IN THE SUPREME COURT OF FLORIDA

FAUNCE LEVON PEARCE

Appellant,

vs. **CASE NO. SC02-476**

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Bryon Loucks worked and lived at We Shelter America setting up mobile homes. Ken Shook was his stepson and went to school with Rob Crawford and Steve Tuttle. (V-7, 403-404). Pearce worked for Loucks setting up mobile homes. (V-7, 404-05). When Loucks got home from work on the afternoon of September 13, 1999, he found Pearce there waiting for Shook. Pearce was looking for "Jellies" or "Geltabs," a form of acid. (V-7, 406). Loucks told Pearce that he did not want his son to become involved in any drug transaction. Pearce nonetheless talked to Shook about obtaining the drugs. (V-7, 406-07).

Loucks testified that Shook called his school friends, Stephen Tuttle and Rob Crawford to see if they could obtain the Geltabs. (V-7, 407). A short while later, Tuttle, Crawford, and Amanda Havner showed up at his house. (V-7, 408). At some point, Pearce gave them money and said "This is your life. Make sure you bring back the drugs[]." (V-7, 408-09).

Loucks and Pearce waited together for them to return with the drugs. After a few hours or so, Loucks became worried and attempted to find out what was going on. (V-7, 409). Loucks hit redial on the phone Amanda had used in his house and got Tanya's house. "She was screaming and hollering that she had been ripped off." (V-7, 409). Loucks did not immediately tell Pearce what he was told. He hoped that the "kids wouldn't come

back." (V-7, 409). Just before they arrived, however, Loucks told Pearce what he had learned. (V-7, 409). Loucks testified: "He [Pearce] said that they would have to pay the consequences." (V-7, 409). Pearce was armed with a ".40 caliber" pistol when he said that. (V-7, 409-10).

When the "kids"[1] showed up, Pearce and Loucks were standing out in front of the office. (V-7, 410-11). With a gun in his hand, Pearce demanded that "everybody go into the office." (V-7, 411). "He said that they have to pay the consequences, they lost his money." (V-7, 411). Pearce was not pointing the gun at anyone in particular, just "waving it around." (V-7, 411). They all followed Pearce's commands and entered the office. (V-7, 412).

The kids told him they had been ripped off. Pearce demanded that they call Tanya and get his money back. (V-7, 412). Amanda called Tanya but after making the call told Pearce that she "couldn't get the money." (V-7, 412). "He [Pearce] got really violent and grabbed her by the throat, put the gun up to her head, slammed her head into the wall, and he just calmed down after that." (V-7, 412). Pearce put the gun to Amanda's head and said "I want my fucking money or I'll blow your head off." (V-7, 413). Loucks stepped in and told everybody to "calm down." (V-7, 427). This was followed by a discussion

[1]Loucks testified that the kids were Amanda Havner, Ken Shook, Steve Tuttle and Robert Crawford. (V-7, 411).

about a drug dealer named “Chippy.” Tanya was supposedly going to his house to buy drugs or do “something with his money.” (V-7, 413).

At some point, Pearce took Tuttle out back. It was dark and Loucks could not see them out back. (V-7, 429). After some period of time, Loucks became concerned and yelled out back for Pearce. He heard Pearce respond and went out back. (V-7, 429). Loucks saw Pearce standing over Tuttle who was lying on the ground, with his hands behind his back. (V-7, 413, 429). Loucks asked Pearce to bring Tuttle back to the office. (V-7, 414). Pearce appeared calm, but Tuttle looked “nervous, very nervous.” (V-7, 432). Pearce brought Tuttle back inside the office.

Loucks was trying to assure Pearce that he would get his money back. Tuttle told Pearce that he could get the money from his mom that night. Loucks also offered to get the money for Pearce but “he didn’t want to hear none of that.” (V-7, 414). Loucks asked if he could take the kids home, but Pearce told him, “No.” (V-7, 414). Pearce did let Amanda go when her brother drove up in a car. (V-7, 414). Loucks again asked if the boys could leave with Amanda. (V-7, 415). After Amanda left, Pearce said that he was going to “call his boys and they were going to take care of business.” (V-7, 415).

Teddy Butterfield, Joey Smith and Heath Brittingham showed

up at the office in response to Pearce's call. (V-7, 415, 431). Each one of them was armed. (V-7, 431). One of them, Butterfield, he thought, had a "sawed-off" shotgun. (V-7, 415). Joey Smith said that they were here to "take care of business." (V-7, 416). Loucks again asked if he could take Crawford and Tuttle home, but Pearce stated he "wanted to take the boys." (V-7, 416). Pearce said that "he was just going to take them down the road, and rough them up, and give them a long walk home." (V-7, 416-17). Loucks never heard the boys ask if they could leave. (V-7, 417).

Kenneth Shook testified as did Loucks regarding the set up of the drug deal initiated by Pearce. (V-8, 441-445). After being ripped off and unsuccessfully attempting to recover the money, Shook testified that he, Tuttle, Crawford, and Amanda drove back up to his house at We Shelter America. (V-8, 445-449). Pearce met them as they drove up, with a gun in his hand, telling everyone to come inside the office. (V-8, 449).

Once inside, Amanda began yelling at Pearce and was clearly upset. Pearce told her to make a call to get his money back. (V-8, 450). Pearce placed his gun on the counter and told Amanda, you want to shoot me, "[h]ere's the gun. You can shoot me." (V-8, 463). Amanda made some calls in an attempt to get Pearce's money back. (V-8, 463). However, Amanda told Pearce that she couldn't get his money back. (V-8, 450). Pearce

became angry and grabbed Amanda by the throat, slamming her head into the wall. (V-8, 450-51). Shook observed Pearce put his gun to Amanda's head and threaten to shoot her. (V-8, 451). Loucks stepped in and broke them up, stating that "everything's going to be fine." (V-8, 465).

Amanda's brother, Joe, arrived in a truck and Pearce let Amanda leave. (V-8, 466). Shook opined that Pearce let her go because he thought she was a "lesbian or something like that." (V-8, 451).

Pearce made Shook search his friends. (V-8, 451-52). Shortly after that, Teddy Butterfield, Heath Brittingham, and Joey Smith entered the office. (V-8, 451). They were all armed but Shook did not recall what kind of weapon they each carried. (V-8, 452). Smith said that they were there to take care of business, "quit screwing around." (V-8, 471). They all appeared to be on drugs, or "nuts." (V-8, 471). He thought he heard Pearce say they would be fine, that they were going to get his money back, and then he would take them home. (V-8, 471-72). Shook admitted that he used cocaine with Pearce that evening. (V-8, 473).

Amanda Havner testified about her role in attempting to procure drugs for Pearce. (V-8, 475-78). She was friends with Shook, Tuttle and Crawford, but only met Pearce when she arrived at We Shelter America to make the deal. (V-8, 478). When

Pearce gave them the money he stated something like if they didn't bring the money or Geltabs back then "it was our ass." (V-8, 479). Amanda went with Tanya to get the drugs and believed Tanya and her boyfriend's claim that they had been "jacked" or ripped off. (V-8, 482). Amanda did not want to believe that her friend had ripped them off. (V-8, 500).

The returned to We Shelter America where Pearce met them outside as they pulled up. She did not see a gun at that time, but he was telling everyone to go inside. (V-8, 484). They were all afraid. (V-8, 484). Inside the office, Pearce flipped out and appeared very angry. (V-8, 484). He told Amanda to call Tanya to get his money back. (V-8, 484). Amanda made some calls but had to tell Pearce that she could not get his money back. (V-8, 485). She wanted to go outside to get her cigarettes and began cussing out Pearce. Amanda testified: "I guess he thought I was going to do something, so he grabbed me by the throat and he slammed me against the wall. My head hit the air conditioner vents." (V-8, 485). Loucks stepped in and pulled Pearce off of her, telling them to "just chill out." (V-8, 485). She identified photographs of her face taken shortly after that incident which showed bruising on her neck and throat area resulting from her confrontation with Pearce. (V-8, 486).

Pearce cocked and pointed the gun at Amanda, telling her that he was going to "blow" her fucking head off. (V-8, 488).

Amanda did not recall his exact words, but it was something like the following: "You better shut her up. You better shut her up."[2] (V-8, 506). She was afraid of Pearce and did not think that she was free to leave. (V-8, 488). It did not appear that Tuttle or Crawford were free to leave either. (V-8, 512-13). Amanda recalled that Pearce called someone and asked for a few people. (V-8, 490).

At some point, her brother called and based upon their conversation, came to the conclusion that something was wrong. (V-8, 523-24). Her brother tracked her location down and drove to the We Shelter America Office. Pearce appeared startled to see him and Amanda testified that it "may have freaked him out a little bit." (V-8, 490). Pearce let her go because she had "balls" and Pearce said that he liked her. (V-8, 490). Amanda claimed that she never held up a knife to Pearce, but did see one that Shook had after it was placed on a table. (V-8, 490-91).

Amanda observed Pearce threaten Crawford with his gun. (V-8, 491). From the time Pearce met Crawford, it seemed to Amanda that Pearce did not like him. (V-8, 491). Tuttle was sitting quietly in the trailer, and it was only pointed at him when Pearce waived the gun around. (V-8, 491). He definitely singled out Crawford. (V-8, 492). Amanda asked Pearce if she

[2]This was quoted by defense counsel from a deposition taken of Amanda prior to trial. (V-8, 506).

could take the boys home. She told Pearce that she was not going to leave unless he promised to take them home. Pearce assured her it was all right and that he knew Tanya had the money. (V-8, 492). He appeared calm to Amanda when he made that statement. (V-8, 511).

