

IN THE SUPREME COURT OF FLORIDA

JOEL DIAZ,

Appellant,

v.

Case No. SC01-0278

Lower Tribunal No. 97-3305CF

STATE OF FLORIDA,

Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
Telephone: (813) 801-0600
Facsimile: (813) 356-1292

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

<u>NO. :</u>	<u>PAGE</u>
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
SUMMARY OF ARGUMENT	27
ARGUMENT	30
ISSUE I	30
APPELLANT’S CLAIM THAT THE CIRCUMSTANTIAL EVIDENCE SUPPORTS HIS TESTIMONY THAT THE VICTIM STRUCK HIM IN THE FACE DURING AN ALTERCATION IN THE GARAGE IS WITHOUT MERIT, AND EVEN IF APPELLANT’S THEORY IS SUPPORTED BY THE EVIDENCE, THIS DOES NOT PRECLUDE THE TRIAL COURT FROM FINDING THAT THE SUBSEQUENT MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER AND THAT IT WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.	
ISSUE II	41
THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, AND THE EVIDENCE SUPPORTS THE TRIAL COURT’S FINDING OF THIS AGGRAVATOR.	
ISSUE III	54
THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION AND THE EVIDENCE SUPPORTS THE TRIAL COURT’S FINDING OF THIS AGGRAVATOR.	
ISSUE IV	68

APPELLANT'S DEATH SENTENCE IS PROPORTIONAL.

CONCLUSION 72
CERTIFICATE OF SERVICE 73
CERTIFICATE OF FONT COMPLIANCE 73

TABLE OF CITATIONS

<u>NO.:</u>	<u>PAGE</u>
<u>Almeida v. State,</u> 748 So. 2d 922 (Fla. 1999)	69
<u>Arbelaez v. State,</u> 626 So. 2d 169 (Fla. 1993)	70
<u>Bates v. State,</u> 750 So. 2d 6 (Fla. 1999), <u>cert. denied,</u> 531 U.S. 835 (2000)	70
<u>Bell v. State,</u> 699 So. 2d 674 (Fla. 1997)	60-62
<u>Blackwood v. State,</u> 777 So. 2d 399 (Fla. 2000)	70
<u>Bonifay v. State,</u> 626 So. 2d 1310 (Fla. 1993)	45
<u>Cardona v. State,</u> 641 So. 2d 361 (Fla. 1994)	71
<u>Cheshire v. State,</u> 568 So. 2d 908 (Fla. 1990)	45
<u>Cochran v. State,</u> 547 So. 2d 928 (Fla. 1989)	36
<u>Cooper v. State,</u> 492 So. 2d 1059 (Fla. 1986)	51
<u>Cummings-El v. State,</u> 684 So. 2d 729 (Fla. 1996)	64
<u>Dennis v. State,</u> 27 Fla. L. Weekly S101 (Fla. Jan. 31, 2002)	64
<u>Douglas v. State,</u> 575 So. 2d 165 (Fla. 1991)	64

<u>Farinas v. State,</u> 569 So. 2d 425 (Fla. 1990)	46
<u>Finney v. State,</u> 660 So. 2d 674 (Fla. 1995)	36
<u>Ford v. State,</u> 802 So. 2d 1121 (Fla. 2001)	57
<u>Guzman v. State,</u> 721 So. 2d 1155 (Fla. 1998)	46
<u>Hamilton v. State,</u> 678 So. 2d 1228 (Fla. 1996)	50
<u>Henry v. State,</u> 649 So. 2d 1366 (Fla. 1994)	42
<u>Howell v. State,</u> 707 So. 2d 674 (Fla. 1998)	60, 61
<u>Jackson v. State,</u> 648 So. 2d 85 (Fla. 1994)	64
<u>Larkins v. State,</u> 739 So. 2d 90 (Fla. 1999)	70
<u>Lawrence v. State,</u> 698 So. 2d 1219 (Fla. 1997)	64
<u>Maulden v. State,</u> 617 So. 2d 298 (Fla. 1993)	64
<u>McCray v. State,</u> 416 So. 2d 804 (Fla. 1982)	66
<u>Morrison v. State,</u> 27 Fla. L. Weekly S253, S259 (Fla. Mar. 21, 2002) . . .	45, 48
<u>Occhicone v. State,</u> 570 So. 2d 902 (Fla. 1990)	66
<u>Phillips v. State,</u> 476 So. 2d 194 (Fla. 1985)	50, 51
<u>Pooler v. State,</u>	

704 So. 2d 1375 (Fla. 1997)	46, 49
<u>Preston v. State,</u> 607 So. 2d 404 (Fla. 1992)	46
<u>Provenzano v. State,</u> 497 So. 2d 1177 (Fla. 1986)	58, 59, 61
<u>Richardson v. State,</u> 604 So. 2d 1107 (Fla. 1992)	64
<u>Rodriguez v. State,</u> 753 So. 2d 29 (Fla.), <u>cert. denied,</u> 121 S. Ct. 145 (2000)	54
<u>Rogers v. State,</u> 511 So. 2d 526 (Fla. 1987)	63
<u>Santos v. State,</u> 591 So. 2d 160 (Fla. 1991)	64
<u>Spencer v. State,</u> 645 So. 2d 377 (Fla. 1994)	64
<u>Spencer v. State,</u> 691 So. 2d 1062 (Fla. 1996)	69
<u>Steinhorst v. State,</u> 412 So. 2d 332 (Fla. 1982)	41
<u>Sweet v. State,</u> 624 So. 2d 1138 (Fla. 1993)	61, 65
<u>Tillman v. State,</u> 591 So. 2d 167 (Fla. 1991)	69
<u>Walker v. State,</u> 707 So. 2d 300 (Fla. 1997)	64
<u>Williams v. State,</u> 437 So. 2d 133 (Fla. 1983)	71
<u>Wyatt v. State,</u> 641 So. 2d 1336 (Fla. 1994)	46
<u>Zakrzewski v. State,</u>	

717 So. 2d 488 (Fla. 1998) 64, 69, 71

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE

On November 18, 1997 the grand jury returned a three count indictment charging Appellant with (1) the premeditated murder of Charles Shaw; (2) the attempted first degree murder of Lissa Shaw; and (3) aggravated assault with a firearm upon Roy Isakson. (V1:R.7-8). Appellant entered a not guilty plea and subsequently filed a notice of intent to rely on an insanity defense. (V1:R.10; V2:R.32-33). The court entered an order appointing three confidential mental health experts to assist defense counsel in the preparation of his defense (Dr. Paul Kling, Dr. Ricardo Rivas, and licensed clinical social worker Maria Ortiz) as well as an order appointing two experts to examine Appellant to determine whether he was insane at the time of the crime (Dr. Bruce Crowell and Dr. Richard Keown). (V1:R.11-12, 16-18; V2:R.19-21; V3:R.45-47).

The case proceeded to jury trial on July 25-28, 2000 before the Honorable Judge Thomas S. Reese. At the conclusion of the trial, the jury returned a guilty verdict as charged on all three counts. (V4:R.84-86).

After conducting the penalty phase on October 10, 2000, the jury returned an advisory verdict of 9-3 recommending the death penalty. (V5:R.138). The court conducted a Spencer hearing on November 3, 2000, and on January 29, 2001, the court rendered an

order imposing the death penalty for the murder of Charles Shaw. (V5:R.168-97, 203-16). The court also imposed a consecutive 151 month sentence for the attempted murder of Lissa Shaw and a consecutive five year sentence for the aggravated assault conviction, each with a three year minimum mandatory sentence for the use of a firearm. (V5:R.196-97). Appellant filed a notice of appeal on February 1, 2002.

STATEMENT OF THE FACTS

Appellant and Lissa Shaw were involved in a relationship for about two years. (V2:T.282). At the beginning of their relationship, Lissa lived with her parents in a house on Dresden Court. The house was in a gated community that had remote-controlled gates. (V2:T.293). Lissa and her daughter from a previous marriage eventually moved into a trailer with Appellant. (V2:T.282). Lissa testified that she had an on and off rocky relationship with Appellant. (V2:T.283). She characterized Appellant as a very jealous and controlling person. (V2:T.283).

About two months before the murder, Lissa left Appellant and moved back in with her parents.¹ Lissa was the one that actually made the decision to move, but it was "sort of a joint-type thing." (V2:T.284). After she moved back in with her parents, Appellant continued to try to have contact with her. He called her and he tried to see her in person. She did not want to have any contact with him. (V2:T.285). After she moved out, they talked a "handful" of times. The last time she talked to Appellant was September 17 or 18, 1997. After that date she chose not to talk to him anymore. (V2:T.308-09).

¹Between the time she first moved in with Appellant and the end of August, 1997, she moved out three times. (V3:T.306).

On the morning of October 28, 1997, Lissa was going to work. She was afraid and "felt that things were going on" so she had a pattern that she did every morning. (V2:T.285). She went out into the garage and got in her car. She drove an Iroc Camaro that she kept parked in the garage because she didn't feel safe to go outside.² (V2:T.285). Lissa put all her stuff in the car, locked her door and leaned over to lock the passenger door, and then hit the garage door opener to open the garage door. She caught a glimpse in the rear view mirror that somebody had come underneath the door so she reached for the door to make sure it was locked and then sat back in the seat. (V2:T.286).

When she turned around, Appellant was standing at her window. He had a revolver pointed right at her head. (V2:T.286-87). Appellant kept telling her to get out of the car. The window was up and they were factory tinted. Lissa was telling him to "please don't do this, please don't do this, don't hurt me." After she pled with him and she saw it wasn't working she told him to hold on and let her get her stuff. (V2:T.287). Lissa leaned down like she was getting stuff underneath her feet and reached over and grabbed the gear shift and put the car in reverse. She hit the gas and took off.

²Lissa testified that she was afraid of Appellant because he had beaten her up on more than one occasion. (V2:T.314).

(V2:T.287-88). She didn't know whether it was at that exact time or when Appellant heard the gear go in that he started shooting. She recalled hearing three shots. (V2:T.288).

At the time, she didn't know that she had been hit by any bullets. There was an island right behind their driveway and Lissa struck the island when she backed out of the garage. She looked out, put the car in gear and drove out. Lissa hesitated at the stop sign and turned to leave to get away. She looked in her side view mirror and saw Appellant on the grassy area like he was coming towards her. (V2:T.289-91). The last thing Lissa saw when she was leaving the house was Appellant in the front yard with the gun pointed straight at her father while her father was about five feet away. (V2:T.303). As she was driving away from her street, Lissa saw a man jogging and she slowed down to tell him that he needed to call the police because there was somebody in her house that had a gun and there were still people left in the house. (V2:T.291).

Lissa drove herself to the hospital and realized when she got there that she had been shot. Deputy Denise Wohmer responded to the hospital and noted the gunshot wounds to Lissa's neck and shoulder area. (V2:T.360). Lissa told the deputy that the last thing she saw upon driving away was Appellant chasing her father across the yard with a gun.

(V2:T.361-63).

Barbara Shaw lived in the house at Dresden Court with her husband, Charles, her daughter, Lissa, and Lissa's four-year-old daughter, Taylor. (V2:T.240-41). At about 6:30 in the morning on October 28, 1997, Barbara was lying in bed when she heard her daughter Lissa in the kitchen area getting ready to leave for work. She heard Lissa go through the laundry room into the attached garage. (V2:T.242-43). Barbara heard Lissa get into her car, slam the door, start the engine and open the garage door. The next thing she heard were five gunshots. (V2:T.243).

