640, 642 (Fla. 1979) (inquiring into juror's bias which might affect fairness of trial is proper ground of inquiry). Instead, the State was attempting to find those jurors with biases. When faced with pointed questions from the panel, the State professionally avoided bolstering the credibility of its witnesses by directing the jurors to await the evidence, hold the State to its burden of proof, and to use their common sense (T 2494-96). None of the comments so undermined the resulting trial as to render it unfair.

Challenges to the use of "we know" and "uncontroverted" in the State's argument were addressed in Point 6 and the State will rely upon that response. However, it should be noted, even if the voir dire issue was preserved, the failure to object to in the closing argument renders this unpreserved. Rivera v. State, 718 So.2d 856 (Fla. 4th DCA 1998). See, Chandler v. State, 702 So.2d 186, 191 (Fla. 1997) (requiring contemporaneous objection and motion for mistrial to preserve alleged prosecutorial misconduct for review).

Similarly, at trial, Evans did not raise the allegation of misconduct in the voir dire as it may relate to the penalty phase. Hence, it is unpreserved. Steinhorst, 412 So.2d at 338. Nonetheless, by the time the jury had reached the penalty phase, they had heard from the conspirators, Waddell and Thomas, who had been subjected to pointed cross-examination as well as witnesses not tied to the conspiracy. The jury was instructed on the different burdens of proof for aggravators and mitigators. As such, it was the evidence which supported the conclusion Evans was the more culpable and deserving of the death penalty (R 506-12). This Court should conclude no error occurred below and affirm.

POINTS 9 AND 10

THE DEATH SENTENCE IS PROPORTIONATE (restated)

Evans makes two arguments: (Point 9) the murder is not the most aggravated and least mitigated and (Point 10) if he were a minor participant, not the shooter, then the sentence is disproportionate (IB 73-75, 82). The purpose of proportionality review is to consider the totality of the circumstances in a case compared with other capital cases. Urbin, 714 So.2d at 416-417; Terry v. State, 668 So.2d 954 (Fla. 1996). While the evidence established Connie wanted her husband killed, it was Evans who masterminded the plan, actively prepared for the killing, carried out the shooting after lying in wait for Pfeiffer, and benefitted from the contracted homicide. The mitigation found was of very

little to moderate weight. The State submits the facts of this case, viewed in light of other first-degree murder cases where the death penalty was imposed, support the sentence rendered here. It is proportionate and should be affirmed.

Pfeiffer was killed for pecuniary gain in a cold, calculated, and premeditated manner by a nineteen year old adult of high average to superior intelligence. The judge found Evans was the "mastermind" behind this contract killing and cover-up as well as being the actual shooter. In exchange, Evans received electronic equipment and anticipated receiving insurance proceeds (R 504-06). Analyzing the CCP aggravator, the judge opined:

The state presented evidence during the guilt phase that established the defendant deliberately planned and carried out the execution style murder of Alan Pfeiffer at the request of Connie Pfeiffer and with the assistance of Donna Waddell and Sarah Thomas. The defendant originally planned to purchase a knife to murder Alan Pfeiffer but later changed the plan to include the use of a gun. The defendant then went with Donna Waddell to her parent's home and broke in to steal a gun and ammunition to use in the murder. The defendant even test-fired the weapon to make sure it was operating properly. The defendant planned an alibi for all participants to attend the Firefighter's Fair so they would be seen there the night of the murder. Earlier on the day of the murder, the defendant, Connie Pfeiffer, Donna Waddell, and Sarah Thomas went to the trailer and moved items near the door to make it look like a burglary was taking place at the time of the murder. The defendant was wearing gloves so his finger prints would not be found at the murder scene. Later that evening, the defendant had Donna Waddell and Sarah Thomas drop him off near

Alan Pfeiffer's trailer where he entered the trailer through a door that had been previously unlocked for him. The lights in the ceiling fan were disabled and the stereo was turned on to a level that was loud enough to drown out the sound of gunshots. The defendant then waited inside the trailer in the darkness to murder Alan Pfeiffer upon his arrival. A call was made by Connie Pfeiffer to Alan Pfeiffer at his place of employment to insure that he would arrive home within a certain time frame. When Alan Pfeiffer arrived home, the defendant shot him three times. Twice in the head and once in the lower back. There were no signs of a struggle. The defendant then left the residence to return to his rendezvous point to be picked up by Donna Waddell and Sarah Thomas and return to the fair to finish establishing the alibi. The defendant later tossed the gun into a canal along State Road 60 in western Indian River County. The gun was never recovered. The record reflects proof beyond a reasonable doubt that the defendant's decision to murder Alan Pfeiffer was the product of a cool and calm reflection, a careful plan or prearranged design, with heightened premeditation, and no pretense of moral or legal justification....

(R 505-06). Also found were the statutory age mitigator (given little weight), and 12 non-statutory mitigating factors of which three were given moderate weight: (1) suffered great trauma as a child, (2) hyperactive child, (3) co-defendant's life sentence; five were given little weight: (1) was good inmate awaiting trial, (2) behaved well in court, (3) difficult childhood, (4) raised without father, and (5) product of a broken home; and four were given very little weight: (1) father of two girls, (2) belief in God, (3) will adjust well to prison life, and (4) love of family.