Joseph Havner, Amanda's brother, testified that after receiving a call from his sister he became suspicious. He looked the number up on the internet and learned that she called from a business, not a friend's house, as she had told him. (V-8, 523). He drove to We Shelter America and was met at the gate by someone he thought was a security guard. The man he met was Bryon Loucks. (V-8, 524).

At first, he was told that Amanda was not there, that she had already left. (V-8, 524). As he was getting ready to leave, he was asked if he would like to speak with Amanda. (V-8, 524). Havner thought it was strange, but answered that he would like to speak with her. (V-8, 524). Havner was asked to pull up inside the gate. (V-8, 524). The gate was closed and locked when he arrived. (V-8, 526). There was a lock on the gate, it was a fence with barb wire on the top. It appeared that the fence ran the entire perimeter of the We Shelter America property. (V-8, 524-25). Havner was reluctant to pull his ruck inside the gate. Almost immediately after someone asked him to pull in, Amanda came running out. He and Amanda

jumped into the truck and drove home. (V-8, 525-26). Amanda was hysterical and when they got back home she went to her room to make a number of phone calls. (V-8, 525-26).

Tanya Barcomb testified about her role in the rip off scheme. (V-8, 527-33). She was friends with Amanda Havner, Rob Crawford, Ken Shook, and Stephen Tuttle. She did not know either Pearce or Bryon Loucks. (V-8, 529). Barcomb recalled receiving a frantic call from Amanda who stated that she was in danger. (V-8, 536). Barcomb asked Amanda if she wanted her to call the cops or to get her brother to help. (V-8, 536). Amanda told her no. (V-8, 547). Barcomb hung up and called Amanda's brother Joe, giving him the number. (V-8, 536-37). She originally lied to the police about her role in the drug deal because she had warrants and was afraid of being arrested. (V-8, 538-39). However, after she learned that Crawford was dead and Tuttle was in critical condition, Barcomb testified that she told the detectives the truth about what happened that night. (V-8, 539).

Stephen Tuttle testified about his role in attempting, along with Crawford, Havner and Shook, to obtain a book of geltabs for Pearce. (V-8, 553-556). Tuttle testified that before leaving with the $1,200 Pearce gave them, Pearce said: "Money is your life or drugs, bring back one of the two." (V-8, 555-56). Tuttle observed Pearce with a gun. (V-8, 556). Tuttle

testified that he did not know Pearce, Brittingham, or Butterfield prior to September 13th. (V-8, 552-53).

When they arrived back at We Shelter America, Pearce met them out front. He asked them if they had it, but they responded that "We got jacked." Pearce replied, "[t]hat's pretty much what I figured." (V-8, 559). They all went inside the front office where Tuttle testified: "[Pearce] pulled a gun out and started threatening us, and practically beat up Amanda." (V-8, 559). Pearce pointed the gun "at all of us." (V-8, 560). Tuttle did not feel free to leave. (V-8, 560). Pearce ordered Amanda to call Tanya and try to get his money back. (V-8, 560). When Amanda said that she could not get his money back, Pearce became "[v]ery angry." (V-8, 560). Pearce slammed Amanda's head into an air conditioner "slapped her, pushed her." (V-8, 560).

Pearce took Tuttle outside of the office at gun point. (V-8, 561). Pearce ordered Tuttle down to his knees and put the gun to his head. (V-8, 561). Tuttle testified that "he made me get back on my knees, with a gun to my head, told me I got to suck his fucking dick if I wanted to live." (V-8, 561). He had no choice in the matter and did as he was told by Pearce. (V-8, 561). After that, he was taken back inside We Shelter America by Pearce. (V-8, 561).

Amanda was apparently allowed to leave because "she had

[the] balls to stand up to him." (V-8, 561-62). Tuttle asked Pearce more than once if he could leave. Pearce told him "no." (V-8, 562). Tuttle told Pearce that he would get his money back in the morning. (V-8, 562). At no point did Tuttle feel free to leave. (V-8, 562-63). Nor did it appear that Crawford could leave if he wanted to: "Of course not." (V-8, 563). When Pearce was outside with Amanda, he did not leave. Tuttle testified that he had too much fear to leave. There was also a ten foot high fence with barbed wire surrounding We Shelter America. (V-8, 563).

Pearce made a phone call and three men showed up: "All three of them had guns." (V-8, 562). Tuttle had never seen these individuals before. (V-8, 562). The three individuals were only present for about five minutes before "we are made to get in the car." (V-8, 564). Tuttle did not believe he had a choice in the matter. (V-8, 564). However, he did not say he was directly threatened. (V-8, 564). It was clear that the three "guys" had guns and that Pearce had one as well. (V-8, 564-65).

Pearce drove off with Joey [Smith] in the front passenger seat. Tuttle was in the back seat on Rob's [Crawford] lap, Teddy [Butterfield] was on his left side and Heath [Brittingham] was on his right. (V-8, 565). Tuttle observed a gun in Smith's lap and the two individuals on either side of Tuttle and

Crawford had guns. (V-8, 584). One had a sawed off shotgun and the other a handgun. (V-8, 584).

Instead of heading out toward town, Pearce drove south on 41 then right on state road 54. (V-8, 566-77). Pearce drove the car down about three miles on 54, then turned the car around and pulled over to the right side of the road. Tuttle was told to get out, but he was not sure who said it. (V-8, 567). Tuttle did as he was told and got out from the passenger side. (V-8, 567). Tuttle put on his hat then everything went "black." (V-8, 568). He picked himself up off of the ground, then began walking down the road. (V-8, 568). He felt a hole in the back of his head. The hole was larger than his thumb which he pressed against it to stop the bleeding. (V-8, 568). He was picked up by a truck driver who offered assistance. (V-8, 568). They went to a 7-11 and the next thing Tuttle remembered was waking up in the hospital. (V-8, 568-69). Tuttle admitted that he has suffered memory problems as a result of being shot in the head. (V-8, 569).

Truck driver Lauren Golden testified that he stopped when Tuttle flagged him down for help. Tuttle looked horrible: "His face was covered in blood. The back of his head was bloody. His hand was bloody. Really pretty gruesome." (V-8, 587). Tuttle said he could feel his life slipping away and that he needed help right away. (V-8, 588-89).

Theodore Butterfield, Jr., testified that he was acquainted with Pearce, Brittingham, and Smith. (V-8, 590-93). He did not know Steve Tuttle or Robert Crawford. (V-8, 593). On the evening of September 13, 1999, he got a call from Pearce. (V-8, 593). He was at a friend's house with Smith and Butterfield when he received the call. Id. Butterfield testified: "He required some help, said that he had got ripped off for $1,000." (V-8, 593-94). Pearce told him to come armed, to "get a piece." (V-8, 594). Butterfield took a .22 or .25 caliber handgun and Brittingham had a "12-gauge." Smith was armed with a "9mm." (V-8, 594). They went to the We Shelter America mobile home park. (V-8, 594). Butterfield believed that Loucks let him in the gate. (V-8, 594). They went into the office where he observed Pearce, "the two kids, Bryon and the other kid." (V-8, 594).

Pearce told Butterfield that the two kids were going to show them where the people who ripped them off lived and they were going to get his money back. (V-8, 595). None of them threatened the kids while they were in the office. (V-8, 595-96). Pearce did have a gun in his hand when they came in. (V-8, 596). Pearce had a conversation with Smith away from everybody else in the office. (V-8, 596). He could not hear what was said because they were whispering. (V-8, 596). Butterfield testified that Pearce was calling the shots and was

in “charge.” (V-8, 596). They left the office only four or five minutes after arriving. (V-8, 611).

Butterfield testified that he did not hear or observe anyone threaten either of the boys when they left We Shelter America. (V-8, 612). They all got into the TransAm owned by Pearce. Pearce was the driver with Smith in the front passenger seat. Crawford and Tuttle were sitting in the back seat between Butterfield and Brittingham. (V-8, 597).

During the drive out on US 41, Pearce and Smith exchanged guns. (V-8, 597). Smith told Pearce that the “9mm jams and he wanted the .40 caliber.” (V-8, 598). Pearce turned right on SR 54 and drove a couple of miles before making a U-turn and stopping on the side of the road. (V-8, 598-99). He told the kid that “mainly got him [Pearce] ripped off to get out of the car.” (V-8, 599). Pearce told Smith to break his “fucking jaw” and teach him a lesson. (V-8, 599). Butterfield heard a gun shot and then Smith got back in the car. (V-8, 599). Pearce asked Smith if Tuttle was dead. (V-8, 599-600). Smith replied that “I shot him in the head.” (V-8, 600). Butterfield testified that he was surprised because he was not aware of a plan to murder these kids. (V-8, 616).

Pearce drove the car about another two hundred yards and then pulled over again. (V-8, 600). Pearce told Crawford to get out of the car. (V-8, 600). “The other kid gets out of the

car. You hear two gunshots, and Joey [Smith] gets back in the car again, and we drive off." (V-8, 600). There was no conversation between Pearce and Smith from the time Smith got back in the car after stating he shot Tuttle in the head to the time Pearce pulled the car over again two hundred yards down the road. (V-8, 600). After Crawford had been killed, Smith turned around from the front seat and pointed the pistol back at Butterfield and Brittingham, stating: "Snitches are bitches. Bitches deserve to die." (V-8, 601). Butterfield took that as a threat. (V-8, 601). Smith made a statement "that he had shot 13 or 14 people[]," or that this made his "13th and 14th." (V-8, 616).