Charles Shaw was half asleep when Barbara shouted at him that it sounded like gunshots were fired after Lissa had just went out the door to work. (V2:T.246). Mr. Shaw sat up for a minute to orient himself on the side of the bed and then he jumped up and ran outside dressed only his underwear. (V2:T.246-47). A couple of minutes elapsed before Barbara heard her husband's voice. He was talking very softly and was saying, "Calm down, put it down, come on, calm down, take it easy." (V2:T.247). Charles was not talking to her but at that time, she did not know who he was talking to. Mrs. Shaw, a quadriplegic, was unable to get out of bed to do anything, but she managed to roll over and see Appellant standing there with

a gun. (V2:T.247-48).

Appellant came through the bedroom door and stood at the side of the chest of drawers that is closest to the door. Charles was standing on the other side of the chest of drawers, closer to the bathroom door. (V2:T.251). Appellant was standing with the gun in his hands pointed straight out, directly across the chest of drawers at her husband and the gun was six to eight inches from his chest. (V2:T.251). Her husband was pleading with Appellant to put the gun down and to calm down, but Appellant did not do this, he pulled the trigger once and the gun just clicked. (V2:T.251-52). Apparently, there was no shell. Mrs. Shaw heard her husband audibly sigh and observed him visibly relax, like "thank God there was nothing in the gun." (V2:T.252-53).

Barbara Shaw testified that Appellant was "very fast. He had the gun in his left hand and he flipped it open so the cylinder fell out, tipped it up so the shells fell out and reloaded." (V2:T.253). When Mr. Shaw realized Appellant was reloading, he ran to the bathroom because there was no place else to go. There was no way for him to get out of the bathroom. Appellant followed him in immediately. Her husband stopped in front of the shower and he turned around and he looked at Appellant and he put his hand up and said, "Oh, man.

Why you got to do this?" (V2:T.253). Appellant pulled the trigger three times, one after the other. The gun fired and Mrs. Shaw saw her husband's knees buckle and he grabbed his midsection and fell over face first onto the floor. (V2:T.253-54). During this incident, Mrs. Shaw never saw her husband make any overt movements toward Appellant. (V2:T.277).

After Appellant shot Mr. Shaw three times, he came out into the bedroom beside Barbara and she screamed at him, "Why did you do this, why did you do that?" Appellant said he deserved to die. (V2:T.254). Barbara testified that she thought Appellant was out in the bedroom with her for about 30-60 seconds but she was so terrified she was not certain of the time. (V2:T.254-55). She thought Appellant was going to kill her because she saw what he had done to her husband. All of a sudden Appellant turned around and went back into the bathroom and stood over her husband. (V2:T.255). He walked up to where her husband's body was laying and he bent over him and aimed the gun at her husband's lower back and pulled the trigger. He moved his arm further toward his left and pulled the trigger again. Barbara could not see what Appellant was pointing at when he pulled the trigger the second time; she could only see the span of the movement of his arm. She testified that Mr. Shaw's head was in that direction. (V2:T.25556).

Appellant came back out to Mrs. Shaw and told her that he had never been in any trouble before and she told him that he was now. He said that "if that bitch of a daughter of yours, if I could have got her, I wouldn't have had to kill your husband." (V2:T.256). Appellant was in the Shaws' house for between 45 minutes and an hour after he shot Mr. Shaw. He spent time talking to her. He was all over the house, checking out the rooms. She heard him go into her daughter's and granddaughter's room. She heard him make a phone call which Mrs. Shaw assumed was to his mother because he was speaking in Spanish and she knew his mother did not speak English. (V2:T.256-57).

Appellant was walking through the house, passing the gun from one hand to the other and he would load and unload the gun and put it underneath the bed. He did that three or four times. (V2:T.258). At one time he told her he wanted to shoot himself, that he should just "blow my brains out." She told him that she thought that would just be one more senseless killing. (V2:T.258). He also told Barbara that her husband was prejudiced and that he deserved to die. He told her she was probably prejudiced too. (V2:T.270).

Delores Isaakson, a neighbor of the Shaws, testified that she was about to go jogging at about 6:30 a.m. on October 27,

1997, when she came out of her house and noticed a gentleman wearing dark clothing standing between the Shaws' garage door and the back of their van. (V2:T.317-18). The van was parked facing the street. The individual was between the closed garage door and the back of the van. Mrs. Isaakson wasn't sure who the person was, she hadn't seen him before and there were no other cars around. She testified that she thought the person saw her and then he walked around to the passenger side of the van so she could not see him anymore. (V2:T.318-21).

Mrs. Isaakson became concerned and went inside and mentioned to her husband, Roy, that there was somebody outside who was kind of suspicious. Her husband was just waking up and was in bed. He was a retired police lieutenant and she asked him to go and investigate. (V2:T.321). Then, she heard squealing of tires and two shots. She called Barbara Shaw, but did not get a response. Both Delores and Roy Isaakson went outside and walked up to the Shaws' house. They observed the garage door open and they could see that the door leading into the laundry room was also open, with a figure moving back and forth in the doorway. (V2:T.323-24).

Roy Isaakson testified that when he saw the individual pacing back and forth, he thought it was unusual. (V2:T.329). Mr. Isaakson went into the garage and called out for Charles

Shaw. Appellant stepped into the garage, raised a black, snubnose revolver and pointed it at his face and said, "Get the fuck out of here." (V2:T.329-30). Mr. Isaakson was concerned for his life. He said, "You've got it" and proceeded to leave. Appellant's demeanor was that he was somewhat agitated and Mr. Isaakson testified that Appellant did not appear to be intoxicated. (V2:T.330-31).

Patricia Hadgehorn, another neighbor that lived on Dresden Court, testified that at approximately 6:50 a.m. she heard five gunshots. (V2:T.338-39). She knew exactly how many shots were fired because she counted them off on her fingers. Mrs. Hadgehorn had just been on a jury two days earlier and she was intent on listening to all the testimony and it was still with her. She stated that all five shots were fired consecutively. (V2:T.339-40).

After hearing the five shots, Mrs. Hadgehorn heard tires screeching and she called her husband to come out on to the lanai. She heard tires screeching and assumed that the car turned the corner and it had run up on an embankment. (V2:T.340-41). She then heard what she thought was the car backing down like tires rolling down over the curb and then the car sped away and that is when she and her husband saw the car leave. She recognized it as Lissa Shaw's blue car. (V2:T.341).

Mrs. Hadgehorn left and started walking towards the Shaws' house when she heard Roy Isaakson in his driveway yell at her to get back in her house, which she did. (V2:T.342-43).

Deborah Wilson lived in the same neighborhood and left her house the morning of October 28, 1997 to go walking at 6:10 a.m. (V2:T.344). On her way back from her walk, she heard five or six gunshots. After the gunshots, she heard tires squealing and saw a car come around the corner at a very rapid pace and hit the curb. (V2:T.346). After the car drove away, Ms. Wilson saw Appellant come from the corner and go back into the street. She went behind the trees toward the berm hedge to take cover. She observed Appellant going backwards into the street with his hands behind his back. She could not see if the person had anything in his hands. (V2:T.349). Mr. Shaw, dressed only in his underwear, came out and stood on the corner. He was pointing his finger at Appellant, who was standing in the street. She could not hear what they were saying. During this time she did not see Appellant remove his hands from behind him when Mr. Shaw was there. (V2:T.349-50). She saw Mr. Shaw leave.

Ms. Wilson saw Appellant approach a green electrical or telephone box. He took his hands from behind him and he laid something on top of the box. Then he reached in his right

pocket, pulled something out of his pocket, reached back on top of the box, held it and did a motion like he was loading a gun. (V2:T.351-53). She could not tell what the object was that was on top of the green box.

Officer Roger Turner of the Lee County Sheriff's Office was the first law enforcement officer to arrive at the Shaws' residence. He arrived five minutes after the dispatch call came in at 6:40 a.m. (V2:T.365-66). Officers established communications with someone inside the residence and about an hour later, Appellant exited the house through the garage. Officer Turner told Appellant to get down on his knees. He took Appellant down "to his face" and shook him down for weapons. (V2:T.371-72). Appellant did not have any weapons on his person.

Richard Joslin, a deputy in the forensic unit, entered the residence immediately after Appellant was apprehended and took photographs before anything was disturbed. (V3:T.388-91). After taking photographs, he began to collect evidence. Officer Joslin collected six spent .38 shell casings from the master bedroom and located a .38 Rossi five-shot revolver from under the bed with six live cartridges next to the gun. (V3:T.392-99). Inside the garage, Officer Joslin located a pack of Newport cigarettes. Outside of the residence, he located some

cigarette butts and broken glass with window tint attached to it. (V3:T.404).

Officer Joslin also processed Lissa Shaw's vehicle once it was secured at the sheriff's warehouse. Two projectiles were recovered from the steering wheel of the vehicle. One was a portion of a projectile and the other was a whole projectile. (V3:T.405-09). Projectiles were also recovered from the right front passenger door of the vehicle. (V3:T.412)

On cross-examination, defense counsel questioned Officer Joslin regarding blood samples taken from the scene. Officer Joslin recovered blood samples from the foyer floor near the entrance of the master bedroom; from the floor near the entrance to the northeast bedroom-one of the bedrooms on the other side of the house; from the inner side of the right door to the northeast bedroom; from a child's drawing paper that was found on the dresser in the northeast bedroom; from the large pool of blood in the master bathroom where the victim had laid; from a cutting board near the southwest corner of the master bedroom; from a man's shoe on the floor near where the victim's guns were;³ from the east wall of the master bath, opposite the

³Barbara Shaw testified that they had guns in the house but they had just come the previous Friday. They were hunting weapons that were broken down and packaged from when the Shaws had moved two and half years previous. (V2:T.252). Officers located the two guns and they were packaged as indicated by Mrs.

shower; and from the southeast corner of the kitchen counter near the phone; and from the phone in the kitchen. (V3:T.415-17). Joslin did not test the blood, but sent it to FDLE for testing. (V3:T.417-19).

When crime scene investigator Robert Walker testified about assisting Officer Joslin in collecting the evidence, defense counsel questioned him about the blood samples sent to FDLE. (V3:T.437-38). The State objected to the testimony regarding the admissibility of the FDLE results on the blood samples because defense counsel did not lay the proper foundation for its admissibility and there needed to be a Frye hearing before any DNA evidence could be introduced. (V3:T.438-39). The trial court sustained the objection. (V3:T.439).

Crime scene investigator Walker traced ownership of the firearm and determined that the gun was purchased by Appellant from Rick's Pawn Shop in Fort Myers, Florida. (V3:T.436-37). Phillip Primrose worked at Rick's Pawn Shop in October, 1997. On October 6, 1997, Appellant came in and purchased a Rossi .38 revolver. He described Appellant as eager to purchase a firearm. (V3:T.441-42). Appellant was not able to take possession of the gun because of the three-day cooling off

Shaw. Neither of the weapons appeared to be opened and there were no fingerprints on the weapons or the vinyl case. (V3:T.413-15).

period. Three days later, Appellant came in to pick up the firearm but he was unable to because he had only a "conditional approval." (V3:T.443). Mr. Primrose told Appellant that he would call FDLE in three to five days to see if he was approved. During this time, Appellant continued to call him about every day to see if he was approved. Appellant was irate because there was a delay and wanted to cancel the transaction. (V3:T.444). Mr. Primrose told him they could not cancel the transaction. Finally, on October 16, 1997, Appellant was able to take the gun with him. (V3:T.445).