Addressing Connie's life sentence as mitigation, the judge stated:

.. A co-defendant's life sentence is a factor which the trial court can consider in mitigation of a sentence of death for a defendant. Gordon v. State, 704 So.2d 107 (Fla. 1997). The defendant argues that both he and the co-defendant are equally culpable for the death of Alan Pfeiffer and that the defendant should also receive a sentence of life in prison without the possibility of parole for twenty-five years. However, the evidence at trial established that the defendant was the one who fired the three fatal shots while waiting inside the trailer in the darkness for Alan Pfeiffer to arrive home from work. The defendant was more than the mere hired gun. He was the "mastermind" behind the planning and carrying out [of] the murder plan as well as establishing the alibi for the participants. The defendant selected the weapon to be used for the murder and arranged to steal it from the Waddell home. The defendant disposed of any evidence connecting him to the murder scene. The evidence has established that the defendant was more culpable than the co-defendant.

(R 510-11). The judge determined the offered mitigation of Evans being the product of a dysfunctional family, had been accounted for and addressed in the mitigators of Evans' difficult childhood, broken home, and lack of a father. The allegations of immaturity and artistic ability were rejected as non-mitigating (R 510-12).

Based upon the aggravation and mitigation here, the death sentence is proportionate and Ray v. State, 755 So.2d 604 (Fla. 2000) does not mandate reversal. In Ray, the evidence established the co-defendant was the dominant player in the robbery and homicide. Id. at 612. The co-defendant was the only one injured by

the victim and those injuries were consistent with his arms being raised in a firing position. Id. at 611-12. Not only was the co-defendant's blood found on the murder weapon, but his statements suggested he was the shooter. Id. at 612. Under these facts, the Court reasoned, at a minimum, the perpetrators were equally culpable and it was improper to have sentenced the defendant to death in light of the co-defendant's life sentence. Id. Conversely here, the record establishes Evans was the dominant party in the crime. While Connie had solicited his services for a fee, it was Evans who developed the plan, created the alibis, directed the staging of the scene, procured the weapon, ordered his transportation to and from the murder site and locations where evidence was discarded, and fired the fatal shots after lying in wait for Pfeiffer (T 3375, 3386, 3411, 3674-78, 3681, 3690-92, 3694-701, 3798-800, 3803-17, 3826-39, 3841-48). The instant **case** is distinguishable from Ray.

Equal culpability alone does not establish disparate treatment. By the very definition of proportionality review, the Court must look to the totality of the circumstances, including the aggravation and mitigation. Urbain, 714 So.2d at 416. Surely, if two defendants are equally culpable, but one has higher aggravation and less mitigation, death would be an appropriate sentence for one, but not the other. Taking Evans' argument to its inevitable conclusion, if one principal in a crime which resulted in a

homicide gets life, then no other member **may** receive the death penalty no matter how much aggravation or mitigation is proven. This is not the state of Florida law. See, Larzelere v. State 676 So.2d 394, 406 (Fla. 1996) (finding "equally or more culpable codefendant's sentence is relevant to a proportionality analysis", but not dispositive - co-perpetrators not prosecuted and shooter acquitted in contract killing); Ventura v. State, 560 So.2d 217 (Fla. 1990) (affirming death sentence for the actual killer in a contract murder even though the party instigating murder and another principal received a lesser or no sentence at all).

Evans points to Snipes v. State, 733 So.2d 1000 (Fla 1999), but it does not preclude the imposition of the death penalty here. While at first blush, Snipes appears to assist Evans, however, when the Court looks at the mitigation in Snipes closely, it will find Snipe's mitigation is much stronger than that offered by Evans'. The mitigation in Snipes, not found here includes: (1) sexually abused as a child, (2) drugs/alcohol abuse from an early age, (3) no prior violent history', (4) alcoholic family, (5) personality disorder, (6) confessed, (7) remorse, (8) state depended on Snipes to convict co-defendant, (9) crime arranged by older individuals, (10) easily led by older individuals. Id. at 1008. In the case at bar, Evans' mitigation related in large measure to his parents'

⁸ Evans waived the statutory mitigator of no significant criminal history (T 4295-97).

divorce and the attendant troubles from the break up, the loss of his brother, hyperactivity, and ability to adjust well to prison (T 4318-96). There was no allegation Evans was abused as a child or took drugs to excess; clearly he did not confess, or assist in obtaining convictions of others. Moreover, Evans was described as intelligent and the facts established he was the "mastermind" not one easily led by others. As such, the finding of substantial mitigation in Snises does not undermine the judge's conclusion death is the appropriate sentence; in fact, Snipes supports the death penalty imposed upon Evans. Implicit in Snipes is that those who are the driving forces in planning and executing contract killings are deserving of the death penalty.