Pearce drove them to a Waffle House after the shootings where Smith and Pearce ate breakfast. (V-8, 601-02). Butterfield and Brittingham did not feel like eating. Smith and Pearce did not seem to have any problem eating: "Didn't appear to be, no, sir." (V-8, 602). While at the Waffle House Pearce made a call and talked to "Chip." Pearce said that he and Smith were going to his house. (V-8, 602). Pearce and Smith dropped Butterfield and Brittingham off at a Winn Dixie in Tampa and told them they would be back. (V-8, 602-03). They did not leave the store because Brittingham and Butterfield thought it might be a "set up" to see if they were going to call the cops. (V-8, 603). Pearce and Smith returned after 45 minutes to pick

up Butterfield and Brittingham. (V-8, 603). Before taking them home, Pearce drove over the Howard Franklin Bridge where Smith pulled the .40 caliber out of the glove box. Smith threw the gun into the waters of Tampa Bay. (V-8, 603-604).

Sometime the next morning, while sleeping at Pearce's house, Butterfield was awakened by officers at gun point. (V-8, 604). He was told he was under arrest for the murder of two boys. Butterfield was interviewed by detectives and at first lied to them. He told the detectives two or three different stories, but did not recall the details of those stories. (V-8, 604) Butterfield eventually told the detectives the truth which was the testimony he presented before the jury. (V-8, 604-05). Butterfield was told that they had already brought in Smith and Brittingham and that unless he cooperated in the investigation he would be charged as an accessory. (V-8, 606).

Heath Brittingham testified that he was acquainted with Butterfield, Smith, and Pearce. He did not know the victims in this case, Crawford and Tuttle, or Havner, Shook and Loucks. (V-9, 627-28). On the evening of September 13, 1999, he was at Damien's house, along with Butterfield and Smith. (V-9, 628). Butterfield received a call and as a result, he Butterfield and Smith armed themselves and left Damien's house. (V-9, 629-30). Brittingham had a .12 guage shot gun, Smith had a 9mm, and, Butterfield had a small caliber hand gun. (V-9, 629-630).

Damien's brother drove the three to a mobile home dealership and dropped them off. (V-9, 630).

The We Shelter dealership had " big chain link fence all the way around it." (V-9, 630). The fence was a tall one, "like 10, 12 foot. It was too tall to climb." (V-9, 630). It had barbed wire on it and the fence was locked when they got there. (V-9, 629-30). Loucks had to unlock the gate in order for them to enter. (V-9, 631). When they entered the office, Brittingham observed Pearce standing in the door and noticed "two young boys" inside. (V-9, 631). Pearce had a .40 caliber gun. While he did not observe Pearce pointing it at anyone in particular, he was waving it around and it remained in his hand the whole time Brittingham was in the office. (V-9, 631). Things appeared peaceful in the office. (V-9, 647). Pearce and Smith stepped away from the door and talked to one another where no one else could hear the conversation. (V-9, 632). Shortly after arriving, they said that we were going to go for a ride. (V-9, 632). Brittingham assumed that they were going to Pearce's money back. (V-9, 632).

Pearce told Tuttle and Crawford to get in the car. (V-9, 632). When Pearce told them to get in the car he had the pistol in his hand: "Yeah, it was still in his hand. He didn't like, point it at them and say, 'Get in the car,' but he was, like, you know, 'Move on. Get in the car.'" (V-9, 633). He was

waving the gun at them. (V-9, 633). When asked if it seemed they were willing to go, Brittingham testified: “When Faunce told them, “Let’s go,” he was like, “Come on. Go get in the car,” and he had a gun in his hand. I guess if they wanted not to, they could have tried that.” (V-9, 649). However, Brittingham noted that waving the gun around was a threatening gesture: “I would have taken it as threatening, kind of.” (V-9, 651). “Well, like when he - - he told them to get in the car, the barrel was actually pointed at them and he was waving it. I don’t think it was at anybody directly because he was holding it to three or four people.” (V-9, 671).

Brittingham testified that they all got in the car with Pearce driving and Smith next to him in the front seat. The boys were in the back seated between Brittingham and Butterfield. (V-9, 633). They all had their weapons with them in the car. (V-9, 633). When they left We Shelter America they went South on 41 then made a right going East on 54. (V-9, 634). He considered that unusual as there was “nothing out there.” “It’s just a long road until you get to 19.” (V-9, 634). On the drive, Pearce and Smith traded guns, but he could not hear their conversation well. (V-9, 634). The T-tops were off and from the back seat you could hear wind rushing by. (V-9, 676). At some point, Butterfield asked one kid where he lived. (V-9, 653). Brittingham testified: “We drove down the

road for a while until there was no more houses and there was no businesses or anything on that road..." (V-9, 635). It was a "desolate" area. Pearce made a U-turn then "pulled over alongside of the road." (V-9, 635).

"They" told Tuttle to get out of the car. Pearce said "'[p]op him in the jaw for stealing my shit.'" (V-9, 636). Smith said "[f]uck that," spun around and shot him in the head. (V-9, 636). Smith got back in the car and Pearce asked Smith if Tuttle was dead? Smith replied: "Yes, he's dead. I shot him in the head with a fucking .40." (V-9, 637). Pearce asked are "you sure?" (V-9, 637). Brittingham testified that he was "stunned." (V-9, 665). He did not recall telling the detectives that after jumping in the car Smith told Pearce to "Drive, drive."[3] (V-9, 673). He did recall them arguing over whether or not Tuttle was dead. (V-9, 673).

Pearce drove off another 200 yards or so and "told the other boy, Robert, [Crawford] to get out."[4] (V-9, 637). It was Smith who told Crawford to get out of the car. (V-9, 674). When he

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[3]Later, defense counsel brought out Brittingham's deposition testimony where he heard Joey say "Right here." (V-9, 677). At trial, Brittingham recalled Smith saying something but did not recall "exactly what words he used." (V-9, 677).

[4]Defense counsel showed Brittingham a sworn statement made to the state attorneys office, wherein, Brittingham recalled: "Joey jumped in the car and he said 'Drive, drive.' And Faunce looked at him and he said, 'Is he dead?' And Joey said, 'Yes. I shot him in the head.' And Faunce goes, 'Are you sure?' And Joey says, 'Yeah. I shot him in the head with a fucking .40.' And then they took off driving down the street." (V-9, 672).

got out, Crawford said: “No. Please, no.” (V-9, 637). Smith then shot Crawford twice. (V-9, 637). After the first shot, Crawford fell to the ground. Smith stepped toward the body “and then he was aiming almost straight down, and he shot again, and then he got back into the car.” (V-9, 638). After Smith got back in he waved the gun around and said to Brittingham and Butterfield if “we said anything to anybody, or if even he thought that we said anything to anybody, he was going to kill us.” (V-9, 638-39). Brittingham was afraid and thought Smith meant it. (V-9, 639). Smith also made a statement to make it seem like “he’s killed more people than just them.” (V-9, 669).

After shooting the victims, Pearce suggested that they stop for breakfast. They went to the Huddle House, but Brittingham did not feel like eating. (V-9, 639). He felt sick. (V-9, 639-40). Brittingham and Butterfield were dropped off at a Winn Dixie store and instructed to wait. They were told not go anywhere or do anything. (V-9, 640). Brittingham did as he was told and waited. When Pearce and Smith returned, they got back in the car and drove off. During the drive, Brittingham observed Smith throw a handgun from the Howard Franklin Bridge. (V-9, 640-41).

When he ultimately arrived home, Brittingham tried to tell himself that it “really didn’t happen.” (V-9, 642). He

returned to Damian Smith's house and talked to Damien's sister about the situation. (V-9, 642). He tried to get advice from her without involving her in his own predicament. (V-9, 642). Brittingham made contact with a Sheriff's deputy outside of Damian's home. He was subsequently interviewed by Detective Moe and cooperated in the investigation. He showed the officers where the gun was thrown from the Howard Franklin Bridge. (V-9, 642-643).

Pasco Sheriff's Deputy Phillip Lattice responded to the 7-11 where a truck driver had taken Tuttle. He observed an individual [Tuttle] in the parking lot bleeding from a head wound. (V-9, 691). Lattice attempted to communicate with the young man but he became violently ill. (V-9, 691-92). While there, he learned of another person found in the vicinity by the side of the road. (V-9, 693). He responded to the scene with a fire truck and "found a young, male subject lying on the ground on the side of the road, in the grassy area." (V-9, 693). He approached the young man, testifying: "...he was bleeding from the head. They began treating him as best they could. They called for an ambulance and medivac helicopter at that point." (V-9, 693). They began emergency treatment, however, the young man was pronounced dead at the scene. (V-9, 694). Deputy Lattice secured the crime scene. (V-9, 694).

Dr. Marie Hanson, Medical Examiner for Pinellas and Pasco

Counties testified that she arrived at the scene of an apparent murder at approximately 7:00 am. She observed a young male, "he was already on the EMS backboard and was strapped in. He had a defect to the side of his head and, apparently, a defect to the side of his neck. He had blood on him." (V-10, 742-44). The body was taken back to the coroner's office for a more detailed examination.

Dr. Hansen testified regarding the external examination of the victim's body:

> The external examination of the body revealed several holes. There was a hole in the out - - in the left arm. There was a mark on the left side of the neck. And there were two holes in the head: one on the right and one on the left side.

(V-9, 746). An internal examination revealed the path of the bullets through Crawford's body:

> There were two gunshot wound paths. One went through the arm, through the muscles of the posterior back, broke the clavicle, and went up to the side of the neck, with a bullet that we found in the back of the throat. It missed both the artery and the vein on the side of the neck, but it went in that area, and the bullet ended up in the middle of the throat.

(V-10, 748). The gunshot wound to the head traveled through the brain from the right, about four inches above the ear, causing a complex fracture of the skull and "hemorrhage and contusion of the brain." (V-10, 748-49).