Carol Huser, medical examiner for Lee County, testified that she conducted an autopsy on Charles Shaw on October 28, 1997. She noted five gunshot wounds, but was unable to testify to the sequence in which the victim received the wounds. (V3:T.450-55). Mr. Shaw suffered a painful flesh wound to the right calf, and two non-fatal wounds to the abdomen, each going in different directions. (V3:T.456-58). The medical examiner also noted a wound to the upper chest that entered at a shallow angle near the victim's nipple. This wound broke the third rib and perforated the victim's lungs and heart. A person could survive with such a wound for a second to perhaps a minute or two and would become unconscious "very quickly." (V3:T.455-56, 464). The last gunshot wound noted was to the back of the victim's

head. There was some stippling at the entrance of this wound which she did not observe on any of the other wounds. It went through the brain and the brain stem and lodged against the skull. The injury was instantly fatal. (V3:T.459-60).

The State called Appellant's brother, Jose Diaz, to testify regarding Appellant's actions immediately prior to the murder. In October 1997, Jose had only been living with his brother for a month or less. (V3:T.467-68). On October 27, 1997, Appellant asked Jose for a ride to a friend's house the next morning. Appellant wanted Jose to take him about 5:30 the next morning. (V3:T.469). The next morning, Appellant drove Jose and his girlfriend to the Shaws' gated community. Jose did not notice that Appellant had any guns with him or any bullets in his pockets. (V3:T.471).

Although Appellant was not a smoker, Jose testified that he had started smoking Newport cigarettes lately. (V3:T.473-74). Jose did not recall if Appellant was smoking Newports that morning or not. There were gates at the place where they stopped the car. Appellant got out of the car and Jose's girlfriend got in the other side and she drove Jose to work. (V3:T.474). Jose testified that law enforcement officers came

to their house a couple of days later with a search warrant.⁴ They took some things from the house and located a letter Appellant wrote to Jose. The letter stated:

Jose First I want to apologize for using you or to lieing to you to take me where you did I felt so bad but there was no other way. Theres no way to explain what I have to do but I have to confront the woman who betrayed me and ask her why because not knowing is literly killing me. What happens then is up to her.

If what happen is what I predict than I want you to tell our family that I love them so much. Believe me I regret having to do this and dieing knowing I broke my moms heart and my makes it even harder but I cant go on like this it's to much pain. Well I guess that all theres to say I love you all.

Joel

P.S. Someone let my dad know just because we werent close doesn't mean I don't love him because I do.

(V3:R.62).

After the State rested its case-in-chief, defense counsel moved for a judgment of acquittal which the trial court denied. (V3:T.508-13). The State then orally moved to prevent a defense witness, Dr. Kling, from testifying about DNA results or from testifying about any struggle between Appellant and Charles Shaw. (V3:T.523-31). The trial judge sustained the objection as to the DNA results, but allowed Dr. Kling to testify about

⁴Officer Chiapetta, the agent that served the search warrant, testified that it was served the day of the murder. (V3:T.498-99).

any struggle. (V3:T.531)

The defense called Dr. Kling, a clinical psychologist, to testify about his examination of Appellant. Dr. Kling administered three personality tests to Appellant: the Rorschach Inkblot, the Minnesota Multiphasic Personality Inventory II, and the Millon Multiaxial Clinical Inventory, Version II. (V3:T.539-40). Based on his interview of Appellant and the tests results, Dr. Kling initially opined that Appellant was sane at the time of the crime. However, after reviewing the depositions of Lissa and Barbara Shaw and Deborah Wilson, the doctor changed his mind and reported that Appellant was insane at the time of the murder. (V3:T.542-44). Dr. Kling testified that Appellant suffered from a defect of reason resulting from a disease of the mind. (V3:T.545). Dr. Kling diagnosed Appellant with both impulse control disorder and intermittent explosive disorder. (V3:T.570). Dr. Kling thought that Appellant was aware of what was happening on the day of the crime but he did not know what the implications were. (V3:T.545). In an abstract and general sense, Appellant knew right from wrong, but he was not able to distinguish between right and wrong on that date as other people would. (V3:T.546).

On cross-examination, Dr. Kling admitted that he was unaware

that Appellant had procured the firearm several days before the murder and that he had called the pawn shop daily inquiring about the gun. Dr. Kling was also unaware that Appellant had purchased bullets, written a note to his brother telling him what he was planning on doing, and walked to the victims' residence from where he was dropped off. (V3:T.552-55). The doctor admitted that these were facts which may have been important in his ultimate conclusion that Appellant was legally insane. (V3:T.554-55).

Appellant testified that he met Lissa Shaw in 1995 and dated her for about a year before they moved in together. (V3:T.577). Appellant met Barbara and Charles Shaw but avoided them because they did not like him. According to Appellant, once Lissa moved out, he continued to have contact with her and saw her often. Sometime in October, 1997, Lissa completely broke off all communication. (V3:T.581-82). Appellant became very depressed.

Prior to October 28, 1997, Appellant went to Rick's Pawn Shop and purchased a gun because his place had been broken into and Lissa's father had a couple of tools in the patio and he did not know if he was involved. (V3:T.583). He acknowledged that he went into the pawn shop angry on the third day, but testified that he was angry because his place was being broken into and the pawn shop would not give him an answer. He told the pawn

shop to just give him his money back. (V3:T.584).

The night before the incident, on October 27, he came home very late at night and started drinking and got depressed. Before Jose went to bed, Appellant asked him for a ride to a friend's house the next morning. Before Appellant left the house on October 28, he wrote Jose a letter. Appellant testified that he did not plan on shooting or killing anyone. (V3:T.586-87). Appellant had the gun with him. He usually kept the gun in the house but since his brother was living with him and he would have the kids over, Appellant started keeping it in the car. (V3:T.588).

When they were about to leave his residence, Appellant remembered the gun being in the car and so when his brother was not looking, he put the gun on because he did not want to leave it in the car because his brother was going to have the car the rest of the day. (V3:T.588). He believed the gun was loaded because he always kept it loaded and there was also a round in the glove compartment. (V3:T.589). Appellant claimed that it was just a coincidence that he took the gun with him. (V3:T.592). If the gun at been inside the house he would have never of taken it. However, since it was in the car and he did not want to leave it there, he took it with him when he arrived at Cross Creek Estates. (V3:T.589, 592).

After walking to Lissa Shaw's house and waiting outside her garage for about ten minutes, the garage door went up. Appellant approached the car and told Lissa that he needed to talk to her. (V3:T.590-91). She did not want to open the door and he kept telling her that all he wanted to do was talk to her. He went in front of the windshield and pulled the gun out and pointed it at her, trying to scare her. When he realized that he scared her, he put the gun down and went back to the driver's side and kept asking her to talk to him. (V3:T.591). She put the car in reverse and Appellant was standing so close to the car that when she put it in reverse, the car almost ran over him and that's what "acted" him to shoot. (V3:T.591-92). Appellant fired more than once because it was just his "bad reaction" when she threw the car in gear and the car backed up and almost ran him over. (V3:T.592).

Appellant first saw Charles Shaw when he came out of the house. Appellant testified that Mr. Shaw was running toward him and forced him off of the sidewalk into the road. (V3:T.593). They argued first and then they fought. (V3:T.594). Appellant wanted to leave, but Mr. Shaw did not want him to leave. Mr. Shaw pushed him back into the yard because Appellant wanted to walk away. When they were in the garage they got into a fight again and Appellant testified that Mr. Shaw struck him with

something. He didn't know if it was his fist or an object but Mr. Shaw hit him and that's "when I lost it." (V3:T.594).⁵

After Mr. Shaw hit him, Appellant lost control and chased him into the house. Appellant does not remember what happened after they went into the house, but has flashbacks of certain events. (V4:T.596-98). Appellant testified that he definitely did not stop and load the gun inside the residence; Mr. Shaw would not have let him. (V4:T.598). Appellant stated that he fired all five shots at once and he did not leave the bathroom and then go back in and fire more shots. After the shooting, Appellant unloaded and reloaded the gun because he was panicking and in shock. (V4:T.599-600).

On cross-examination, Appellant testified that he got into a scuffle with Charles Shaw outside the house. (V4:T.615). Mr. Shaw tried to corner Appellant between the van and the garage door. (V4:T.617). According to Appellant, Mr. Shaw attacked him in the yard and in the garage. (V4:T.618). Mr. Shaw was not able to wrestle the gun away from him but that was what he was trying to do. (V4:T.619). The last thing Appellant remembered was Mr. Shaw hitting him with his hands or a tool and

⁵Defense counsel introduced into evidence Appellant's booking photograph, defense exhibit #1, which purportedly shows a cut on one side of Appellant's face and a birthmark on his other cheek. (V3:T.595).

that is what caused Appellant to chase Mr. Shaw. (V4:T.619-20). Appellant "lost it" after Mr. Shaw hit him. (V4:T.620).

Appellant testified that once they were in the bedroom, Appellant fired the gun and there were bullets in it. He did not reload the gun. (V4:T.623-24). After Mr. Shaw went into the bathroom, Appellant followed him in. Appellant shot Mr. Shaw a couple of times when he fell down. Appellant kept shooting. After Mr. Shaw was down on the floor, Appellant could have kept shooting and struck Mr. Shaw in the back of his head. Appellant guessed his hand was following Mr. Shaw while he was going down and the whole thing was a bad reaction. (V4:T.625-26). Appellant asserted that Mrs. Shaw lied when she testified that Appellant went back into the bathroom a second time to shoot her husband. (V4:T.608).

After the defense rested and renewed its motion for judgment of acquittal which the trial judge again denied, the State called psychiatrist Dr. Keown as a rebuttal witness. (V4:T.639). At the outset of his testimony, defense counsel moved in limine to prevent the doctor from referencing a restraining order Appellant had against him. The trial judge granted the motion. (V4:T.643).

Dr. Keown interviewed Appellant for about two hours and administered an Anger Styles Quiz which consisted of 30

true/false questions regarding anger. Appellant's answers indicated that he has a lot of very deep anger or hate and he has trouble letting go of it. He may spend time thinking about vengeful things or actions. (V4:T.646-47). Dr. Keown also gave Appellant a test for attention deficit hyperactivity disorder. The way Appellant scored indicated there was some possible mild to moderate degree of attention deficit disorder. The test results indicated a tendency to be impulsive and to not necessarily be very assertive at times. (V4:T.648).

Diagnostically, Dr. Keown saw Appellant at the time as suffering from an adjustment disorder with depressed mood. The depression was situational and most likely due to his current legal situation and his incarceration. It is not unusual for people to be depressed. Dr. Keown believed that Appellant did not seem to fit the pattern of intermittent explosive disorder. (V4:T.648-50). There was also a possibility of dependent personality features and passive/aggressive features. Appellant had no history of medical problems, no neurological problems, and no seizures or head injuries. Appellant reported that the night before the murder he had been drinking Crown Royal, but he did not feel drunk. (V4:T.652).

Dr. Keown opined that Appellant was sane at the time of the offense and was able to appreciate what he was doing and he knew

the difference between right and wrong at the time of the commission of the crime. (V4:T.653). In forming this opinion, Dr. Keown noted that the commission of the crime took a lot of planning; he had been thinking about a course of action for some time; he got the gun ahead of time; he made sure to get there before Ms. Shaw went to work; he did not tell his brother where or why he was going because he probably thought his brother would try to prevent him; and his activity throughout the incident was goal directed. (V4:T.653). When Appellant went back and shot Mr. Shaw the second time and at close range to the head, that shows a very deliberate sort of thinking. A person does not do that unless they are thinking of killing somebody and making sure they are dead. (V4:T.653).