Neither Chakv v. State, 651 So.2d 1169 (Fla. 1995) nor Livingston v. State, 565 So.2d 1288 (Fla. 1988) support Evans' position. In Chakv, there was one, discounted aggravator and two mitigators. Chakv, 651 So.2d at 1171,1173. Here we have two very strong aggravators, CCP and pecuniary gain and mitigation of very little to moderate weight (R 506-12). The differences in the level of mitigation in the instant case is even more striking when compared to Livingston than it was in Snipes. In Livingston, the defendant had been beaten severely as a child resulting in intellectual functions described as marginal. Livingston, 565 So.2d at 1292. Livingston was young, inexperienced, and immature; he used drugs extensively. Id. Conversely, Evans was of high

average to superior intelligence and the trial court found he was not immature (R 510-12). While, his parents neglected him by leaving him with babysitters, there was no evidence of abuse (T 4319, 4355). When the mitigation is compared, it is clear both Livingston and Snipes hold much greater levels of mitigation than presented by Evans, thus, the aggravation here clearly outweighs the mitigation and the death sentence is proportional.

Evans also challenges his death sentence based upon the fact he was 19 when he committed the contract killing (IB 79-80). Under Florida law, there is no impediment to executing those 17 years of age or older when convicted of first-degree murder. LeCroy v. State, 533 So.2d 750 (Fla. 1988). See, Brennan v. State, 754 So.2d 1, 5 (Fla. 1999) (concluding death penalty is cruel or unusual punishment, violating State Constitution, if imposed on a defendant under the age of 17); Allen v. State, 636 So.2d 494, 497 (Fla. 1994) (finding execution of person who is less than sixteen unconstitutional). However, as reasoned in LeCroy:

... we note that the jury here recommended death for the premeditated murder of Gail Hardeman but was able to distinguish between this more aggravated murder and that of her husband, for which it recommended life imprisonment. This reflects a community judgment that in this particular case, under these circumstances and for this defendant, the death penalty is appropriate. Section 921.141(6)(g) recognizes age as a possible mitigating factor. Cases cited by appellant for the proposition that Florida seldom imposes the death penalty on minors indicate only that minors convicted of first-degree murder tend to exhibit immaturity

of other mitigating characteristics which persuade juries and sentencing judges that the death penalty is inappropriate in their specific cases. [c.o.] They do not show that there is a per se rule against imposing the death penalty on minors.

LeCroy, 533 So.2d at 757 (citations omitted). The reviewing court must look to each case's circumstances to determine whether the sentence is proportionate. Here, at the time of the crime, Evans was 19 years old, an adult of above average intelligence, living on his own. His age does not, in and of itself, establish disproportionate treatment. See, Nelson v. State, 748 So.2d 237, 246 (Fla. 1999) (affirming death sentence for 18 year old); Kimbrough v. State, 700 So.2d 634, 637 (Fla. 1997) (finding no abuse where trial court refused to find age mitigator in capital murder prosecution of 19 year old); Henvard v. State, 689 So.2d 239 (Fla. 1996) (affirming death sentence for 18 year old); LeCroy, 533 So.2d at 757 (affirming death penalty for 17 year old).

Evans asserts Connie's life sentence indicated his sentence is disproportionate (IB 73-74, 81-84). The State disagrees. Evans masterminded the planned killing, benefitted financially, and was the actual shooter (T 3375, 3386, 3411, 3674-78, 3681, 3690-92, 3694-701, 3798-800, 3803-17, 3826-39, 3841-48). The sentence is proportional.

Imposition of the death penalty has been upheld on a consistent basis for the actual perpetrator of the murder in contract killings. In Mordenti v. State, 630 So.2d 1080 (Fla.

1994) the defendant agreed to kill the victim for money. It was Mordenti's wife, Gail, who was the contact person between Mordenti and the victim's husband who committed suicide shortly after being indicted for the murder. Id. at 1082. The victim suffered multiple gunshots and stab wounds, but none was defensive; she was not sexually abused or robbed. Id. The trial court found pecuniary gain and CCP along with eight non-statutory mitigators. Finding the death sentence proportional, this Court opined: "[a]lthough Gail Mordenti was involved in this case by acting as the contact person between Royston and Mordenti, it was Mordenti who actually carried out the contract murder." Id. at 1085. Great weight was placed upon the fact the defendant was the actual shooter.

Bonifav v. State, 680 So.2d 413 (Fla. 1996) supports the death penalty for Evans. When affirming the death sentence in Bonifav, this Court recognized the murder was a contract killing where the defendant was the shooter. Id. 417-18. While there were three aggravators, felony murder, pecuniary gain, and CCP as well as two statutory mitigators of no significant prior criminal history and age (17), in addition to four non-statutory mitigators this Court cited to those cases affirming the penalty on proportionality grounds where the defendant was the shooter Id. at 418.