Dr. Hansen testified that the injuries suggested Crawford was shot first in the arm. Dr. Hansen testified:

> I think it is more probable that the arm shot went first. However, I can't say for absolute certain. But once you have the shot through the head and the damage that it does, I would not expect him - - I would not expect him to be able to raise his arm up...

(V-10, 751). The gunshot wound to the head was fatal. Following the head shot, Crawford would have lost consciousness "in the area of 20 seconds to a max of a minute, maybe even less - - less – - 15 seconds." (V-10, 757). The wound would have caused death in two to three minutes, maybe five. (V-10, 757).

Deputy Nathan Long of the Pasco County Dive Team, testified that he recovered a weapon believed to have been used in a homicide from the waters of Tampa Bay. The weapon was found in an area near the Howard Franklin Bridge in accordance with information received from the Sheriff's Department. (V-8, 515-19). The weapon was found with a magazine spring, but the face plate to the magazine was not found. (V-8, 518). The weapon had live rounds in it. It was extremely lucky for the weapon to have been found: "It is - - it's definitely the needle in a haystack." (V-8, 518-19).

SUMMARY OF THE ARGUMENT

ISSUE I–The trial court did not abuse its broad discretion in refusing to allow defense counsel to impeach witness Brittingham with a videotaped statement. Brittingham did not recall making the prior statement. Moreover, defense counsel failed to satisfy the predicate for its admission by allowing Brittingham to view the statement as part of his proffer.

ISSUE II–The evidence of premeditation was sufficient to overcome appellant's motion for a judgment of acquittal. Pearce shared in Smith's intent to murder Crawford and provided substantial assistance to Smith in achieving that goal.

ISSUE III–The State's evidence was sufficient to overcome appellant's motion for a judgment of acquittal for kidnapping. The evidence established that both victims were held against their will before being ordered into the car by Pearce. The victims were taken to a remote location by Pearce where they could be executed by Smith.

ISSUE IV–Substantial, competent evidence established that the murder occurred during the course of a kidnapping.

ISSUE V-The evidence was sufficient to establish that Crawford's murder was cold, calculated and premeditated.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW DEFENSE COUNSEL TO IMPEACH A STATE WITNESS WITH AN UNSWORN VIDEOTAPED STATEMENT? (STATED BY APPELLEE).

Appellant argues that the trial court abused its discretion in refusing to allow him to impeach state witness Brittinham with an unsworn videotape made to the investigating detectives. Appellant claims that this error requires reversal of his convictions. The State disagrees.

An evidentiary ruling of the trial court is reviewed on appeal for an abuse of discretion. See San Martin v. State, 717 So. 2d 462, 470 (Fla. 1998)("A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed."). "Under this standard, the trial court's ruling should be sustained unless no reasonable person would take the view adopted by the trial court." Overton v. State, 801 So. 2d 877, 896 (Fla. 2001)(citing Huff v. State, 569 So. 2d 1247 (Fla. 1990)).

The State maintains that it was the appellant's burden as the proponent of the evidence to show that the statement was admissible as a prior inconsistent statement. Brittingham was asked by defense counsel if he had "testified" previously that

Faunce seemed surprised and said “What the hell” after Smith shot the first victim. (V-9, 659). Brittingham denied he used those words or words like that. (V-9, 659-60). Defense counsel then asked Brittingham if he recalled talking to Detective Moe and having his statement videotaped. Brittingham did recall being videotaped. (V-9, 660). However, Brittingham did not “remember” saying on the videotape “[w]hat the hell? What are you doing?” before asking him is “he dead?” (V-9, 660).

The prosecutor initially objected to the tapes admission, claiming that if it was admissible, it must be admitted during the defense case. (V-9, 661). The prosecutor stated that he had “to prove up the impeachment, and you do that in your case, Mr. Ivie [defense counsel] not mine.” (V-9, 661). Defense counsel stated he was “going to proffer the tape right now as part of my impeachment in this thing.” (v-9, 661-62). The trial court stated the record would reflect the proffer but said that the defense should introduce the tape after the state rests. (V-9, 662).

After the State rested, defense counsel sought to introduce the tape into evidence for “impeachment.” (V-10, 815, 849). Defense counsel did not attempt to limit the proposed introduction, stating that “it’s such a large part of the tape, it may well be better to show the entire tape.” (V-10, 816). Brittingham’s statement that Faunce said “‘What the hell? What

are you doing?" was on the tape. This was immediately followed by a discussion over whether or not Smith was certain Tuttle was dead. (V-10, 835). Brittingham stated: "He [Pearce] asked him, 'Is he dead?' And Joey was, like, 'Yeah. I shot him in the head.' And Faunce goes, 'Are you sure?' And Joey was, like, 'Yeah. I hit him in the head with a .40'. And then they dropped the second kid, and then they make it here to 52 and 41 ..." (V-10, 835). When pressed by the prosecutor on which specific part of the tape he wanted admitted, defense counsel stated: "The part of the videotape I am most interested in is the part dealing with the witness talking to the police about Faunce Pearce's reaction to the actions of Joey smith." (V-10, 848).

The prosecutor argued the tape was hearsay and that the only possible basis for its admission was for impeachment. (V-10, 849). However, the prosecutor stated the only response from Brittingham with regard to Smith allegedly telling Pearce to pull over was "I don't recall." Consequently, the prosecutor argued that the tape did not truly impeach Brittingham's trial testimony. (V-10, 849). After some discussion over whether you can impeach an "I don't recall" or "I don't remember" response with extrinsic evidence, the judge ultimately agreed that the tape was not admissible to impeach Brittingham's testimony. (V-10, 851-52). The court found the tape did not meet the

requirements for admission as impeachment under the Florida Evidence Code. (V-10, 851).

It was the appellant's burden to demonstrate that the individual statements reflected in the videotape qualified for admission as prior inconsistent statements. In attempting to lay the predicate for admission, defense counsel asked Brittingham if he made a videotaped statement to Detective Moe. Brittingham denied having seen the tape and denied that anyone had asked if he wanted to see it. (V-9, 683). Defense counsel did not, however, actually let Brittingham see the statement in court and confront the allegedly inconsistent statement as part of the proffer. Consequently, Brittingham was not given an opportunity to see and hear his prior statement, or, more importantly, given an opportunity to explain it.[5] See e.g. Saucier v. State, 491 So. 2d 1282, 1283 (Fla. 1st DCA 1986)(error to admit impeachment without giving witness an opportunity to explain or deny the prior statement); Earhardt, Florida Evidence, § 614.1 (2000 ed.) ("After a witness admits making a

[5]Although the trial court may have initially prohibited defense counsel from playing the tape while Brittingham on the stand, during the proffer, defense counsel made no attempt to play the tape for Brittingham and actually confront him with individual statements. Under these circumstances, it cannot be said the trial court restricted defense counsel's proffer from establishing the necessary predicate. C.f. Kimble v. State, 537 So. 2d 1094, 1096 (Fla. 2d DCA 1989)(since the trial court actually prevented the defense from confronting a witness with the prior inconsistent statement, failure to lay the proper predicate cannot be attributed to the defense).

prior statement, the witness should be given the opportunity to explain it, to show that the witness was mistaken when it was made, or to explain that the prior statement is not inconsistent[].”). Certainly if the statement was reduced to writing the witness must be given an opportunity to see his statement in writing and address the apparent inconsistency. It should be no different in this case where the allegedly inconsistent prior statement is not written, but videotaped.[6] As such, appellant did not establish the appropriate predicate for admission of the videotape. However, even assuming the issue is preserved for review, the trial court’s ruling did not constitute reversible error.

There is some ambiguity in the law on whether or not extrinsic evidence of a prior statement can be admitted for impeachment where the witness merely has an inability to recall or remember as opposed to affirmatively denying the prior statement. Compare James v. State, 765 So. 2d 763, 765 (Fla. 1st DCA 2000)(holding in the alternative that extrinsic evidence of an out of court statement was not proper where the witness simply stated he had “no recollection” which was not “truly inconsistent” with his previous statement.); Calhoun v. State, 502 So. 2d 1364, 1365 (Fla. 2d DCA 1987)(extrinsic evidence of

[6]It is not clear from the proffer if Brittingham’s statement reflected Pearce’s reaction to the shooting or whether Brittingham was reflecting his own sense of surprise at the shooting.

statement improper where witness's lack of "recall" was not inconsistent with prior statement); With MBL Life Asur. Corp. v. Suarez, 768 So. 2d 1129, 1134 (Fla. 3d DCA 2000)("When a witness states that she does not recall questions asked or answers given at a previous time, the law provides that extrinsic evidence of the prior statement is admissible."(citing Pugh v. State, 637 So. 2d 313 (Fla. 3d DCA 1994) and Section 90.614 (2), Fla. Stat.); Fleming v. State, 457 So. 2d 499, 502 (Fla. 2d DCA 1984)(witness's inability to "recall his specific statement" to a detective laid the "necessary foundation for the subsequent introduction of extrinsic evidence establishing the statement.").[7] Given the relative lack of clarity in the law, this Court should decline to find an abuse of discretion in this case. That is, the trial court did not render an evidentiary ruling so erroneous that "no reasonable person would take the view adopted by the trial court." Overton, 801 So. 2d at 896.

In any case, assuming this Court adopts the view that Brittingham's lack of recollection opened the door to introduction of the videotaped statement, any error in excluding the impeachment was clearly harmless in this case.[8]

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[7]See also United States v. Dennis, 625 F. 2d 782, 796 (8th Cir. 1980)(witness's denials of and inability to recall grand jury testimony was inconsistent with his trial testimony).