After closing arguments and instructions to the jury, the jury returned guilty verdicts for all three charged crimes: guilty of first degree premeditated murder, guilty of attempted first degree murder with a firearm; and guilty of aggravated assault with a firearm. (V4:T.793).

The trial court conducted the penalty phase proceeding on October 10, 2000. The State did not present any additional evidence and relied on the evidence presented at the guilt phase. (V5:T.820). Defense counsel called Appellant's sister, Minerva Diaz, as a witness. Ms. Diaz, who was four years

younger than Appellant, testified that their father was an alcoholic and drug addict. (V5:T.824). Their father would beat their mother in view of the children and he was abusive to her brothers. (V5:T.824). Appellant had to quit school in the 9th grade because their father stopped working and wanted the children to get jobs and support the family. Minerva Diaz believed that her father's problems affected Appellant and caused him to physically strike his three girlfriends. (V5:T.826, 833). She testified that Lissa Shaw confided in her that Appellant would beat her on a regular basis. (V5:T.835).

Appellant testified at the penalty phase hearing and informed the jury that he has no other criminal history, just traffic violations. (V5:T.840). Appellant then apologized to the victims' family and to his family. (V5:T.841). Appellant claimed on cross-examination that he was only physically abusive to two of his girlfriends, Missy and Lissa Shaw. (V5:T.844).

The State requested that the jury be instructed on three aggravating circumstances: (1) CCP, (2) HAC, and (3) prior violent felony conviction. Defense counsel did not raise any objections to these instructions. (V5:T.846-47, 891). After closing arguments, the jury returned an advisory verdict recommending the death penalty by a vote of 9-3. The trial judge followed this recommendation and sentenced Appellant to

death. The court found that the three aggravating factors of CCP, HAC and prior violent felony conviction outweighed the mitigating factors established. The court found in mitigation: (1) the defendant has no significant history of prior criminal activity; (2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; (4) the age of the defendant at the time of the crime (24 years old); (5) the defendant is remorseful; and (6) the defendant's family history of violence. The trial court stated that each one of the aggravating circumstances, standing alone, would be sufficient to outweigh the mitigation presented.

SUMMARY OF ARGUMENT

Appellant argues that the circumstantial evidence does not contradict, but rather corroborates, his story that the victim struck him in the face in the garage and he "lost it" at that time. Contrary to Appellant's assertion, the State submits that the evidence does not support his version of events. The State introduced evidence that clearly refuted Appellant's testimony that he fought with Charles Shaw outside of the residence and that Charles Shaw somehow corralled him inside the garage. Rather, an eyewitness to the incident testified that there was no physical confrontation between Appellant and Mr. Shaw outside the residence and Mr. Shaw returned to the house and Appellant followed him. Even if Appellant's claim that the victim struck him were true, such an action does not negate the trial court's finding of the CCP and HAC aggravating circumstances.

The trial court properly found that the evidence supported a finding that the murder of Charles Shaw was especially heinous, atrocious, or cruel. Appellant pointed a firearm at Mr. Shaw and pulled the trigger despite the victim's pleas for his life. When the gun did not discharge, the victim physically relaxed and let out an audible sigh. Appellant then proceeded to empty the shells from the gun and reload the five-shot revolver. The victim ran into the master bathroom and Appellant

followed him inside. While the victim continued to plead for his life, Appellant shot him three times: once in the lower leg and twice in the abdomen. Appellant then left the bathroom while the conscious victim thrashed around in a growing pool of his own blood, fully aware of his impending death. Appellant eventually returned to the bathroom and shot the victim twice. The fifth and final shot was an instantly fatal, execution-style shot to the back of the victim's head. Given the victim's abject terror, fear and emotional strain, this Court should affirm the trial court's finding that the instant murder was especially heinous, atrocious or cruel.

The State submits that the evidence established that the murder was committed in a cold, calculated, and premeditated manner. Contrary to Appellant's assertions, the trial judge did not err in allowing the State to argue in its penalty phase closing argument that the focus of this aggravator is on the manner of the murder, not the initial target of the murder. The key to this factor is the defendant's level of preparation, not the success or failure of his plan. Here, Appellant had a prearranged plan to kill his ex-girlfriend when she left her parents' home for work. Although Appellant failed in his plan to kill Lissa Shaw based on her evasive actions, Appellant then turned his attention to her father because she managed to escape

and Appellant believed Charles Shaw was prejudiced against him.

After chasing the unarmed and helpless Mr. Shaw into his residence, Appellant pointed his gun at him and pulled the trigger. When the gun did not fire, Appellant had to empty the cylinder and reload with five bullets. He then shot Mr. Shaw three times. After a brief conversation with Barbara Shaw, Appellant returned to the bathroom and fired two fatal shots at the victim, including an execution-style shot. Appellant's actions demonstrate a heightened level of premeditation. Because the manner of the homicide was committed in a cold, calculated and premeditated manner without any moral or legal pretense of justification, the trial court's finding of CCP should be affirmed.

Appellant's death sentence is proportionate to other capital cases. The trial judge found three valid aggravating factors: CCP, HAC, and prior violent felony conviction. This Court has stated that CCP and HAC are two of the most serious aggravators. In mitigation, the court gave moderate weight to a few mitigating circumstances: extreme mental or emotional disturbance, Appellant's age (24 years old) and his family history of violence. The court found additional mitigating factors but gave them very little weight. Given the weighty

nature of the aggravating circumstances and the insubstantial mitigation, this Court should find that Appellant's death sentence is proportionate.

ARGUMENT

ISSUE I

APPELLANT'S CLAIM THAT THE CIRCUMSTANTIAL EVIDENCE SUPPORTS HIS TESTIMONY THAT THE VICTIM STRUCK HIM IN THE FACE DURING AN ALTERCATION IN THE GARAGE IS WITHOUT MERIT, AND EVEN IF APPELLANT'S THEORY IS SUPPORTED BY THE EVIDENCE, THIS DOES NOT PRECLUDE THE TRIAL COURT FROM FINDING THAT THE SUBSEQUENT MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER AND THAT IT WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant's first issue on appeal is merely a factual contention he labels as a "preliminary point on appeal" relating to his other appellate sentencing issues of CCP, HAC, and proportionality. Initial Brief of Appellant at 45. Appellant claims that the circumstantial evidence did not disprove, but actually corroborated, his testimony that the victim struck him in the face during an altercation in the garage. The State submits that the circumstantial evidence did not corroborate Appellant's testimony, but even if it did support his story, such a finding does not negate the trial court's finding of the aggravating circumstances of cold, calculated and premeditated (CCP) and especially heinous, atrocious, or cruel (HAC).

On or about August 28, 1997, Appellant's girlfriend, Lissa Shaw, broke off her relationship with Appellant and moved back home with her parents. (V2:T.241, 284). Appellant attempted to contact Lissa after she moved out of his trailer, but he only

succeeded in speaking with her a few times. (V2:T.285; 308). Lissa last talked with Appellant on September 17th or 18th. (V2:T.308-09).

On October 6, 1997, Appellant went to Rick's Pawn Shop and purchased a Rossi .38 Special from Philip Primrose. After the three day cooling-off period, Appellant returned to the pawn shop but was unable to pick up the firearm because he had only a "conditional approval." (V3:T.441-43). Primrose told Appellant he would call FDLE in three to five days and see if he had been approved. During this time, Appellant continued to call the pawn shop and Mr. Primrose testified that Appellant was irate with the delay. (V3:T.444). On October 16, 1997, Appellant was finally allowed to take the firearm.

On October 27, 1997, Appellant asked his brother to give him a ride to a friend's house the following morning at 5:30 a.m. (V3:T.469). The next morning, Appellant drove his brother, Jose, and Jose's girlfriend to the entrance of the Shaws' gated community. Appellant exited the vehicle armed with the loaded .38 Rossi and a number of extra live rounds.⁶ Jose's girlfriend got into the driver's seat and drove Jose to work. (V3:T.470-74). Appellant walked about five minutes to Lissa Shaw's

⁶Law enforcement officers found a box of .38 caliber ammunition at Appellant's residence. There were 36 live rounds in the box of 50. (V3:T.499).

residence and waited outside by the garage.

One of the Shaws' neighbors, Delores Isaakson, was about to go jogging at approximately 6:30 a.m. when she observed Appellant, dressed in dark clothing, standing outside the Shaws' residence by their garage. She testified that she thought Appellant saw her and he then walked around to the other side of a parked van so she could not see him anymore. (V3:T.320). Mrs. Isaakson went back home and told her husband, Roy Isaakson, a retired police officer, that there was a suspicious person outside by the Shaws' garage. While her husband was getting up from bed, Delores Isaakson heard squealing tires and gunshots. (V3:T.321). She and her husband went outside and observed the Shaws' garage door open and the door leading into the Shaws' laundry room was also open. Delores Isaakson observed a figure moving back and forth in the laundry room area. (V3:T.321-25).

Roy Isaakson testified that he also observed the figure moving back and forth in the open doorway from the garage to the laundry room. Mr. Isaakson went into the garage and called for Charles Shaw. Appellant stepped into the garage, pointed a gun at him, and said, "Get the fuck out of here." (V3:T.330).

Barbara Shaw lived in the house with her husband, Charles, her daughter, Lissa, and her four-year-old grand-daughter, Taylor. On the morning of October 28, 1997, Barbara was in bed

at about 6:30 when she heard her daughter in the kitchen area getting ready to leave for work. (V2:T.240-43). Barbara heard Lissa enter the garage, start her car, and then open the garage door. The next thing Barbara heard were five gunshots.⁷ (V2:T.243). Barbara woke her husband up and told him about the shots, and he ran outside dressed only in his underwear. (V2:T.246-47). A couple of minutes passed, and Barbara heard her husband's voice saying, "Calm down, put it down, come on, calm down, take it easy." (V2:T.247, 251). She eventually was able to roll over in her bed and observe her husband come into the bedroom with Appellant following him.⁸ (V2:T.251).

Once inside the bedroom, Appellant was standing on one side of a chest of drawers and Charles Shaw was on the other side pleading with Appellant to put down his gun and to calm down.

⁷Lissa Shaw testified that Appellant came underneath the garage door when she opened it and approached the driver's side window and immediately pointed a gun at her head. Lissa began pleading with Appellant to no avail. (V2:T.286-87). She then told him she would get out of the car and talk to him, but when she reached down to get her belongings, she put the car in reverse and quickly backed out. Appellant began firing into the car, striking her in the neck and shoulder area. (V2:T.287-88; 360). As she was driving away from the residence, she saw her father pointing at Appellant while Appellant pointed a gun at her father. (V2:T.303). While at the hospital, Lissa told an officer that the last thing she remembered was her ex-boyfriend chasing her father across the yard with a gun in his hand. (V2:T.361).

⁸Barbara is a quadriplegic who was confined to her bed during the entire incident. (V2:T.248).