In Downs v. State, 572 So.2d 895, 901 (Fla 1990), like in this case, there was a murder for hire for insurance proceeds, Downs agreed to commit the murder and enlisted the assistance of Larry

Johnson. Id. at 897. According to Johnson, who was present at the murder scene and was given immunity, Downs was the actual shooter. Arguing against the death penalty, Downs claimed he was not the triggerman. Id. at 898. In aggravation the judge found prior violent felony, pecuniary gain, and CCP and no mitigation which could offset the aggravation. Id. at 898-99. Finding the death penalty proportional, this Court acknowledged that Downs had presented "substantial valid nonstatutory mitigating evidence", but there was "substantial competent evidence in the record to support the trial court's conclusion that Downs was the triggerman in a cold-blooded contract murder." Id. at 901. Because Downs was the shooter, he was the more culpable. Id.

Similarly, in Ventura, 560 So.2d at 218, the death sentence was affirmed for the actual killer in a contract murder even though the party instigating the murder and another principal received a lesser sentence, or no penalty at all. Ventura agreed to kill the victim for the insurance proceeds and posed as a customer to lure the victim to a pre-ordained location, where he was killed. Id. at 218, n.*. Both CCP and pecuniary gain aggravators were found, but there was no mitigation. Id. at 219.

Here, the trial court found not only was Evans the mastermind, but the actual shooter and, thus, more culpable. (R 511). Such is supported by substantial, competent evidence. This Court should find the sentence proportional. Downs, 572 So.2d at 898, 901

(finding record support for trial judge's conclusion defendant was the triggerman and deserving of the death penalty in spite of claim co-defendant killed victim). Further, while Connie received the lesser sentence, she was the less culpable, therefore, the differences in sentences do not establish disparate treatment. Mordenti, 630 So.2d at 1085; Ventura, 560 So.2d at 218.

Evans asserts the State's guilt phase argument relating to whether he was a principal and not the shooter requires finding the sentence disproportional (IB 82-83). Disagreeing, the State acknowledges at trial it argued Evans could be guilty without being present, but asserted it was "saying that he [Evans] was present." (T4228). To further his position, Evans claims he was a minor participant, however, the record belies this claim; the State did not argue Evans was not the shooter nor that he was a minor player.

In the State's penalty phase closing argument, it stated:

And then it was the next day with the fair. [Evans] had to pull the entertainment center out, remove the T.V., stack the stuff by the door, the microwave, the phones, everything like that, make sure no fingerprints were there, construct the alibi for afterwards of what we will say, go get the gun. Let's take these two paintings and put them by the door also. The rental car, the fair, unscrew the light bulb so that when Alan Pfeiffer comes home and turns on the light, nothing will happen. "Now he will not see me waiting for him in the darkness." Stereo blaring to drown out the shots.

(T 4433). Clearly, the State's position was that Evans was the shooter, deserving of the death penalty. This was bourn out by the

testimony of both Waddell and Thomas who explained it was Evans who developed the plan and kept them involved by stating "we're all in this together. We're all going to get something out of it." It was Evans who developed the scheme to make the murder scene look like a robbery and to use the fair as their alibi. It was Evans who stole the gun used in the killing and then secreted himself in Pfeiffer's darkened trailer, turned the music up to such a level as to mask the gunshots, and killed Pfeiffer (T 3375, 3386, 3411, 3674-78, 3681, 3690-92, 3694-701, 3798-800, 3803-17, 3826-39, 3841-48). Evans was not a minor participant and when compared to Connie, he is the more culpable. Merely because the State addressed Evans' argument that Connie and Waddell may have had an opportunity to kill Pfeiffer or that he had solicited others to do the killing, does not detract from the substantial, competent evidence it was Evans who pulled the trigger three times hitting Pfeiffer once in the back and twice in the head with a .38 caliber revolver. Such involvement in the contract killing distinguishes this case from Fernandez v. State, 730 So.2d 277 (Fla. 1999) where the defendant was not the triggerman and was not at the murder scene even though he assisted in the planning and accomplishment of the robbery where a police officer was killed.

The cases of State v. Hargrove, 694 So.2d 729 (Fla. 1997) (holding jury must make finding defendant carried firearm before sentence may be enhanced) and State v. Estevez, 753 So.2d 1

(Fla. 1999) (finding jury must determine amount of drugs involved before statute implicated) do not undermine the validity of Evans' sentence. It is well settled; a major participant in a felony murder, although not the actual "triggerman" is eligible for the death penalty. Van Poyck v. State, 564 So.2d 1066, 1070-71 (Fla. 1990) (finding record did not support theory defendant was triggerman, but his role in felony murder confirmed death sentence was proportional). A special verdict finding the defendant was the actual triggerman in a felony murder is not required. Rouers v. State, 511 So.2d 526 (Fla. 1987) (rejecting argument death sentence unconstitutional because jury issued no finding defendant was triggerman or present at murder). Moreover, a major participant in a contract killing, although not at the murder scene is eligible for the death penalty. Archer v. State, 637 So.2d 17 (Fla.) (affirming sentence of principal in contract killing who hires gunman, wanted murder disguised as robbery, provided floor and security layout, location of cash box, detailed what shooter should say, and procured gun), cert. denied, 519 U.S. (1996).