[8]In theory, Brittingham's lack of recollection renders the entire statement admissible as a prior inconsistent statement. It is

State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The allegedly prior inconsistent statement was only offered by defense counsel to impeach Brittingham's credibility and not as substantive evidence. (V-10, 815). Indeed, even on appeal appellant does not contend that the tape was admissible as substantive evidence. The statement was not sworn and did not qualify as a statement made under oath in court, in sworn deposition, or in an other "proceeding" under Section 90.801(2). See Ellis v. State, 622 So. 2d 991, 997-98 (Fla. 1993)(noting that a sworn statement to a prosecutor with court reporter present did not constitute an "other proceeding" so that the prior inconsistent statement could be considered admissible as substantive evidence under 90.801(2)(a)); State v. Smith, 573 So. 2d 306, 314-15 (Fla. 1990)(sworn prior inconsistent statement in prosecutor's interrogation admissible only as impeachment, not substantive evidence); Thomas v. State, 697 So. 2d 926, 927 (Fla. 5th DCA 1997)(noting that prior inconsistent statements from witness interviews were not substantive evidence and therefore could not establish an essential element of the offense.). Since the statement was not admissible as substantive evidence, reversible error may be established only if the impeachment of Brittingham was such that it seriously

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questionable whether or not introduction of an extrinsic statement really operates to impeach the stated inability to recall. In reality, it appears to be merely an attempt to admit otherwise inadmissible hearsay.

compromised his credibility.

Appellant's contention that the proffered tape "should have been allowed into evidence as the most accurate account of his [Pearce's] response on the night in question" is incorrect. While Pearce asserts that the statement was admissible as impeachment, such a statement reflects an attempt to use the prior inconsistent statement as substantive evidence. As noted above, the only basis to admit the taped statement was to impeach Brittingham's credibility. Thus, what Brittingham said on the tape cannot be considered "the most accurate" account of Pearce's reaction. Dudley v. State, 545 So. 2d 857, 859 (Fla. 1989)("The law is clear that, although a prior inconsistent statement may be used to impeach the credibility of a witness, a prior inconsistent statement made by the witness about what another person told him is hearsay and cannot be used as proof of the facts contained therein.")(citing Ehrhardt, Florida Evidence § 801.2 (2d ed. 1984)). The impeachment could only be considered to detract from Brittingham's credibility.

Defense counsel successfully elicited from Brittingham that no one in the car expected Smith to shoot Tuttle.[9] (V-9, 665). Since Brittingham's testimony was cumulative to testimony introduced through other witnesses, any error in excluding the

[9]An objection was sustained to this question regarding what anyone else thought. (V-9, 665). However, the jury was not instructed to disregard the answer given by Brittingham. Id.

proffered impeachment was harmless.

In Garcia v. State, 816 So. 2d 554 (Fla. 2002) this Court reversed a conviction based upon exclusion of a proffered videotaped statement for impeachment made by a state witness during a police polygraph. This Court noted that the witness in question, Ribera, was "the lynchpin of the State's case and his credibility was critical to the strength of the state's case." 816 So. 2d at 563. Consequently, the error in excluding the impeachment could not be considered harmless.

In this case, Brittingham's testimony was not critical to the State's case since at least two other witnesses established the charged offenses. Brittingham's testimony was corroborated in almost every significant respect by Butterfield's and Tuttle's.[10] (V-8, 561-69; V-8, 561-69). See Derrick v. State, 581 So. 2d 31, 36 (Fla. 1991)(error in restricting impeachment of detective on taking the defendant's confession was harmless error in light of corroborating witnesses to defendant's confession and other compelling evidence of guilt). Further, this Court should consider that the State presented absolutely overwhelming evidence of Pearce's guilt as both a principle and as a perpetrator responsible for the charged offenses under a felony murder theory.

The fact that Pearce was the primary actor in the kidnapping

pursuant to a felony murder theory was established by the testimony of Havner, Loucks, Shooks, Brittingham, Butterfield, and surviving victim Tuttle. Based upon this record, the underlying felony of kidnapping and the fact the murders occurred in the course of a kidnapping cannot be subject to dispute. Consequently, appellant's reliance upon Pugh v. State, 637 So. 2d 313 (Fla. 3d DCA 1994), is misplaced. In Pugh, the defendant's conviction rested almost entirely upon the testimony of one witness whose prior inconsistent statement cast considerable doubt upon his testimony. Pugh, 637 So. 2d at 313, 314. See Kane v. State, 698 So. 2d 1254, 1256 (Fla. 2d DCA 1997)(error in allowing state to call witnesses for the purpose of introducing prior inconsistent statements was harmless where evidence established the completed crime of burglary and lack of evidence of withdrawal resulted in overwhelming evidence to establish first degree felony murder).

Appellant's assertion that the purpose of the "drive" was to get the money back is not supported by the evidence. Rather, it appears the goal of the drive was to get rid of the boys who Pearce still believed had "stolen" his money. Indeed, instead of heading toward town or to a location where he might get either drugs or money, Pearce drove the victims to a remote location and stopped the car. Pearce was clearly in charge of the victims' fate from the moment they left with his money.

Pearce told them as they left, the money was their life. They did not return with the money or drugs and Pearce used Smith to take Crawford's life and attempt to take Tuttle's.

The evidence was uncontradicted that Pearce was the one who did not let the boys leave from We Shelter America. Pearce was the one who forced Tuttle to perform a sexual act on him. Pearce called for armed backup, bringing Smith, Butterfield, and Brittingham into the criminal episode. Pearce is the one who told the victims to get in the car. Pearce is the one who drove the victims to a remote location. Pearce provided Smith with the murder weapon after Smith complained that his 9mm was prone to malfunction.

After Tuttle was shot, Pearce, hearing only one shot, wanted assurance from Smith that Tuttle was dead. After receiving such assurance, Pearce drove off, only to stop a short while later, again in a remote area. Despite Crawford's plea, he was taken out of the car and shot two times. Pearce did not need any assurance from Smith of Crawford's death this time, after hearing and/or observing Crawford being shot twice.

Overwhelming evidence established Pearce's guilt as a principle for attempted first degree murder on Tuttle and of first degree murder on Crawford. However, the jury apparently gave Pearce the benefit of any doubt with regard to Tuttle, finding him guilty of only attempted second degree murder. As

the impeachment arguably attacked Brittingham's credibility with regard to the Tuttle shooting, any error in refusing to admit the impeachment was clearly harmless under the circumstances of this case.[11]

[11]Defense counsel impeached Brittingham with a previous statement he made about stopping the car a pretrial deposition. (V-9, 677). Defense counsel also used a taped, sworn statement Brittingham made to the state attorney's office to impeach him. He did not remember Smith telling Pearce to "drive, drive" after shooting the first boy, but defense counsel impeached his answer using the sworn statement. (V-9, 672). Further, defense counsel used his deposition to impeach Brittingham's failure to recall Smith telling Pearce "[r]ight here" after driving off from the first shooting. (V-9, 675-76). Using the video tape to impeach on the same basis would constitute cumulative evidence.

ISSUE II.

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR FIRST DEGREE MURDER ON THE ELEMENT OF PREMEDITATION? (STATED BY APPELLEE)

Appellant asserts that the trial court erred below in failing to grant his motion for a judgment of acquittal because the State failed to present sufficient evidence of premeditation. Accordingly, the appellant argues that his conviction for first degree murder must be reversed. The State disagrees.

While the trial court's decision denying the motion for a judgment of acquittal is reviewed de novo, the State is entitled to an extremely favorable review of the evidence. Jones v. State, 790 So. 2d 1194, 1196 (Fla. 1st DCA 2001). "'A court should not grant a motion for a judgement of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party.'" Deangelo v. State, 616 So. 2d 440, 442 (Fla. 1993)(quoting Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991), cert. denied, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994). In moving for a judgement of acquittal, appellant admits "the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence." Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991). "If there is room for a difference of opinion

between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury." Id.

Most of the evidence connecting Pearce to the murder of Crawford and attempted murder of Tuttle was direct, consisting of eye witness accounts. However, as in most first degree murder cases, premeditation must be established by circumstantial evidence. Where circumstantial evidence is used to establish an element of the offense, “the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences.” Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995). After the judge determines as a matter of law, whether such competent evidence exists, the “question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury.” Long v. State, 689 So. 2d 1055, 1058 (Fla. 1997). “The sole function of the trial court on motion for directed verdict in a circumstantial evidence case is to determine whether there is prima facie inconsistency between (a) the evidence, viewed in the light most favorable to the State and (b) the defense theory or theories. If there is such inconsistency, then the question is for the finder of fact to resolve. The trial court’s finding in this regard will be

reversed on appeal only where unsupported by competent substantial evidence." Orme v. State, 677 So. 2d 258, 262 (Fla. 1996)(citing State v. Law, 559 So. 2d 187 (Fla. 1989)).

In State v. Allen, 335 So. 2d 823, 826 (Fla. 1976), this Court stated:

> ...Circumstantial evidence, by its very nature, is not free from alternate interpretations. The state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way which is consistent only with the allegations against the defendant. Were those requirements placed on the state for these purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary elements of a crime.

Pearce was prosecuted as a principle to first degree murder [Crawford] and attempted first degree murder [Tuttle]. "Under our law, both the actor and those who aid and abet in the commission of a crime are principals in the first degree. See § 777.011, Fla. Stat. (1985). In order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime." Staten v. State, 519 So. 2d 622, 624 (Fla. 1988)(string cites omitted). "When a defendant is charged with a specific intent crime based on an aiding and abetting theory, the state also has the burden to prove requisite intent. It can do so by either showing that the aider and abettor had the requisite intent or that he knew

that the principal had that intent." (citing Stark v. State, 316 So. 2d 586, 587 (Fla. 4th DCA 1975)). See also S.G. v. State, 591 So. 2d 294 (Fla. 3d DCA 1991)("Intent can be proven either by showing that a defendant had the requisite intent himself, or that he knew that the principal had the intent.")(citation omitted).