(V2:T.251). Appellant held the gun in both hands and pointed it at Charles' chest. Appellant pulled the trigger once and the gun just clicked. Charles Shaw gave an audible sigh of relief and physically relaxed his body, but Appellant flipped the revolver's cylinder open and emptied the shells and reloaded the gun. (V2:T.253-54). When Charles Shaw realized Appellant was reloading the gun, he ran into the master bathroom. Appellant followed Charles into the bathroom and Mr. Shaw put his hands up and said, "Oh, man. Why you got to do this?" Appellant proceeded to shoot Charles Shaw three times. (V2:T.253-54). Mr. Shaw grabbed his midsection and fell onto the floor.

After shooting Charles Shaw three times, Appellant came back into the bedroom and told Barbara Shaw that "he deserved to die." (V2:T.254). After a short period of time, Appellant returned to the bathroom and shot Charles Shaw two more times. Barbara Shaw testified that Appellant shot her husband in the lower back and then moved his arm up towards the head area.

The medical examiner testified that the victim suffered five gunshot wounds: (1) a flesh wound to the right calf; (2) one to the abdomen, entering from the right side; (3) another abdomen shot entering from the opposite direction; (4) a wound in the upper chest area that entered from a shallow angle; and (5) an execution-style wound to the back of the head from very close

range. (V3:T.454-60). Although the medical examiner could not identify the order of the five shots, she did testify that the three wounds to the calf and abdomen area would be very painful, but not fatal. The wound to the chest, however, would be almost immediately fatal, with the victim only living approximately a few seconds to a minute or two. The victim would have lost consciousness "very quickly." (V3:T.464). The wound to the back of the head would be instantly fatal. (V3:T.455-60). As the prosecuting attorney argued to the jury in closing argument, the pictures introduced into evidence clearly show a substantial amount of blood on the bathroom tile floor smeared by the victim as he moved around on the floor. In order for there to be this amount of blood and smearing, the victim had to be alive and conscious for some period of time. Thus, the prosecutor properly argued that the two fatal wounds to the chest and the head had to be the last two wounds inflicted when Appellant returned to the bathroom. (V4:T.711-12).⁹

⁹Barbara Shaw indicated that the final shot was to the victim's head. Although she testified that the fourth shot was aimed at her husband's lower back, there were no gunshot wounds to this area. The circumstantial evidence supports the State's theory that the fourth shot was to the victim's chest. After the first three shots were fired, the victim grabbed his midsection and fell to the floor. This is consistent with the victim being shot in the abdomen. The State maintained that the first shot struck the victim in his calf because the bullet struck the bottom of the shower stall. (V3:T.400).

The State's evidence surrounding the attempted murder of Lissa Shaw and the murder of Charles Shaw clearly contradicted Appellant's version of events. Appellant's primary claim in this issue is that Charles Shaw struck him while in the garage, and this suddenly changed Appellant's behavior and caused him to "lose it" and go after Charles Shaw. Although there is no direct evidence to contradict Appellant's self-serving testimony that Charles Shaw struck him in the face during an altercation in the garage, the State submits that the circumstantial evidence does not corroborate his story. Furthermore, even if Charles Shaw struck Appellant in the face as alleged by Appellant, such a justifiable defensive action does not negate the aggravating circumstances of CCP and HAC.

It is well established that the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury's verdict, the verdict will not be reversed on appeal. Cochran v. State, 547 So. 2d 928, 929-930 (Fla. 1989) (stating that the circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as appellee, is entitled to a view of any conflicting evidence in the light most favorable

to the jury's verdict); see also Finney v. State, 660 So. 2d 674, 678-79 (Fla. 1995) (concluding that jury can reject a defendant's reasonable hypothesis of innocence based on the defendant's inconsistent statements).

In the instant case, Appellant claimed that he did not go over to the Shaws' residence with the intent to murder anyone. (V4:T.587). However, the State's evidence established that Appellant took a .38 caliber handgun and a large amount of ammunition with him.¹⁰ After confronting Lissa Shaw in the garage at gunpoint, Appellant fired five shots at her as she attempted to flee in her car. Two of these shots struck her in the upper body and two projectiles lodged in the steering wheel.¹¹ When Charles Shaw went outside to investigate,

¹⁰Appellant claimed that he did not mean to take the gun with him, it was just in the car and he did not want to leave it there; it was a just a "coincidence." (V3:T.592). When his brother was not looking, he managed to grab the gun and stick it in his waistband. (V3:T.588; V4:T.632). On cross-examination, Appellant initially stated that he loaded the gun that day, but then claimed the gun was already loaded. (V4:T.630). Appellant did not mention when or how he grabbed approximately a dozen extra shells to take with him. Appellant fired five shots at Lissa, five shots at Charles, and law enforcement officers found six live shells at the scene. Thus, in addition to carrying a loaded gun, Appellant also possessed a pocket full of ammunition.

¹¹Another projectile was recovered from the right front passenger door. The ammunition would be described as hollow point ammunition. (V3:T.409-12). Appellant claimed he fired these five shots as a "bad reaction" to Lissa backing out of the driveway. (V3:T.592).

Appellant pointed the gun at Mr. Shaw. Eventually, Appellant followed Mr. Shaw back into the house. Although Appellant claimed that Mr. Shaw and him fought in the road, an eyewitness to the incident, Deborah Wilson, did not observe any physical confrontation between the two men. In fact, Ms. Wilson testified that she observed Appellant walk into the street following Lissa Shaw's car. Appellant was walking backwards with his hands behind his back. (V2:T.344-50). Ms. Wilson saw Charles Shaw come out of the house and stand on the corner pointing his finger at Appellant while he stood in the street. Mr. Shaw left and Appellant walked over to an electrical box and made motions like he may be loading a gun. (V2:T.349-53). This evidence directly conflicts with Appellant's story that Mr. Shaw and him fought in the street and that Mr. Shaw corralled him into the garage area.¹² Appellant's claim in this issue that he "lost it" after being struck in the face in the garage is completely inconsistent with the State's evidence. After

¹²Appellant claimed he fought with Mr. Shaw in the yard and Mr. Shaw pushed him back into the yard when he wanted to walk away. (V3:T.594). Appellant initially did not describe how they "winded up in the garage" (V3:T.594), but on cross-examination, he testified that Mr. Shaw cornered him and forced him into the garage. (V4:T.615-17). Obviously, the jury could easily reject Appellant's story given Ms. Wilson's testimony and the absolute unlikelihood of an unarmed man in his underwear controlling and corraling Appellant, an armed man with an open road at his disposal.

attempting to kill Lissa Shaw by shooting at her five times, Appellant continued his rampage by chasing Mr. Shaw into his residence. Once inside the Shaws' master bedroom, Appellant pointed his revolver at Mr. Shaw's chest and pulled the trigger. When the gun did not discharge, Charles Shaw audibly sighed with relief and physically relaxed. Appellant then reloaded the gun and pursued Mr. Shaw into the bathroom. The evidence supports the trial court's conclusion that Mr. Shaw, pleading for his life, was shot three times, once in the leg and twice in the abdomen. (V5:R.206). Appellant then exited the bathroom and spoke with Mrs. Shaw for a period of time. Appellant told Mrs. Shaw that her husband deserved to die. (V3:T.254). Appellant then returned to the bathroom and inflicted two more shots, including the final execution-style shot to the back of his head.

Even if Appellant's story were to be accepted that Mr. Shaw struck him in the face in the garage, such a defensive action was justified and did not cause Appellant to change his behavior. There is no evidence, however, that supports Appellant's self-serving story. Appellant claims he had a cut on his face that was bleeding. Although there was testimony presented that blood droplets were located at various places throughout the house (V3:T.416-18, 505), the jury was in the

best position to determine whether the evidence supported Appellant's claim that he suffered a cut from a physical altercation with Mr. Shaw. Appellant produced a booking photograph that allegedly showed a cut by his left eye. Barbara Shaw testified, however, that she did not observe any abrasion or cut on Appellant's face while he was inside her residence. She did recall subsequently seeing a photograph which depicted a cut above his eye. (V2:T.269-70).¹³ Thus, the State submits that contrary to Appellant's position on appeal, the evidence did not corroborate Appellant's version of events. As will be discussed in the remaining issues of this brief, even if this Court finds that Mr. Shaw struck Appellant while in the garage, this action does not negate the trial court's finding of the aggravating circumstances of HAC and CCP.

¹³When arrested in the garage, Officer Turner told Appellant to get on his knees. Officer Turner "took him to his face and shook him down for any weapons." (V2:T.372). It is unclear whether Appellant was taken down in the area where broken glass was located. (V3:T.404).

The case agent, Officer Chiapetta, testified that on the afternoon of the murder, he came into contact with Appellant but he did not notice any injuries to Appellant. (V3:T.504). He testified that he thought Appellant had an abrasion on his face, but he was not sure if it was an abrasion or a birthmark. (V3:T.505).

ISSUE II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, AND THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING OF THIS AGGRAVATOR.

Appellant argues that the trial judge erred in instructing the jury on the aggravating factor that the murder was especially heinous, atrocious, or cruel (HAC), and in finding that this aggravator had been proven beyond a reasonable doubt. The State submits that Appellant has failed to preserve any issue regarding the trial court's jury instruction on the HAC aggravator and asserts that there is substantial, competent evidence in the record to support the trial court's finding of this aggravating circumstance.

Appellant has failed to preserve for appeal any issue regarding the applicability of the jury instruction on the HAC aggravator. When the trial judge conducted the charge conference at the penalty phase proceeding, the court asked defense counsel if he had any objection to the jury instructions proposed by the State on the three aggravating circumstances: (1) HAC; (2) CCP; and (3) prior conviction for a violent felony. (V5:T.846-47, 891). Defense counsel indicated that the he had no objection to these instructions. (V5:T.847, 891). Accordingly, Appellant cannot now complain on appeal that the

trial judge erred in instructing the jury on the HAC aggravating circumstance. See Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court."). Furthermore, Appellant's claim is without merit. If evidence of an aggravating factor has been presented, a jury instruction on that aggravator is required. Henry v. State, 649 So. 2d 1366, 1369 (Fla. 1994). In the instant case, the State presented evidence which justified the giving of a jury instruction on the HAC aggravating circumstance.

Likewise, Appellee submits that the State presented substantial, competent evidence to support the trial court's finding of the HAC aggravator. Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court has noted that it "'is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Alston v. State, 723 So. 2d 148, 160

(Fla. 1998) (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997) (footnotes omitted)).

In finding that the State proved this aggravator beyond all reasonable doubt, the trial judge stated:

From the evidence presented during the guilt phase of this trial, at the time of his murder, Charles Shaw and his wife Barbara lived in a home at Cross Creek Estates in Fort Myers, Florida. Approximately two months before Charles Shaw's murder, the Shaws' daughter, Lissa, had broken up with her boyfriend, the Defendant Joel Diaz. Before the killing, Lissa had been living with her parents for approximately two months since the date of the breakup.

On the morning of the murder, at approximately 6:30 a.m., Lissa Shaw left the kitchen of the Shaws' residence and went to the garage to leave for work. She got into her car, locked the doors, started the car and then opened the garage door. Before the garage door went all the way up, a person ducked under the door and came up to the driver's side of the car. That person was the Defendant. The Defendant demanded that Lissa get out of the car. Lissa Shaw did not comply, and instead put the car in reverse and hit the gas. As soon as the car accelerated out of the garage, the Defendant started shooting at her.

Lissa Shaw testified that she heard three shots as she backed out of the garage all the way across the street and into a landscaped island. She then fled the scene and drove herself to the hospital, as she had received gunshot wounds to her shoulder and neck.