For Evans' final challenge to his death sentence, he relies upon Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) and Jones v. United State, 526 U.S. 227 (1999) for the proposition to require separate jury findings regarding sentencing enhancements (IB 84). This issue is not preserved, as Evans did not seek such a special verdict. Steinhorst, 412 So.2d at 338 (holding "in order for an

argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below"). However, if the merits are reached, Apprendi does not invalidate Florida's sentencing scheme.

Apprendi does not apply; 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).

Based upon the foregoing, clearly, Evans' death sentence is proportional. By nine to three the jury recommended death and the judge found both pecuniary gain and CCP proven beyond a reasonable doubt. Further the judge found Evans was the "mastermind" and actual shooter in the contract killing (R 501-12). Given this, Evans' sentence is proportional and constitutionally sound.

POINT 11

FUNDAMENTAL ERROR DID NOT OCCUR DURING THE
STATE'S PENALTY PHASE CLOSING ARGUMENT
(restated).

Contending fundamental error occurred in the penalty phase, Evans points to portions of the closing claiming the State: (A) argued for non-statutory aggravators, (B) used a religious phrase, (C) used CCP to double pecuniary gain; (D) urged the jury not to consider valid mitigation, and (E) attributed imaginary statements to him. The comments were not error, but if improper, not so egregious as to constitute fundamental error.

A failure to object to improper comments and show fundamental error, precludes review. Wyatt v. State, 641 So.2d 355, 360 (Fla. 1994); Duest v. State, 462 So.2d 446, 448 (Fla. 1985) (finding challenge to argument unpreserved where neither objection nor curative requested). "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial." Bertolotti,

476 So.2d at 133. But see, Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984). "Wide latitude is permitted in arguing to a jury. [c.o.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove, 413 So.2d at 8. In arguing to a jury "...prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents...." Spencer, 133 So.2d at 731. None of the comments drew an objection, and when read in context, do not constitute fundamental error.

A. Allegation of Reliance upon Non-statutory Aggravators.

In the penalty phase, the State summarized the evolution of the case noting it was Evans' greed and murder scheme which led to Pfeiffer's death and the ability to keep it quiet for six years (T 4429). Pointing to the reference to the time between the murder and trial, Evans complains it amounts to a non-statutory aggravator (IB 85). However, the comment does not ask the jury to recommend death on this fact nor does it pertain to facts outside the record. As such, Evans obtains no assistance from Drake v. State, 441 So.2d 1079 (Fla. 1983) (rejecting as improper non-statutory aggravation judge's use of fact defendant dumped body in rural area so elements and animals could act upon it) or Miller v. State, 373 So.2d 882 (Fla. 1979) (vacating sentence where judge relied on factors of eventual parole and incurable mental illness to impose death). In both cases, the judge used non-statutory factors to impose

sentences. Here, the State merely recapped the crime. A review of the sentencing order reveals the judge did not use the six year conspiracy as aggravation.

Evans also points to the State's argument related to the fact others had rejected Connie's request to kill Pfeiffer before Evans accepted the contract (IB 87; T 4430). This was not a non-statutory aggravator, but merely an argument questioning how much weight should be given pecuniary gain. When put in context, the argument is neither improper nor fundamental error.

B. Biblical Reference

Discussing pecuniary gain, the State argued Evans' motivation was financial, and "[k]illing someone by waiting for them in the dark to ambush them for what? A handful of money? Thirty pieces of silver? . . . It doesn't get any worse than murder for hire" (T 4430). The comment did not draw an objection; considering the argument in context leads to the conclusion it did not result in a harsher sentence. Mere reference to a biblical passage is not per se reversible error. Paramore v. State, 229 So.2d 855, 860-61 (Fla. 1969), vacated in part on other grounds, 408 U.S. 935 (1972). Here, the evidence was overwhelming that the sole purpose of the killing was to get a financial benefit, electronic equipment and promised cash. The one, isolated biblical reference surely does not undermine confidence in the jury's recommendation. Also, it has not been shown to have impacted the judge's sentencing

decision. More egregious and pervasive biblical references have not required reversal. Lawrence v. State, 691 So.2d 1068, 1074 (Fla. 1997) (rejecting claim of fundamental error where prosecutor equated jury's task to "God's judgment of the wicked"); Ferrell v. State, 686 So.2d 1324, 1327-28 (Fla. 1996) (finding no fundamental error in discourse on biblical scholars' differences in translation of Ten Commandments - "Thou shalt not commit murder"); Street v. State, 636 So.2d 1297, 1303 (Fla. 1994) (finding no fundamental error where prosecutor referred to defendant as sinner which the jury could condemn); People v. Wash, 861 P.2d 1107, 1135-36 (1993), cert. denied, 513 U.S. 836 (1994) (referencing God as providing for defendant's punishment improper, but not fundamental error).

Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991), is distinguishable. The court's main concern was comments focusing on Cunningham's exercise of his constitutional rights and suggesting he abused the system and was not entitled to constitutional rights in addition to suggesting Judas Iscariot, like Cunningham, had been a good person once Id. at 1019-20. Those comments went far beyond what was referenced here. The State merely used a biblical phrase which has entered the common vernacular, becoming synonymous with getting paid for a wrongful act. In and of itself, this comment would not sway the jury to recommend a higher penalty.

c. Allegation of Improper Doubling

Without citing a case, Evans complains the State improperly doubled the pecuniary gain and CCP aggravators when it asked "How much should you weigh that aggravating factor, financial gain? It's cold, calculated, and premeditated." (T 4431) Improper doubling occurs when the aggravating factors refer to the same aspect of the crime. See, Provence v. State, 337 So.2d 783, 786 (Fla. 1976). When the State's discourse is read in context, the Court will find no fundamental error.

After discussing the facts supporting CCP, the State referred to financial gain, however, such appears to be a misstatement; it seems the prosecutor meant to ask about CCP (T 4430-31). Obviously, it **was** merely a question, not a direction to the jury that financial gain proved CCP or visa versa. Nonetheless, the jury was instructed properly on the two aggravators, and told each had to be proven beyond a reasonable doubt (T4440-42). It is presumed the jurors follow their instructions. Sutton v. State, 718 So.2d 215, 216 n. 1 (Fla. 1st DCA 1998) (finding law presumes jurors followed judge's instructions in the absence of contrary evidence). See, U.S. v. Olano, 507 U.S. 725, 740 (1993) (finding presumption jurors follow court's instructions). Furthermore, the trial court did not double these aggravators, but relied upon both properly in sentencing Evans. McDonald v. State, 743 So.2d 501 (Fla. 1999) (finding CCP and pecuniary gain in contract killing case); Downs,

740 So.2d at 506(same); Bonifay, 680 So.2d at 413(same); Mordenti, 630 So.2d at 1080 (same).

D. Allegation the State Urged Jury to Disregard Mitigation.

The State did not urge the jury to disregard valid mitigation concerning Evans' childhood difficulties or his age (IB 88-89). What the State argued was whether these factors were proven. In so doing, the State reminded the jurors of the case facts, the intricate plan Evans conceived and the fact he made choices between killing options (T 4432). When discussing Evans' childhood, the State asked the jury to look at the facts to determine whether his criminal acts undermined a finding that his childhood mitigated the crime; the State argued "A rotten childhood is a terrible thing.... How was it in this case?" (T 4432)(emphasis supplied).

In Hitchcock v. State, 755 So.2d 638 (Fla. 2000), this Court found the prosecutor's argument improper because:

the jury could have understood the prosecutor's statement that "[Hitchcock's] poverty and his living circumstance are not mitigating in this case, at all, because they don't give us any understanding of why he did what he did" to be a limiting statement as to the jury's consideration of the mitigating circumstance of Hitchcock's background.

Id, at 642 (emphasis in original). Such is not the case here. At each juncture, the State focused the jury's attention on the facts of the case and never told the jury what was or was not mitigation. The un-objected to comments **do** not undermine confidence in the jury's recommendation and are not fundamental error. Moreover, the

judge took Evans' difficult childhood and age into account in his sentencing order, thus, any error was harmless. Bertolotti, 476 So.2d at 133 (finding penalty phase "prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence" where jury recommendation is advisory only).

E. Allegation State Utilized an "Imaginary" Statement.

Evans' final challenge to the penalty phase closing argument involves the State's discussion of his offered mitigation of adjustment to prison life and his pre-trial jail behavior (T 4431-32). The comment at issue here is: "Now, let's talk about mitigation. .. He will do time well? When faced with the death penalty, "I don't make trouble until my trial, I'll get a mitigator." Do time well." (T4432). The State did not identify Evans as the speaker. In context, this comment was more of an argument than an imaginary script; it suggested Evans' had an ulterior motive for behaving well in jail, i.e. his actions were contrived to obtain a mitigator. The jury had heard Evans had been in structured homes previously, but had several incidents involving violence. The discourse did not so undermine the advisory sentence as to require a new sentencing especially where the judge found the mitigation established. Bertolotti, 476 So.2d at 133 (finding "prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence"). This Court should affirm Evans' sentence,

POINT 12

THE TRIAL COURT DID NOT ERR IN ITS WEIGHING OF APPELLANT'S OFFERED MITIGATION (restated).

In this point, Evans contends the trial court erred in its evaluation of the offered mitigation concerning his immaturity and artistic ability (IB 90-91). The State disagrees.

While aggravators must be proven beyond a reasonable doubt, Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), mitigating factors are "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990); Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990) (finding judge may reject claimed mitigator if record contains competent substantial evidence to support decision). In analyzing mitigation, the trial judge must (1) determine whether the facts alleged as mitigation are supported by the evidence; (2) consider if the proven facts are capable of mitigating the punishment; and if the mitigation exists, (3) determine whether it is of sufficient weight to counterbalance the aggravation. Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The trial court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factor, it is truly of a mitigating nature." Campbell, 571 So.2d at 419. Whether a mitigator is established lies with the judge and

"[r]eversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991), cert. denied, 503 U.S. 946 (1992); Stano v. State, 460 So.2d 890, 894 (Fla. 1984). Resolution of evidentiary conflicts is the trial court's duty; "that determination should be final if supported by competent, substantial evidence." Id. Also, the relevant weight assigned a mitigator is within the sentencing court's province. Campbell, 571 So.2d at 420. See, Alston v. State, 723 So.2d 148, 162 (Fla. 1998) (finding sentence within court's discretion where detailed order identified mitigators, and weight assigned each); Bonifay, 680 So.2d at 416 (same). A weight assignment is reviewed under the abuse of discretion standard. Cole v. State, 701 So.2d 845, 852 (Fla. 1997), cert. denied, 118 S.Ct. 1370 (1998).