"Premeditation is a fully formed conscious intent to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the act about to be committed and the probable result of that act." Spencer v. State, 645 So. 2d 377, 381 (Fla. 1994)(string cites omitted). Premeditation is often impossible to prove by direct testimony and must be inferred from the circumstances surrounding the homicide. See Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). "The grade or degree of a homicide, and the intent with which a homicidal act was committed are questions of fact dependent upon the circumstances of the case, and are typically for resolution by a jury." Larsen v. State, 485 So. 2d 1372 (Fla. 1st DCA 1986), aff'd, 492 So. 2d 1333 (Fla. 1986). Consequently this Court provides deference to the jury: "Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury." Penn v. State, 574 So. 2d 1079, 1081 (Fla. 1991).

Appellant's argument that the evidence showed that he merely

wished to "at worst" cause some battery to the victims, is not supported by the record.[12] Such an assertion asks this Court to take a defense oriented view of the evidence, a view to which Pearce is not entitled to on appeal. And, a view which is not supported by the great weight of the evidence against Pearce.

Pearce did much more than merely assist Smith in committing the murders. Pearce orchestrated the kidnapping and subsequent murder and attempted murder. He was the leader of the group. (V-8, 596). Premeditation was established by showing Pearce assisted Smith in committing the murder of Crawford and attempted murder of Tuttle, and that he shared in Smith's criminal intent.

When the victims left with Pearce's money, he made it clear to them that the money was their life, bring back the drugs or money. (V-7, 408-09; V-8, 555-556). When he learned they had lost his money, he said that they would "have to pay the consequences." (V-7, 411). Appellant was enraged. (V-8, 560). He called for assistance from his friends, bringing the trigger man, Joey Smith, into contact with the victims. He asked them to come to We Shelter America armed. (V-8, 594). When Smith arrived he said that he was there to "take care of business." (V-7, 416; V-8, 471). The "business" Smith referred to was that

[12]Since the jury convicted appellant of attempted second degree murder for the Tuttle shooting, the State presumes that his premeditation argument only addresses the Crawford murder.

orchestrated and directed by Pearce.

Pearce repeatedly rejected attempts by others to take the boys away from his control at We Shelter America. (V-7, 416; V-8, 492). In fact, Tuttle asked if he could leave, and Pearce told him "no." (V-8, 562). Pearce and Smith had a private conversation before leaving We Shelter America. (V-8, 596).

Pearce ordered the victims into the car and drove off. On the drive, Smith complained that his 9mm was prone to jamming. Pearce provided Smith with a .40 caliber handgun, the murder weapon. Pearce chose to drive off to a remote area, pulling the car over to the side of the road before ordering Tuttle out. Pearce told Smith to break his "fucking jaw" and teach him a lesson. (V-8, 599). Tuttle was shot in the head by Smith. When Smith got back in the car, Pearce asked for assurance that Tuttle was dead. (V-8, 600). Only after receiving such assurance, did Pearce drive off. (V-9, 636-37).

With the knowledge that Smith shot Tuttle in the head and [apparently] killed him, Pearce pulled the car over to the side of the road a couple hundred years from the scene of the first shooting. Crawford was told to get out of the car. (V-8, 600). Despite a plea for mercy (V-9, 637), Smith shot Crawford two times. (V-8, 600, V-9, 638). Smith was observed aiming straight down at Crawford as he lay on the ground. (V-9, 638).

Of the two shots, the first shot went through Crawford's arm as it was raised up, going through the muscles of his back, finally lodging in the back of his throat. (V-9, 748, 751). The second shot struck Crawford in the head, about four inches above his ear, inflicting a fatal wound. (V10, 748-49).

The record clearly shows Smith's fully informed intent to kill Crawford. As Smith recognized in his comments after shooting Tuttle, shooting someone in the head with a .40 caliber handgun, can be expected to cause death. See Griffin v. State, 474 So. 2d 777, 780 (Fla. 1985)(affirming first degree murder conviction based on premeditation, after finding that Griffin used a particularly lethal gun, there was an absence of provocation, and the wounds were inflicted at close range and, thus, "unlikely to have struck the victim unintentionally."). With the knowledge that Smith had just shot and apparently killed Tuttle, Pearce stopped the car a short distance from the scene of the first shooting so that Crawford could be executed. There can be no doubt at this point, that Pearce shared Smith's criminal intent.

Appellant's reliance upon Mungin v. State, 689 So. 2d 1026 (Fla. 1995), is misplaced.[13] In Mungin this Court found the

[13]Cummings v. State, 715 So. 2d 944 (Fla. 1998), provides no support for appellant's argument on appeal. In Cummings the defendant was in a car from which an occupant fired a gun a number of times into a darkened carport. There was no evidence to suggest the defendant or co-defendant saw the victim standing

trial court erred in instructing the jury on both premeditated murder and felony murder. This Court found evidence of premeditation lacking where there were no eyewitnesses to the shooting and the store clerk was found mortally wounded with a single gun shot wound to the head. This Court found the State's evidence lacking where "[t]here are no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation." Mungin, 689 So. 2d at 1029. Although the evidence as to premeditation was lacking, this Court affirmed the first degree murder conviction based upon felony murder and an underlying robbery. Id. at 1030.

In contrast to Mungin, the State presented eye witness testimony to the murder and evidence of a threat Pearce made to the victims' to bring back his money or the drugs. Failure to do so would cost them their lives. The totality of circumstances show that Smith had the premeditated intent to kill and that Pearce shared in that intent. Pearce not only assisted Smith in committing the charged offenses, he was the

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"in the darkness of the carport." Cummings, 715 So. 2d at 949. Consequently, this Court could not rule out the "possibility that Cummings and his cohorts merely intended to frighten Johnson or to damage his car, which was struck by several of the bullets." Id. In this case, there was no random shooting into a car or carport in the dark. Crawford was executed by Smith shortly after Tuttle was shot in the head. Pearce believed Tuttle had been killed by the shot to the head and questioned Smith to ensure that he was indeed dead.

driving force behind the murder and attempted murder. See generally Parker v. State, 458 So. 2d 750 752-53 (Fla. 1984)(failure to give independent act instruction was not error where evidence showed that drug dealer set in motion the events which led directly to the victim's death, including the fact the defendant was aware the victim was being driven to the woods "against his will as part of the ongoing terrorization for failure to pay his drug debt...").

The trial court heard all of the testimony and considered the arguments of counsel before determining that sufficient evidence was presented to the jury. The jury was able to weigh the evidence, observe the witnesses and evaluate their credibility. The jury found the evidence sufficient to establish appellant's guilt beyond a reasonable doubt. Appellant has offered this Court nothing on appeal which compels a different conclusion than that reached by the trial court and jury below.

Assuming, *arguendo*, this Court finds some defect in the State's evidence on premeditation, the evidence supports appellant's conviction for first-degree felony murder with kidnaping as the underlying felony.[14] See San Martin v. State, 717 So. 2d 462 (Fla. 1998), cert. denied, 143 L.Ed.2d 553 (1999)(reversal is not warranted where general verdict could

[14]The jury utilized a general verdict form reflecting that it found appellant guilty of First Degree Murder. (V-3, 426).

have rested upon theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which evidence was sufficient); Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)(upholding general verdict even though one of the two possible bases of the conviction failed because of insufficient evidence). The argument for upholding appellant's murder conviction under the felony murder theory is made under Issue III, below.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL ON FELONY MURDER? (STATED BY APPELLEE).

Appellant next contends that the State presented insufficient evidence to support his conviction for kidnapping. However, appellant's argument conspicuously avoids discussing the facts developed during the trial. Instead, appellant simply concludes that there was "no evidence" to establish that the homicide was committed in "furtherance" of the kidnapping and that the evidence "established" the homicide was "an independent act" of Joey Smith. (Appellant's Brief at 31). The State disagrees.

As argued in Issue II above, the State did present competent, substantial evidence to establish premeditation. The same evidence discussed above established that Pearce kidnapped Crawford and Tuttle and that the murder and attempted murder occurred during the course of the kidnapping. Since the evidence establishing felony murder was direct, not circumstantial, the State is entitled to an extremely favorable view of the evidence on appeal. See Darling v. State, 808 So. 2d 145, 155 (Fla. 2002)("Where there is room for a difference of opinion between reasonable men as to the proof of facts from which the ultimate fact is sought to be established, or where there is room for such differences as to the inference which

might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion in such cases, that should prevail and not primarily the views of the judge.")(quoting Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974)). The trial court properly denied the motion for a judgment of acquittal below.

It is beyond dispute that the murder of Crawford occurred during the course of a kidnapping. The two victims were held at We Shelter America by an armed and angry Pearce. Pearce waved the gun around as he told everyone to come inside the office of We Shelter America. The We Shelter America office was surrounded by a gate with barbed wire on top. The gate was closed and locked while the boys were inside the office.[15] (V-8, 526, 563; V-9, 630). Tuttle was taken from the office and was forced to perform a sexual act on Pearce under the threat of death. (V-8, 561). Pearce repeatedly rejected attempts by others to take the boys away from the office. In fact, Tuttle asked if he could leave, and Pearce told him "no." (V-8, 562). Consequently, the evidence establishes that the victims were held against their will prior to being taken from the office in Pearce's car.