Lissa Shaw's mother, Barbara Shaw, is a quadriplegic who was in the master bedroom at the time the Defendant started shooting. Upon hearing the shots, she immediately yelled to her husband Charles who had been asleep at the time. Charles Shaw then ran outside dressed in his shorts. Barbara Shaw heard her husband say "Calm down, take it easy," presumably to the Defendant. Charles Shaw and Joel Diaz came back into the house and approached the master bedroom. Joel Diaz then pointed his gun at Charles Shaw's chest and pulled the trigger. The gun seemingly misfired, but was actually out of ammunition. The Defendant was

armed with a five-shot .38 caliber pistol and he had just emptied the gun at Lissa Shaw's car as she fled away.

When the gun did not fire, Charles Shaw gave a sigh of relief. Joel Diaz then slowly reloaded the revolver as Charles Shaw retreated through the master bedroom into the master bathroom. Joel Diaz followed Charles Shaw into the bathroom as Mr. Shaw pleaded with him not to shoot him and to spare his life. Joel Diaz then shot Charles Shaw three times, once in the leg and twice in the abdomen. Charles Shaw hit the floor in the bathroom near the shower as Joel Diaz came out from the bathroom with the gun.

Joel Diaz then approached Charles Shaw's wife, Barbara, as she was confined to her bed. The Defendant stated that Charles Shaw deserved to die because his daughter had escaped. Joel Diaz then went back into the bathroom, bent over Charles Shaw and shot him once in the back of the head and once in the chest. After shooting the victim for the fourth and fifth time, for the next 45 minutes the Defendant talked to Barbara Shaw as she was confined to her bed, waving the gun around. He then unloaded the gun and put it under the bed.

During this conversation, the Defendant told Barbara Shaw that her husband was prejudiced against him because he was hispanic and therefore he deserved to die. Joel Diaz then simply waited for the Sheriff's Department, and when they arrived on the scene, he calmly walked out of the house through the laundry room in the garage. Before the Sheriff's Department arrived, however, Joel Diaz called his mother and even answered the Shaw's phone on one occasion that it rang.

According to Barbara Shaw, although the Defendant was nervous, he was not irrational. While waiting for the Sheriff, the Defendant went into Lissa Shaw's room and rifled through her belongings, presumably looking for some evidence that she had established a relationship with someone else. Barbara Shaw also testified that her husband took no overt actions toward the Defendant at any time and that there was no evidence that would justify his murder.

According to the medical examiner, Dr. Carol Huser, Charles Shaw was shot five times. The first three shots to the abdomen and calf were not

immediately fatal and were survivable. After these shots, Charles Shaw thrashed around in the bathroom, as indicated by the blood smears around the shower stall where he was lying.

Dr. Huser stated that the final two shots at Mr. Shaw were to the upper chest and the back of the head. The shot to the upper chest was immediately fatal and Charles Shaw would have died in less than one minute. However, the shot to the back of the head was at point-blank range to the brain stem and was instantly fatal. The medical examiner was unable to determine which of these two shots was the immediate cause of Charles Shaw's death.

Even though the medical examiner was unable to state within reasonable medical certainty which of the final two shots were fatal, suffice it to say that the Court is convinced that Mr. Shaw was stalked by Joel Diaz through his own home, and after begging for his own life, and after being shot three times, he was certainly alive long enough to know that his death was imminent and that there was a good chance his wife might be killed as well.

The victim was essentially defenseless throughout his encounter with Joel Diaz on the morning of his killing and was obviously in abject terror. Even after the Defendant first unsuccessfully tried to kill Mr. Shaw, three times, and after a period of reflection went back into the bathroom and executed Mr. Shaw.

Based upon the foregoing, the Court finds that this killing was heinous, atrocious, or cruel within the meaning of Florida Law. The Court thus finds that based upon the evidence adduced at trial and the verdict of the jury, the heinous, atrocious, or cruel aggravating circumstance was proven beyond a reasonable doubt and the Court affords it great weight.

(V5:R.204-07).

This Court has previously held that the HAC aggravator applies only in torturous murders - those that evince extreme and outrageous depravity as exemplified either by the desire to

inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). Although the HAC aggravator is usually not associated with shooting deaths, this Court has held that it may be applicable when the evidence proves that the defendant intended to cause the victim unnecessary and prolonged suffering. See Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993) (stating that while the victim sustained extensive injuries from numerous gunshot wounds, there is no evidence that the defendant "intended to cause the victim unnecessary and prolonged suffering."); but see Morrison v. State, 27 Fla. L. Weekly S253, S259 (Fla. Mar. 21, 2002) (stating that the defendant's intent to cause pain is not a necessary element of the HAC aggravator, rather the means and manner in which the death was inflicted justify the HAC finding); Guzman v. State, 721 So. 2d 1155, 1160 (Fla. 1998) (stating that "[t]he intention of the killer to inflict pain on the victim is not a necessary element of the [HAC] aggravator."). This Court has also stated that fear, emotional strain, and terror of the victim may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous. Preston v. State, 607 So. 2d 404, 409-10 (Fla. 1992); see also Pooler v. State, 704 So. 2d 1375 (Fla. 1997) (upholding HAC aggravator

where common-sense inference established victim's terror and fear prior to her death); Wyatt v. State, 641 So. 2d 1336, 1340-41 (Fla. 1994) (finding that trial court properly found HAC aggravator when victims were subjected to mental anguish and abuse prior to fatal execution-style shots to the head); Farinas v. State, 569 So. 2d 425 (Fla. 1990) (finding that trial judge properly concluded that murder was especially heinous, atrocious, or cruel when defendant shot victim and paralyzed her from the waist down, approached her and fired two shots into the back of her head).

In the instant case, the evidence supports the trial court's finding that the murder was especially heinous, atrocious or cruel. When Mr. Shaw, unarmed and dressed only in his underwear, encountered Appellant in his front yard, he realized Appellant was armed with a firearm and that he had just fired numerous shots at his daughter. When Mr. Shaw retreated back into his home, Appellant followed Mr. Shaw. Once in the bedroom, Appellant pointed the firearm at Mr. Shaw's chest and pulled the trigger, despite Mr. Shaw's pleas for his life. When the gun did not discharge, Mr. Shaw let out an audible sigh of relief and visibly relaxed, "like you know, thank God there was nothing in the gun." (V2:T.252). Appellant flipped the firearm's cylinder open and reloaded the gun. Mr. Shaw fled to

the bathroom and again begged Appellant not to kill him. Appellant then fired three wounding shots into Mr. Shaw: one shot into his calf and two non-fatal shots into his abdomen. Mr. Shaw grabbed his midsection and fell to the floor. As Mr. Shaw thrashed in pain on the bathroom floor in a growing pool of his own blood, Appellant returned to the master bedroom and commenced a conversation with Barbara Shaw, a quadriplegic confined to her bed throughout the entire ordeal. Appellant told Mrs. Shaw that her husband deserved to die. After a brief period of time, Appellant returned to the bathroom and shot Mr. Shaw in the upper chest and in the back of the head.

Dr. Huser, the medical examiner, testified that Mr. Shaw would have died instantly from the shot to the head and almost instantly from the shot to the chest. The gunshot wound to the back of the calf was a non-fatal injury causing significant pain to the victim. The two gunshot wounds to the abdomen would have resulted in excruciating pain to the victim. Dr. Huser testified that Mr. Shaw could have survived several hours with the gunshot wounds to the leg and abdomen, but only one or two minutes with the wound to the chest. The wound to the chest would have caused Mr. Shaw to lose consciousness "very quickly." (V3:T.464-65). The physical evidence establishes that Mr. Shaw was alive and conscious after the first three shots. The

photographs admitted into evidence that show Mr. Shaw's final resting position depict blood smeared throughout the floor in the area proximate to his legs and torso. This is indicative of Mr. Shaw's conscious body movements prior to the two fatal shots to the chest and head. Had the chest shot been fired in the first volley of three shots, Mr. Shaw would not have made the smear marks in the large pool of blood. Because Mr. Shaw had to be alive and conscious long enough to cause the smears, the State submits that the evidence refutes Appellant's argument that the chest shot may have been one of the first three shots fired.

This Court recently upheld the HAC aggravator in Morrison v. State, 27 Fla. L. Weekly S253, S259 (Fla. Mar. 21, 2002), in a stabbing death where "death clearly was not immediate, as the blood in the victim's nostrils could only have been caused by the victim trying to breathe in his own blood. The medical examiner testified that the victim died by effectively drowning in his own blood." Likewise, in this case, the victim's death was not immediate. He suffered three painful, non-fatal gunshot wounds, two into the abdomen. As Appellant returned to the master bedroom and spoke with Barbara Shaw, Charles Shaw writhed on the bathroom floor in a pool of his own blood. The photographs admitted into evidence clearly show where the victim

moved about in a large pool of blood, smearing it across the floor. Appellant eventually returned to the bathroom and pumped two fatal shots into Charles Shaw, one of which was a close range shot into the back of his head.

The State acknowledges that the applicability of the HAC aggravator would be more problematic in the instant case if the execution-style shot had been fired first, but that is not the case. Although the medical examiner could not testify to the order of the shots, it is clear from the photographic evidence and Barbara Shaw's testimony that the first three shots were the non-fatal, body shots to the calf and abdomen. Obviously, as the trial judge correctly found, Mr. Shaw suffered severe emotional strain and terror prior to his death.

As this Court stated in Pooler v. State, 704 So.2d 1375, 1378 (Fla. 1997), the victim's mental state may be evaluated for purposes of determining the applicability of the HAC aggravator in accordance with a common-sense inference from the circumstances. A common-sense evaluation of Mr. Shaw's mental state during the events leading up to his murder indicates that Mr. Shaw suffered from intense fear, emotional strain and abject terror when he was trapped in his own bedroom and bathroom, with a firearm pointed at him, anticipating being shot by Appellant. Mr. Shaw was fully aware of Appellant's willingness to shoot the

firearm based on the shots that were fired in the garage as well as Appellant's act of pulling the trigger while pointing the gun at Mr. Shaw in the bedroom. Although this Court has previously stated that "the fact that the gun was reloaded does not, *without more*, establish intent to inflict a high degree of pain or otherwise torture the victims," Hamilton v. State, 678 So. 2d 1228, 1231 (Fla. 1996), the facts of the instant case establish the additional intent of Appellant to torture the victim and impose a high level of emotional strain. Mr. Shaw's audible sigh and visible relaxation following the misfiring of the gun is a significant indicator of the overwhelming anxiety he suffered when confronted with this situation. Since Appellant was standing in the doorway of the master bedroom reloading his gun, Mr. Shaw retreated into the bathroom where defenseless, he had trapped himself, only to be subjected to further emotional distress when Appellant followed him inside.

In Phillips v. State, 476 So. 2d 194 (Fla. 1985), this Court upheld the HAC aggravator when the victim was shot twice in the chest, fled a short distance, and then was shot in the head and back. In addressing the victim's mind set or mental anguish, this Court stated that the trial judge correctly surmised that between the two volleys of gunfire the victim must have agonized

over his ultimate fate. Id. at 196-97. Likewise, in the instant case, the victim surely agonized over his fate when Appellant pulled the trigger and the gun did not fire. See also Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (stating that victims were acutely aware of their impending deaths when bound and rendered helpless, a gun was pointed to their heads and misfired three times). As a helpless Mr. Shaw fled to the bathroom while Appellant reloaded the gun, one does not have to speculate as to his mental anguish. Appellant then entered the bathroom and shot Mr. Shaw three times despite his pleas for his life. Like the victim in Phillips, Mr. Shaw was forced to agonize over his demise prior to the second round of fatal shots.