Receding from Campbell in Trease v. State, 768 So.2d 1050 (Fla. 2000), this Court addressed the sentencing court's responsibility in evaluating evidence offered in mitigation and determining the weight assignment.

Trease also claims that the trial court erred in assigning "little or no" weight to a nonstatutory mitigating factor in the sentencing order. The relative weight given each mitigating factor is within the discretion of the sentencing court. See Campbell v. State, 571 So.2d 415, 420 (Fla. 1990). This Court has permitted trial courts to assign "little or no" or "little to no" weight to such factors.[c.o] These findings, however, are inconsistent with this Court's holding in Campbell that "a mitigating factor

once found cannot be dismissed as having no weight" since "little to no" or "little or no" incorporates the possibility that the mitigating factor though found has been accorded no weight. [c.o]

We hereby recede from our opinion in Campbell to the extent it disallows trial courts from according no weight to a mitigating factor and recognize that there are circumstances where a mitigating circumstance may be found to be supported by the record, but aiven no weiaht. The United States Supreme Court has held that a sentencing jury or judge may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death. [c.o] Nevertheless, these cases do not preclude the sentencer from according the mitigating factor no weiaht. We therefore recognize that while a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case.

Trease, 768 So.2d at 1055 (emphasis supplied). Trease was decided after Merck v. State, 763 So.2d 295 (Fla. 2000), and, controls.

Evans asserts his alleged immaturity should not have rejected (IB 91). Analyzing the age mitigator, the judge reasoned:

The defendant was living on his own with his co-conspirators, Donna Waddell and Sarah Thomas, when the murder was planned and carried out. Dr. Gregory Landrum testified that the defendant was functioning on an above average intelligence level. The defendant planned, prepared and shot the victim in a manner consistent with a mature adult.

(R 507). Evans points to no record evidence to show he was immature at the time of the crime. Merely because he had a difficult youth, was co-habiting with a 16-year-old girl, was unemployed and could not pay his bills does not establish he was easily led or immature. In fact, the evidence is to the contrary. Once the contract killing was agreed upon, Evans is the one who planned the manner of attack and staging of the scene, he procured the weapon, and lay in wait to kill Pfeiffer, putting two bullets in his head and one in his back (T 3375, 3386, 3411, 3674-78, 3681, 3690-92, 3694-701, 3798-800, 3803-17, 3826-39, 3841-48). Such does not show immaturity, but shows a person willing to take another's life for money in a cold, calculated, and premeditated manner. Based upon this record, the judge may not be faulted for not finding Evans immature.

Likewise, there was no error in the evaluation afforded Evans' claim of artistic ability. Here, he cites to Jones v. State, 705 So.2d 1364 (Fla. 1998) and Thompson v. State, 647 So.2d 824 (Fla. 1994), claiming the judge rejected valid mitigation. Yet these cases do not establish a per se rule that artistic ability is mitigation. In Jones, the trial court found the defendant's artistic ability of "no significance." Jones, 705 So.2d at 1365, n. 2. While the sentence was reversed on proportionality grounds, it was due to the Court's evaluation of other single aggravator cases and the presence of mental health mitigation. Id. at 1367.

Conversely, in Thompson the trial court found the defendant's artistic ability mitigation, but discounted its value. Thomsson, 647 So.2d at 826, n.2. Arguing to the trial court the value of these drawings, Evans linked them to his love for his family and his positive prognosis for prison life (R 434). The judge viewed the artwork submitted, found it not mitigating, but found mitigation related to Evans' behavior in prison and his love for his family (R 507, 509; T 4362-64). A review of the record supports this evaluation. Trease, 768 So.2d at 1055 (holding proffered mitigation may be given no weight under case facts).

Should this Court conclude the trial judge should have found Evans' proffered mitigation established, a review of the tenor of the judge's sentencing order reveals the death penalty still would have been imposed. The aggravation of pecuniary gain and CCP significantly outweigh the added effect of artistic ability and immaturity especially given the trial court's finding related to Evans' age. This Court should affirm.

POINT 13

THE JURY IS NOT REQUIRED TO MAKE UNANIMOUS
FINDINGS AS TO DEATH ELIGIBILITY (restated).

Asserting the absence of a unanimous verdict related to each aggravator makes his death sentence unconstitutional, Evans relies upon Jones v. United State, 526 U.S. 227 (1999) and State v. Overfelt, 457 So.2d 1385 (Fla. 1984), overruled on other grounds, State v. Gray, 654 So.2d 552 (Fla. 1995). The State submits

unanimity is not required in the penalty phase. This Court should affirm Evans' sentence.