The boys were ordered into the car by an armed Pearce. Under the circumstances, it was clear they had no choice in the

[15]Havner's brother, Joseph, testified that the gate was closed and locked when he arrived. (V-8, 526).

matter. (V-8, 564; V-9, 633, 649). Once in the car, Pearce drove them a number of miles to a remote location where the murders could occur without detection. See Sochor v. State, 580 So. 2d 595, 600 (Fla. 1991)(victim's removal from "the lounge parking lot to a secluded area facilitated Sochor's acts, avoided detection, and was not merely incidental to, or inherent in, the crime."). The victims' liberty was not restored prior to the murder and attempted murder. See Stephens v. State, 787 So. 2d 747, 754 (Fla. 2001)(finding death of a child left in a car occurred during the course of a kidnapping where the child's liberty had not been restored prior to his death)(citing State v. Stouffer, 352 Md. 97, 721 A.2d 207 (1998)(finding a continuing kidnapping where the victim's liberty was never restored prior to his death)). Consequently, the murder clearly occurred during the course of a kidnapping.[16]

Appellant's assertion that the murder was an independent act of Smith was a question for the jury to decide. The State presented substantial, competent evidence to establish not only

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[16]The jury was instructed that the kidnapping was with the intent to terrorize or inflict bodily harm. (V-11, 976). Pearce clearly possessed the requisite intent, taking control of the victims, refusing to let them leave, and, taking the victims to a remote location where bodily harm could be inflicted upon them. Pearce told Smith to break Tuttle's jaw. Then, when Smith shot Tuttle, Pearce questioned Smith in order to ensure that the victim was in fact dead. Pearce stopped the car two hundred yards down the road, where the second victim was forced out of the car. Despite a plea for mercy, Smith shot Crawford twice, killing him.

that Pearce was an active participant in the kidnapping, but that he was the one who orchestrated the kidnapping and violence against the victims. Although the jury was instructed on the theory of independent acts (V-11, 975), the evidence supporting such a theory was practically non-existent. Indeed, under the facts of this case, the trial court need not even have provided such an instruction to the jury.

In Ray v. State, 755 So. 2d 604, 609 (Fla. 2000), this Court stated:

> The "independent act" doctrine arises when one cofelon, who previously participated in a common plan, does not participate in acts committed by his cofelon, "which fall outside of, and are foreign to, the common design of the original collaboration." *Dell v. State*, 661 So. 2 1305, 1306 (Fla. 3d DCA 1995)(quoting *Ward v. State*, 568 So. 2d 452 (Fla. 3d DCA 1990)). Under these limited circumstances, a defendant whose cofelon exceeds the scope of the original plan is exonerated from any punishment imposed as a result of the independent act. Id. *See also Parker v. State*, 4598 So. 2d 750 (Fla. 1984). Where, however, the defendant was a willing participant in the underlying felony and the murder resulted from forces which they set in motion, no independent act instruction is appropriate. *See Lovette v. State*, 636 So. 2d 1304 (Fla. 1994); *Perez v. State*, 711 So. 2d 1215 (Fla. 3d DCA), review denied, 728 So. 2d 204 (Fla. 1998); *State v. Amaro,* 436 so. 2d 1056 (Fla. 2d DCA 1983). We find that both Ray and Hall were participants in the robbery **and the murder resulted from forces they set in motion**; therefore no independent act instruction was warranted. (emphasis added).

Pearce fails to cite record evidence suggesting his withdrawal from either the kidnapping or the fatal violence which followed. Pearce clearly set in motion the kidnapping and

brought the victims into contact with Smith. Pearce provided Smith with the murder weapon and drove the victims to a remote spot of his own choosing where they could be murdered without interference or detection. Since Pearce set in motion the events leading to the victim's murder, as in Ray, the trial court need not even have provided an independent act instruction. See Suarez v. State, 795 So. 2d 1049, 1053 (Fla. 4th DCA), rev. denied, 819 So. 2d 140 (Fla. 2001)("Where, however, the defendant was a willing participant in the underlying felony and the murder resulted from forces which they set in motion, no independent act instruction is appropriate.")(string cites omitted). The evidence was certainly sufficient to overcome Pearce's motion for a judgment of acquittal.

ISSUE IV.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OCCURRED DURING THE COURSE OF A KIDNAPPING? (STATED BY APPELLEE).

Appellant first argues that the State failed to prove that kidnapping was the sole or dominant motive for the homicide. However, Pearce failed to make this argument below to the trial court. Indeed, the sum total of counsel's argument on the proposed kidnapping instruction was as follows: "I know it was part of the jury instructions, but there was no charge of

kidnapping, so kidnapping has not exactly been proven."[17] (V-11, 1016-17). Since the specific argument now offered by counsel was not made below, this issue is not preserved for appeal. As this Court stated in Rodriguez v. State, 609 So.2d 493, 499 (Fla. 1992), cert. denied, 114 S.Ct. 99, 126 L.Ed.2d 66 (1993), "[i]t is well settled that the specific legal ground upon which a claim is based must be raised at trial and a claim different than that raised below will not be heard on appeal." See also San Martin v. State, 705 So. 2d 1337, 1345 (Fla. 1997); Lindsey v. State, 636 So. 2d 1327, 1328 (Fla. 1994).

In any case, appellant's contention that the state was required to show that kidnapping was the "dominant motive" for the murder is without merit. The cited authority for that proposition, Delap v. State, 440 So. 2d 1242 (Fla. 1983), does not suggest or even imply the State must prove the dominant motive for the murder was kidnapping. Indeed, as the statutory language plainly states, it is sufficient if the State proves that the homicide "was committed while the defendant was engaged, or as an accomplice, in the commission of, or an attempt to commit ... any: ...Kidnapping." Section 921.141(5)(d), Fla. Stat. (2000). C.f. Philmore v. State, 820 So. 2d 919, 935 (Fla. 2002)(the avoiding arrest aggravator focuses on the motive for the crime and this Court will affirm

[17]During the Spencer hearing defense counsel reiterated his position that "there was no kidnapping." (V-4, 557).

this factor in cases where the victim is not a police officer only where witness elimination was the "dominant motive").

Kidnapping was established by the fact that Pearce held the victims against their will and ultimately removed them to a remote location where they could be murdered without detection. The trial court found as follows below:

> This factor is based on Defendant's actions in directing Crawford, Tuttle and two other young people into his office, with gun in hand; in holding them there for a short period of time against their will; in releasing two of the other young people, but refusing to permit Crawford and Tuttle to accompany these other young people when they were released, even though he was requested to do so; in directing Crawford and Tuttle into an automobile to sit in the back seat between two of Defendant's armed accomplices and with the armed co-defendant, Smith, in the front passenger seat; and in allowing Crawford and Tuttle to exit the automobile only when the armed co-defendant, Smith, directed each of them to do so just before Smith shot them. At no time did defendant or his co-defendant, Smith, ever ask Crawford or Tuttle if they wanted to stay in the office or get into the automobile and, without any reasonable doubt, Crawford and Tuttle were coerced into going into defendant's office and getting into Defendant's automobile on their death ride. The kidnapping was clearly intended to facilitate the murder and attempted murder of Crawford and Tuttle and certainly elevated the nature of the murder and attempted murder to a gangland "going for a ride."

(V-3, 477-78). The trial court's conclusion is well supported by the evidence and should be affirmed by this Court on appeal.

Appellant next argues that since he was not the trigger man, it is unconstitutional to sentence him to death under Enmund v. Florida, 458 U.S. 782 (1982). Once again, however, appellant

posits an argument that was not made below in the trial court. As such, the issue is procedurally barred from review. Rodriguez, 609 So. 2d at 499. In any case, under the facts presented here, the issue lacks any merit.

In Franqui v. State, 804 So. 2d 1185, 1206 n. 12 (Fla. 2001), this Court observed the following:

> In *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the United States Supreme Court held that imposition of the death penalty in a felony murder case in which the defendant did not kill, attempt to kill, or intend that a killing take place or that lethal force be employed violated the Eighth Amendment prohibition against cruel and unusual punishment as applied to the states through the Fourteenth Amendment of the United States Constitution. In *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Court held that a finding of major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement for consistency with the Eighth Amendment.

It is clear that although Pearce did not pull the trigger, he was one who orchestrated the victim's murder. See Lebron v. State, 799 So. 2d 997, 1020 (Fla. 2001)(finding Enmund/Tison requirement satisfied where defendant was a major participant in the underlying felonies and "orchestrated the events" leading to the victim's death). See also Duboise v. State, 520 So. 2d 260, 265-66 (Fla. 1988). Pearce brought the trigger man into contact with the victims, ensuring that his associates come armed. Moreover, Pearce provided Smith with the murder weapon after Smith complained that his own gun was susceptible to jamming.

Pearce ordered the victims' into the car and took them to a remote location where the murder and attempted murder could occur without detection. Pearce was present at the scene of the first shooting and after Tuttle was shot, questioned Smith to ensure that he was dead. A short while later, he stopped the car to let Smith and Crawford out so that Crawford could be murdered.

Under these circumstances, the evidence establishes that Pearce was a major participant in the underlying kidnapping felony. More than simply reckless indifference, the record establishes that Pearce wanted the victims dead. Thus, the *Enmund/Tison* requirement is clearly satisfied. Pearce is not entitled to any relief from this Court.[18]

ISSUE V.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF CRAWFORD WAS COLD, CALCULATED AND PREMEDITATED? (STATED BY APPELLEE).