Mr. Shaw's death was not simply an instantaneous, execution-style murder. See Alston v. State, 723 So. 2d 148 (Fla. 1998) (stating that execution-style murders are not HAC unless the State presents evidence to show some physical or mental torture of the victim). Rather, his murder was characterized by intense suffering and pain given the mental anguish and the first three wounds he suffered. Mr. Shaw would have been acutely aware of his impending death. The fact that Appellant did not shoot Mr. Shaw in the head initially is indicative of Appellant's desire that Mr. Shaw suffer from the first three gunshot wounds.

Appellant's claim that he fired all five shots at once is an obvious attempt to refute the common-sense inference that he intended the victim to suffer. In contrast, the evidence establishes that Appellant fired three non-fatal shots and walked out of the bathroom and began conversing with Barbara Shaw. This action is demonstrative of Appellant's complete indifference to Mr. Shaw's suffering. After speaking with Barbara Shaw and informing her that her husband deserved to die, Appellant returned to the bathroom and fired the two fatal shots. The evidence presented by the State supports the trial judge's finding that Mr. Shaw was defenseless on the morning of his murder and was obviously in abject terror and emotional strain throughout this ordeal. As the trial judge stated, even after Appellant first unsuccessfully tried to kill Mr. Shaw, Appellant "slowly reloaded his revolver, shot Mr. Shaw three times, and after a period of reflection went back into the bathroom and executed Mr. Shaw." (V5:R.207). Appellant argues that the trial court's finding is flawed because the judge misstated significant facts regarding the sequence of shots and the speed in which Appellant reloaded his gun. As previously discussed, the physical evidence and the testimony of Barbara Shaw and the medical examiner clearly supports the trial court's finding that the first three shots were non-fatal, whereas the

last two shots were fatal. Admittedly, the trial court's description regarding Appellant's act of reloading the gun did not match the testimony of Barbara Shaw. Mrs. Shaw testified that Appellant "was just very fast" when he flipped the cylinder of his gun open, emptied the shells, and reloaded his gun. This discrepancy, however, is not fatal to the trial court's ultimate finding as it is obvious from the trial court's order that the speed in which Appellant was able to reload his gun did not factor significantly into his decision. Accordingly, this Court should affirm the trial court's finding that the murder was especially heinous, atrocious or cruel.

ISSUE III

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION AND THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING OF THIS AGGRAVATOR.

Appellant's argument that the trial court erred in instructing the jury on the aggravating factor of CCP is without merit. As noted in Issue II, supra, defense counsel was specifically asked if he had any objection to the jury instructions on the aggravating circumstances and he responded in the negative. (V5:T.846-47, 891). Thus, Appellant has waived any error in the giving of the CCP instruction. Even if Appellant preserved this issue, the State submits that the court properly instructed the jury given the evidence adduced by the State establishing this aggravator beyond a reasonable doubt.

In order to prove that a murder was committed in a cold, calculated, and premeditated manner, the State must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with

no pretense of moral or legal justification.¹⁴ Rodriguez v. State, 753 So. 2d 29 (Fla.), cert. denied, 121 S. Ct. 145 (2000). Appellant argues that the court erred in instructing the jury on this aggravator and in finding that it applied to the instant case. As previously noted, whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. This Court's function is not to reweigh the evidence, but rather to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding. Alston v. State, 723 So. 2d 148, 160 (Fla. 1998).

In finding that the murder was committed in a cold, calculated manner without a pretense of moral or legal justification, the trial court stated:

In order for this Court to find the existence of this aggravating circumstance, the law requires the State to prove beyond a reasonable doubt the following:

1. The murder was product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage;
2. The Defendant had a careful plan or prearranged design to commit the murder before the fatal incident;
3. The Defendant exhibited heightened

¹⁴Appellant properly concedes that the fourth element was established beyond a reasonable doubt. Initial Brief of Appellant at 74.

premeditation; and,

4. The Defendant had no pretense of moral or legal justification.

Florida law supports a finding of this aggravating circumstance even where the cold, calculated and premeditated nature of the crime is not directed toward the specific victim. Of primary consideration here is the level of preparation, not the success or failure of the particular plan involved. In addition, the Court should consider such factors as advanced procurement of a weapon, lack of resistance or provocation by the victim, and the appearance of a killing carried out as a matter of course.

In this case, Joel Diaz purchased and took possession of a firearm with ammunition many days prior to the murder of Charles Shaw. The State proved that the Defendant went to the Shaw residence with a plan to confront Lissa Shaw for her alleged "betrayal." This was evidenced by the letter the Defendant wrote to his brother the day before the murder. In this letter the Defendant detailed his plan of confrontation and his regret for lying to his brother and disappointing his parent for doing what he "had to do" while dying in the process.

Joel Diaz was aware of Lissa Shaw's schedule and knew that she left her parent's home at 6:30 a.m. for work. The Defendant asked his brother to take him to a "friend's" the next morning at 5:30 a.m. The Defendant arrived at the Shaws' home under cover of darkness, was dressed in dark clothing and in possession of a loaded five-shot .38 caliber handgun with numerous extra rounds of live ammunition. As Lissa Shaw opened the garage door, the Defendant crept under the door and confronted her. He pointed the firearm at her head, told her to get out of the car, and when she did not comply, the Defendant fired five shots into the car, striking her twice.

The Defendant clearly planned to kill Lissa Shaw. When he was unsuccessful, he did not retreat. Even though confronted by an unarmed older man, Joel Diaz turned his attention to that man, Charles Shaw. When Charles Shaw retreated, Joel Diaz stalked him through his own home and slowly and deliberately executed him. After the killing, he told Barbara Shaw, that "if I had been able to kill that fucking bitch daughter of yours I won't [sic] have had to kill your husband."

This statement from the Defendant himself and the other attendant circumstances of these crimes lead the Court to the inescapable conclusion that this murder was committed without any pretense of moral or legal justification.

Based upon the foregoing, the Court finds that this killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification within the meaning of Florida law. The Court thus finds that based upon the evidence adduced at trial and the verdict of the jury, the cold, calculated and premeditated aggravating circumstance was proven beyond a reasonable doubt and the Court affords it great weight.

(V5:R.208-09).

Appellant argues that the trial court committed reversible error in two separate manners when finding that the murder was cold, calculated, and premeditated. First, Appellant claims the trial judge erred in using, and allowing the jury to use, the theory of transferred intent to find CCP. Second, Appellant argues that the trial judge erred in finding that the evidence supports the aggravator. The standard of review for this Court in addressing Appellant's claims is a mixed question of law and fact. This Court recently stated in Ford v. State, 802 So. 2d 1121, 1133 (Fla. 2001), that a trial court's ruling on an aggravating circumstance is a mixed question of law and fact and will be sustained on review as long as the trial court applied the right rule of law and its ruling is supported by competent, substantial evidence in the record.

Appellant's argument that the court erred in allowing the

jury to use the transferred intent theory is without merit. During the State's closing argument in the penalty phase regarding the CCP aggravator, the prosecutor stated:

The interesting thing about this last aggravator is that it doesn't matter who his initial target was. It goes to the manner of the killing. If Joel Diaz intended to go there to kill Lissa Shaw and instead, as he tells Mrs. Shaw, you know, your daughter had - your husband had to die because I couldn't kill your f'ing daughter.

Ladies and gentlemen of the jury, all that premeditation and all of that planning of buying the gun ahead of time days before, of telling his brother and lying to his brother, saying take me to a friend's house the next day, of writing the letter, of driving the 30 some minutes it took to get from North Fort Myers to Daniels Parkway, of walking up to the home with a loaded gun and bullets -

Mr. Potter [defense counsel]: Excuse me. I hate to interrupt her, I apologize, but I'm going to object. I think this is a clear misstatement of the case law.

The Court: Counsel, approach.

(A side-bar discussion).

The Court: Okay. Record will reflect the defendant is present.

Mr. Potter: Judge, I don't think what she's - this whole argument that she's making here that you can take the premeditation that is towards Lissa Shaw in this case and take all of the preparation and immediately take it and shift it over towards Mr. Shaw, there is some case law that I have seen that talks about this transfer intent, but those cases are definitely the minority, and I think she's misleading the jury.

Ms. Gonzalez [prosecutor]: On the contrary, Judge, transfer intent in the case law is very clear, applies

to that particular aggravator because it focuses, as I was telling the jury, not on who the ultimate target was or who the target was of the killing but in the manner and the planning the killing of someone. I think they expressed some case - it's in the memorandum of law I had to submit ahead of time. It actually does apply to that particular aggravator.

The Court: Okay. Objection is overruled. Go on.

(V5:T.858-60).

The prosecutor's argument is entirely proper based on this Court's precedent. The instant case is factually analogous to Provenzano v. State, 497 So. 2d 1177 (Fla. 1986). In Provenzano, the defendant went to court for a disorderly conduct trial armed with a number of guns sewn inside his jacket. Provenzano had continually threatened to kill the two arresting officers (officers Shirley and Epperson). Id. at 1180. Once inside the courtroom, Corrections Officer Parker approached Provenzano to search him, at which time he screamed, "You're not my friend, M_____ F_____!" Provenzano then chased and fired at least two shots at the corrections officer. Id. A bailiff in an adjacent courtroom, Bailiff Wilkerson, heard the shots and exited the courtroom into the hallway where the shooting was taking place. A chase ensued and as Bailiff Wilkerson approached the defendant, Provenzano removed a loaded shotgun from his jacket and fired a fatal shot when the bailiff was only a few feet away from him. Id. at 1180-82.

On appeal, Provenzano argued that the trial court erred in the guilt phase by instructing the jury on the doctrine of transferred intent because it was not supported by the evidence at trial. The jury was instructed that "if a person had a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated."¹⁵ Provenzano, 497 So. 2d at 1180. This Court disagreed with Provenzano's claim and found that his premeditated design to kill officers Shirley and Epperson directly resulted in the death of another human being. Id. at 1181. Accordingly, the defendant's original malice could be transferred to the person who suffered the consequence of his act, Bailiff Wilkerson. This Court further stated that even if the trial judge erred in instructing the jury on the transferred intent theory, the error was harmless beyond a reasonable doubt because there was substantial evidence that Provenzano had a premeditated design to kill Bailiff Wilkerson. Id.

Similar to Appellant, Provenzano also challenged his death sentence on the grounds that the evidence did not support the trial court's finding that the murder was committed in a cold, calculated, and premeditated manner. Provenzano claimed that

¹⁵At the guilt phase of the instant case, defense counsel objected to the transferred intent jury instruction and the trial court sustained his objection. (V4:T.679-81).

the evidence establishing that he intended to kill officers Shirley and Epperson was irrelevant to the finding of heightened premeditation to kill Bailiff Wilkerson. 497 So. 2d at 1183. This Court rejected this argument and held:

Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim. Rather, as the statute indicates, if the murder was committed in a *manner* that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable. The facts herein indicate that the manner in which Provenzano effectuated his design of death was cold, calculated and premeditated beyond a reasonable doubt.