At the outset, it must be noted this issue is unpreserved. Challenges to the propriety of a bare majority of jurors for the penalty phase, the use of special penalty phase verdict forms, and the adequacy of the aggravation and mitigation instruction were raised below (R 155-56, 183-87, 232, 237, and 238). These are different arguments than that raised here, as such, the matter is unpreserved and should not be addressed. Steinhorst, 412 So.2d at 338 (holding "for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below").

Assuming the merits are reached, the cases relied upon by Evans deal with the substantive crime and the elements which must be proven to establish those crimes. See, Jones, 526 U.S. at 229 (determining whether carjacking statute created three crimes or one with three penalties); Richardson v. United States, 526 U.S. 813 (1999) (agreeing "continuing series of violations" is element to be proven in the substantive offense of "continuing criminal enterprise" crime) Overfelt, 654 So.2d at 1387 (finding possession of firearm element of crime to be proven). The issue before this Court deals with the level of unanimity necessary in the penalty phase of a capital case. The penalty phase is a pure sentencing matter and resolution of this issue rests with the judge Walton v.

Arizona, 497 U.S. 639 (1990); Hildwin v. Florida, 490 U.S. 638 (Fla. 1989) ; and Spaziano v. Florida, 468 U.S. 447 (1984).

Distinctions between elements of a substantive offense and capital sentencing were addressed in Jones and quoted by Evans (IB 92-94).

Noting constitutional challenges to Florida's capital sentencing have been rejected repeatedly the United States Supreme Court opined:

Walton's first argument is that every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings. Contrary to Walton's assertion, however: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." Clemons v. Mississippi, 494 U.S. 738, 745, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725 (1990).

We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. Hildwin v. Florida, 490 [497 U.S. 648] U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In Hildwin, for example, we stated that "[t]his 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," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not

require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 640-641, 109 S.Ct., at 2057.

Walton, 497 U.S. at 647-48. Based upon this, there is no constitutional impediment to Florida's capital sentencing procedure and no need for juror unanimity for aggravators, mitigators, or the ultimate penalty, This Court should affirm the sentence imposed.

POINT 14

FINDING BOTH PECUNIARY GAIN AND CCP DID NOT CONSTITUTE IMPROPER DOUBLING (restated).

Seeking to have his death sentence vacated, Evans claims the trial court doubled the pecuniary gain and CCP aggravators improperly (IB 97). The State disagrees.

This issue was not raised below. It is unpreserved and should not be addressed here. Steinhorst, 412 So.2d at 338 (finding "for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below"). Should the Court reach the merits, it will find the record establishes both aggravators were proven beyond a reasonable doubt and were not doubled improperly.

Assessing pecuniary gain, the judge pointed to the fact Connie was seeking to hire someone to kill Pfeiffer. Toward this end, Connie gave Evans money to buy a knife and later delivered a television, camcorder, and VCR to him. Also promised was a portion of the insurance proceeds. It was the trial judge's opinion "that

the defendant's only motivation to kill Alan Pfeiffer was for pecuniary gain." (R 503-04). In assessing CCP, the judge found Evans "deliberately planned and carried out the execution style murder of Alan Pfeiffer at the request of Connie Pfeiffer and with the assistance of Donna Waddell and Sarah Thomas." CCP was based upon the fact Evans originally planned to use a knife then altered the plan to use a gun and went with Waddell to steal a gun with bullets, and test fired the weapon. Evans planned the conspirators' alibis, and during the staging of the scene, wore gloves so his fingerprints would not be found. He caused the trailer door to be left unlocked, disabled the lights, and turned up the stereo to mask the gunshots, and lay in wait for Pfeiffer to return home. Evans had Connie call Pfeiffer to ensure he returned home at the appropriate time. As Pfeiffer entered, Evans shot him in the back and twice in the head without a struggle. Meeting Waddell and Thomas afterward, they returned to the fair to perfect the alibi. Evans tossed the murder weapon into a canal. The trial court found this established CCP (R 505-06).

The finding of pecuniary gain and CCP in the same case is appropriate. McDonald v. State, 743 So.2d 501 (Fla. 1999) (finding CCP and pecuniary gain in contract killing case); Downs v. State, 740 So.2d 506 (Fla. 1999) (same); Bonifay v. State, 680 So.2d 413 (Fla. 1996) (same); Mordenti v. State, 630 So.2d 1080 (Fla. 1994). Improper doubling occurs when the aggravating factors refer to the

same aspect of the crime. See, Provence v. State, 337 So.2d 783, 786 (Fla. 1976). Here, the pecuniary gain aggravator related to the benefits Evans received or anticipated receiving. CCP related to the manner in which the killing was planned and accomplished. Neither relate to the same aspect of the crime. Both were proven and relied upon properly in sentencing. The death penalty is proportionate and should be affirmed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellee requests respectfully this Court AFFIRM Appellant's conviction and sentence below.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by courier, to: GARY CALDWELL, ESQ., Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on December 28, 2000.



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