Id.; see also Howell v. State, 707 So. 2d 674, 682 (Fla. 1998) (holding that the heightened premeditation necessary for the CCP aggravator does not have to be directed toward the specific victim); Bell v. State, 699 So. 2d 674, 677-78 (Fla. 1997) (reiterating that the focus of the CCP aggravator is the *manner* of the killing, not the target) (emphasis added); Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993) (stating that although the victim was not the actual subject of the planning, this fact does not preclude a finding of cold, calculated premeditation - "the key to this factor is the level of preparation, not the success or failure of the plan").

In the instant case, unlike Provenzano, the trial judge did not instruct the jury on the theory of transferred intent at the guilt phase. However, the judge did allow the prosecutor to

argue in the penalty phase that the focus of the CCP aggravator should be on the *manner* of the killing, not the target. The prosecutor's argument mirrored what this Court has specifically upheld in Provenzano, Sweet, Howell, and Bell. Thus, any argument that the court erred in overruling defense counsel's objection to this argument is completely without merit.

In the instant case, the State established that Appellant had a cold and calculated plan to kill Lissa Shaw, but was unsuccessful in his plan due to her evasive actions. Like Provenzano, the defendant did not succeed in killing his intended victim, but the *manner* in which Appellant effectuated his design of death was cold, calculated and premeditated. Although the evidence establishes that Appellant was in an agitated emotional state given his relationship problems with Lissa Shaw, this does not negate the trial court's finding that the murder was cold and calculated.

A cold, calculated, premeditated murder can be indicated by circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. Bell v. State, 699 So. 2d 674, 677 (Fla. 1997). All of these factors are present in the instant case. Appellant purchased a .38 Rossi handgun several days before the murder. There was no resistance on the

part of Lissa or Charles Shaw, and the killing of Charles Shaw was carried out as a matter of course.

In addition to procuring a weapon prior to the murder, Appellant wrote a note to his brother the night before expressing his intent to confront Lissa Shaw. Although the note does not conclusively state Appellant's intent, the surrounding circumstances support the court's finding of CCP. Appellant took his loaded gun and a number of extra rounds with him and drove to the Shaws' residence at a time of day when he knew Lissa Shaw would be leaving for work. Appellant argues that a reasonable hypothesis is that he simply wanted to confront Lissa Shaw at gunpoint so as to gain control of the situation. If that is the case, there was no need for Appellant to take the extra ammunition to reload his gun. The totality of Appellant's actions negate his hypothesis that he did not intend to kill Lissa and Charles Shaw.

Once Appellant arrived at the Shaws' gated community, he had to walk for about five minutes to their residence. Appellant waited for about ten minutes outside for Lissa to open the garage door, and as soon as the door opened, Appellant ducked inside and pointed the gun at Lissa's head. Appellant did not shoot Lissa until she threw the car into reverse and started to flee. Although Appellant argues that this is indicative of a

spur of the moment reaction, the State submits that it is merely the result of a plan gone awry. Lissa Shaw's actions forced Appellant to shoot at her in the car or risk losing his opportunity to carry out his plan. The fact that he emptied his firearm by firing all five shots at her upper body is indicative of his intent to kill.¹⁶ Clearly, given Appellant's advanced procurement of a weapon, the lengthy time he had to contemplate his actions while driving to the victims' house and waiting for Lissa Shaw to open the garage, and the utter lack of provocation or resistance demonstrates that Appellant had a careful plan or prearranged design to murder Lissa Shaw. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) (stating that "calculation" consists of a careful plan or prearranged design).

Appellant's argument that this was a domestic dispute that negates the coldness element of CCP is likewise without merit. This Court has stated that "cold" means "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). As Justice Anstead noted in his

¹⁶Appellant argues in a footnote that this Court should reduce his attempted first degree murder conviction to attempted second degree murder based on the alleged insufficiency of the evidence. Initial Brief of Appellant at 84-85 n.23. This argument is without merit given the overwhelming evidence that Appellant had a premeditated intent to kill Lissa Shaw.

concurring in part and dissenting in part opinion in Lawrence v. State, 698 So. 2d 1219, 1222-24 (Fla. 1997), this Court has previously rejected the CCP aggravator in domestic murders because of the purported absence of the coldness element. See Spencer v. State, 645 So. 2d 377 (Fla. 1994); Maulden v. State, 617 So. 2d 298 (Fla. 1993); Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Santos v. State, 591 So. 2d 160 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991). However, this Court has recently upheld a CCP finding in domestic murders when the facts demonstrate the requisite coldness. See Dennis v. State, 27 Fla. L. Weekly S101 (Fla. Jan. 31, 2002); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998); Walker v. State, 707 So. 2d 300 (Fla. 1997); Lawrence v. State, 698 So. 2d 1219 (Fla. 1997); Cummings-El v. State, 684 So. 2d 729 (Fla. 1996).

Appellant argues that the State's expert, Dr. Keown, undermined the State's theory of CCP by testifying that Appellant was upset and depressed at the time and that the killing was the product of emotional frenzy. Dr. Keown, however, did not weaken the State's case. He testified in the guilt phase to rebut Appellant's insanity defense and opined that Appellant was sane at the time of the murder. Dr. Keown noted that the crime took a lot of planning:

He had clearly been thinking about some course of action for some time. He had taken the trouble to get

a gun ahead of time. He had to make sure to get there before Ms. Shaw went to work. He didn't tell his brother why or where he was going and I think because he thought his brother would probably object and might try to prevent him. When he - all his activity throughout the incident was very - I mean, he was angry, but it was goal-directed in a sense of it wasn't wild or anything like that. When he shot Mr. Shaw, I mean, we could understand that in a sense of a burst of anger in somebody, but when he went back the second time and shot him at close range behind the head, that shows a very deliberate sort of thinking. You don't do that unless you're thinking of killing somebody and making sure they're dead.

(V4:T.653).

As Dr. Keown properly noted, Appellant had been planning his course of action for some time. The fact that Appellant was angry as a result of relationship issues with Lissa Shaw does not negate the cold, calculated and premeditated manner of the killing. As previously noted, Appellant failed in his attempt to kill Lissa, but "[i]t is the manner of the killing, not the target, which is the focus of this aggravator." Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993). The key to this factor is the level of preparation, not the success or the failure of the plan. Id. When Appellant failed in killing Lissa Shaw, he turned his attention to her defenseless father, Charles Shaw.¹⁷

¹⁷Appellant told Barbara Shaw that Charles Shaw deserved to die. Appellant said, "If that bitch of a daughter of yours, if I could have got her, I wouldn't have had to kill your husband." (V2:T.256). Appellant also told Mrs. Shaw that her husband deserved to die because he was prejudiced. (V2:T.270).

Clearly, the evidence supports a finding of CCP for the murder of Charles Shaw. The CCP aggravator applies to those murders which are characterized as execution-style murders. McCray v. State, 416 So. 2d 804 (Fla. 1982). Here, Appellant pointed a firearm at Charles Shaw and pulled the trigger. When the gun did not discharge, Appellant reloaded his firearm. Appellant pursued Charles Shaw as he went into the bathroom and fired three non-fatal shots into Mr. Shaw. Appellant then left the bathroom and began conversing with Barbara Shaw in the bedroom, thus giving him ample time to contemplate his actions. Appellant subsequently returned to the bathroom and fired two fatal shots, including an execution-style shot to the back of the victim's head at close range. The totality of the circumstances surrounding the killing of Charles Shaw supports the trial court's finding that the murder was cold, calculated and premeditated without the pretense of legal or moral justification. See Occhicone v. State, 570 So. 2d 902 (Fla. 1990) (upholding CCP aggravator in a factually similar case when the defendant broke into his ex-girlfriend's home that she shared with her parents, she escaped, and the defendant shot and killed her parents, including an execution-style shot to her mother). Accordingly, this Court should find that competent,

substantial evidence supports the trial judge's finding of CCP
and affirm the court's sentence.

ISSUE IV

APPELLANT'S DEATH SENTENCE IS PROPORTIONAL.

The trial judge found three aggravating circumstances: (1) the capital felony was especially heinous, atrocious, or cruel; (2) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and (3) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. In mitigation, the court found: (1) the defendant has no significant history of prior criminal activity;¹⁸ (2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired;¹⁹ (4) the age of the defendant at the time of the crime (24 years old); (5) the defendant is remorseful; and (6) the defendant's family history of violence. The trial court stated that each

¹⁸The court gave this mitigator very little weight because the evidence established that Appellant had a history of physically abusing his girlfriends.

¹⁹The court rejected the statutory mitigator involving *substantial* impairment, but found that Appellant's capacity to appreciate the criminality of his conduct may have been impaired and gave this nonstatutory mitigator very little weight.

one of the aggravating circumstances, standing alone, would be sufficient to outweigh the mitigation presented.

This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the aggravating and mitigating evidence established in the instant case demonstrates the proportionality of the death sentence imposed. Appellant correctly acknowledges that there is no "domestic exception" to the imposition of a death sentence when the murder arises from a domestic dispute. See Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998); Spencer v. State, 691 So. 2d 1062 (Fla. 1996). Appellant's argument that the death sentence is disproportionate rests entirely upon the erroneous contention that the only valid aggravating circumstance is that he was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

As noted in Issues II and III, the aggravating circumstances of CCP and HAC are valid given the evidence presented. Furthermore, this Court has previously stated that HAC and CCP are "two of the most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). These aggravators, coupled with the prior violent felony aggravating circumstance, clearly outweigh the insubstantial mitigation present in this case. The only mitigating factors given moderate weight by the trial judge were the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder, his age of 24, and his family history of violence. Given the substantial aggravation and this slight level of mitigation, this Court should find that Appellant's death sentence is proportionate to other capital cases.

This Court's function on appeal is not to reweigh the evidence, but to compare the circumstances of the case with other capital cases. Bates v. State, 750 So. 2d 6, 12 (Fla. 1999) (stating that for the purposes of proportionality review, this Court accepts the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence), cert. denied, 531 U.S. 835 (2000). A review of other death penalty cases establishes that Appellant's death sentence is

proportionate. See Blackwood v. State, 777 So. 2d 399 (Fla. 2000) (upholding death sentence on proportionality grounds in strangulation murder of ex-girlfriend where single aggravator of HAC outweighed one statutory mitigator and numerous nonstatutory mitigators); Arbelaez v. State, 626 So. 2d 169 (Fla. 1993) (finding death sentence proportionate when defendant killed his ex-girlfriend's young boy in order to get revenge and the trial court found three aggravators, HAC, CCP, and death during the kidnapping of a child, and in mitigation, found that the defendant had no significant history of prior criminal activity and was remorseful); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1988) (finding that death sentence is proportional in domestic murder case where there were the same three aggravators of HAC, CCP and prior felony conviction and similar mitigation of extreme emotional disturbance, no significant prior criminal history and a number of nonstatutory mitigators); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (upholding mother's death sentence for killing her child where single aggravator of HAC outweighed two statutory mitigators and three nonstatutory mitigators); Williams v. State, 437 So. 2d 133 (Fla. 1983) (death sentence proportional in domestic killing based on single gunshot wound where there were two aggravating circumstances present). Even if this Court were to strike the aggravators of

HAC or CCP, or both, the remaining aggravator of prior violent felony, based on the contemporaneous attempted first degree murder of Lissa Shaw, is sufficient to outweigh the insubstantial mitigation present in this case. Accordingly, this Court should affirm Appellant's death sentence.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the trial court's death sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN D. AKE
Assistant Attorney General
Florida Bar No. 14087
Westwood Center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
Telephone: (813) 801-0600
Facsimile: (813) 356-1292

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Steven L. Bolotin, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831, on this 15th day of April, 2001.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR APPELLEE