Appellant finally contends that the trial court erred in finding the cold, calculated, and premeditated, aggravator (CCP) for the murder of Robert Crawford. (Appellant's Brief at 35). However, appellant failed to make this argument to the

[18]Although the trial court did not specifically mention Enmund/Tison in its order, the trial court did analyze the role of Pearce and his culpability, essentially satisfying this Court's precedent requiring such an analysis. See V-3, 480-82; 486-87; Diaz v. State, 513 So. 2d 1045, 1048 n.2 (Fla. 1987).

trial court below. Consequently, this issue has not been preserved for review. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). In any case, the evidence introduced below is sufficient to sustain the trial court's finding on appeal.

When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), reiterated the standard of review, noting 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," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997). Pearce does not contend the trial court's instruction on the CCP factor was erroneous, he simply urges that the evidence was insufficient to support the trial court's finding.

As a review of the trial court's findings will show, the evidence clearly supported a conclusion that this murder was cold, calculated and premeditated.

With regard to this factor, the trial court made the following extensive findings in its written order:

a. After requiring Crawford, Tuttle and the other 2 young people to come into his office, Defendant called Butterfield to arm himself and with some other armed people come to Defendant's office. Without any reasonable doubt Defendant's actions in doing so revealed that he had a plan for Tuttle, Crawford and the other young people that required the use of firearms.

b. Upon arrival at Defendant's office, the armed co-defendant, Smith, said, "We're here to do business". Neither Defendant nor co-defendant Smith explained what this "business" was, but it was clear from the circumstances that this "business" was intended to harm Crawford and Tuttle in some fashion.

c. Defendant and his co-defendant Smith conversed for a few moments outside anyone's hearing shortly before Defendant and co-defendant Smith directed Crawford and Tuttle into the automobile. The contents of this conversation are unknown and is not recalled to show the existence of any plan, only to show that Defendant and his co-defendant Smith had an opportunity to plan the actions that were about to take place.

d. Defendant drove the automobile with Crawford, Tuttle, co-defendant Smith and the two armed accomplices in it several miles to a deserted section of S.R. 54, where Defendant stopped the automobile and the attempted murder and murder subsequently took place. Neither Defendant nor his co-defendant Smith indicated to anyone at anytime the destination of their drive and no one requested Defendant stop where he did, a dark, rural section of highway with no traffic and no houses or businesses close by. The location was ideal for the nefarious purpose of Defendant and his co-defendant Smith, and it is beyond belief that it was a spur-of-the-moment whim that caused Defendant to stop when and where he did. It is also important to note that no one in the automobile requested Defendant to stop when and where he did, so his actions in doing so can only be viewed as part of his plan.

e. During this ride Defendant and co-defendant Smith exchanged guns, co-defendant Smith saying his firearm was jammed. If it was not intended for co-defendant Smith to fire his firearm, what difference did it make if his gun was jammed, and why did Defendant want to make sure that co-defendant Smith had a working firearm?

f. Although co-defendant Smith actually pulled the trigger on the gun that he fired into Tuttle, Defendant voiced no objection or surprise, or shock, even though he had requested co-defendant Smith to “break his jaw” when co-defendant had exited the automobile with Tuttle. When co-defendant Smith re-entered the automobile Defendant asked him “Is he dead?” to which co-defendant Smith said, “I shot him in the head with the .45".

g. After the attempted murder of Tuttle, Defendant drove the automobile about 200 yards, when he again stopped and again co-defendant Smith exited taking Crawford with him, and co-defendant Smith then shot and successfully executed Crawford. Co-defendant Smith then re-entered the automobile, with no questions by Defendant this time.

h. Defendant and co-defendant Smith, thereafter, ate breakfast, drove to the Howard Franklin Bridge where co-defendant Smith wrapped the murder weapon in a newspaper and tossed it into Tampa Bay, left their two accomplices at a shopping center for 45 minutes while Defendant and co-defendant Smith went off and did some unknown thing, and then proceeded home.

There was no evidence that Defendant acted in an emotional frenzy, panic or rage at anytime and the evidence was overwhelming that Defendant at all times was cool, calm, collected, sane, rational and in full control of his senses.

The murder of Robert Crawford was clearly caused by a heightened premeditation over and above the required for first-degree murder. Defendant had the means and opportunity to kill Crawford and Tuttle in his office without the aid of co-defendant Smith if he merely intended to kill Crawford and Tuttle. However, in calling in co-defendant Smith, forcing Crawford and Tuttle to ride to a deserted rural section of road, shooting them in the head, and then tossing the murder weapon into Tampa Bay, where he thought it would never be found, shows considerable planning and thought went into the killing and attempted killing that far exceeded what was necessary to kill Crawford and Tuttle and showed the defendant wanted to do the killing without any consequence to himself.

There was no moral or legal justification for the execution of Robert Crawford.

Pearce’s argument that the shooting of Crawford was contrary

to his intent "to only 'rough up' the decedent" is not supported by the evidence. First, Pearce's statement was not made when Crawford was ordered out of the car, it was made when Tuttle was ordered out. When Tuttle first got out of the car, Pearce asked Smith to break his jaw for stealing his "shit." While his statement initially suggests an attempt to simply rough up Tuttle, it becomes clear that Pearce's plan with Smith included murder when Smith got back in the car and Pearce sought assurance from Smith that Tuttle was indeed dead. The fair inference of the following sequence of events is that Smith and Pearce had an agreement to murder both of the boys prior to driving to a deserted area. Indeed, the fact that after shooting Tuttle there was no discussion between Pearce and Smith other than Pearce questioning Smith to ensure the victim was dead suggests it was part of a prearranged plan. And, the fact that Pearce believed Tuttle was dead and stopped the car some 200 yards down the road to order Crawford out, with certain knowledge that he would be murdered, satisfies the requirement of heightened premeditation. That Pearce now offers a different interpretation of conceded facts does not suggest the evidence supporting CCP is inadequate.

This Court's consideration of this factor in Hertz v. State, 803 So. 2d 629, 650 (Fla. 2001) is instructive: "Here the calm and deliberate nature of the defendants' actions against the

victims establish this element beyond any reasonable doubt." Pearce's conduct in this case shows that his plan for the victims was in his mind the minute they left with his money. If they did not come back with the money or drugs, they would pay with their lives. This was a planned execution of Tuttle and Crawford, who, Pearce believed, had ripped him off. Under similar circumstances, this Court has not hesitated to affirm the CCP factor. For example, in Cave v. State,727 So. 2d 227, 229 (Fla. 1998), this Court upheld the CCP finding, stating:

> Clearly there was no pretense of moral or legal justification for this killing, he cold, calculated, and premeditated nature of it was shown by the general plan of the defendant being the one with the gun during the robbery, by defendant being the one who chose to lead the victim out of the store at gunpoint, by the defendant keeping her in the backseat of the car for the long ride out to the scene of the murder, and by the defendant taking her out of the car and turning her over to Bush and Parker who knifed and shot her. The Court finds that this aggravating circumstance has been established beyond a reasonable doubt.

See also Parker v. State, 456 So. 2d 436, 444 (Fla. 1984) (upholding a finding that the murder was cold, calculated, and premeditated, where the evidence showed that the "victim had been pleading with defendant not to harm his girl friend and, at the time he was murdered, was lying naked, face down, on a bed," and that, "[b]efore killing the victim by a gunshot blast into his back, defendant accepted a pillow from his partner in order to muffle the shot"); Bell v. State, 699 So. 2d 674, 677 (Fla.

1997)(this Court explained that CCP can be indicated by the circumstances showing such facts as advance procurement of a weapon [ensuring that his "associates" came armed and ensuring that Smith had a gun that did not jam in the instant case], lack of resistance or provocation and the appearance of a killing carried out as a matter of course.).

Assuming, *arguendo,* this Court were to conclude that the trial court's finding was not supported by competent substantial evidence, the striking of this factor would be harmless beyond a reasonable doubt. Jennings v. State, 782 So. 2d 853, 865 (Fla. 2001) (Where an aggravating factor is stricken on appeal, the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.); Johnston v. Singletary, 640 So. 2d 1102, 1105 (Fla. 1994) (Where there are two other strong aggravators and no mitigation present, error harmless); Reaves v. State, 639 So. 2d 1, 6 (Fla. 1994) (error harmless where two other strong aggravating factors found and relatively weak mitigation.).

Finally, although appellant has not asserted that his sentence is disproportionate, a review of similar cases supports the imposition of the death sentence herein.[19] The trial court complied with the procedures set forth by this Court in Koon v.

[19]This Court has even affirmed the death penalty in single aggravator cases, despite the presence of mitigation. See e.g. Ferrell v. State, 680 So.2d 390 (Fla. 1996), cert. denied, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997).

Dugger, 619 So. 2d 246, 250 (Fla. 1993)(V-11, 1027-30).[20] The trial court also ordered and considered an extensive PSI before sentencing the appellant. See Muhammad v. State, 782 So. 2d 343 (Fla. 2001). The court found three aggravating factors, CCP, the contemporaneous attempted murder and the kidnapping, balanced against non-existent mitigation and correctly imposed a sentence of death.

This Court addresses the propriety of all death sentences in a proportionality review by reviewing and considering all the circumstances in the case relative to other capital cases. Foster v. State, 778 So. 2d 906, 921 (Fla. 2000). Upon comparison to similar "execution-style" killings this Court has repeatedly affirmed sentences of death. Foster, at 921; Ford v. State, 802 So. 2d 1121, 1133 (Fla. 2001); Jones v. State, 690 So. 2d 568, 571 (Fla. 1996); Walls v. State, 641 So. 2d 381, 391 (Fla. 1994). See also See Franqui v. State, 804 So. 2d 1185, 1198 (Fla. 2001)(affirming death sentence for felony murder with three aggravating circumstances of prior conviction for violent felony, during course of a robbery, and the victim was a law enforcement officer (avoiding arrest merged) balanced against

[20]This Court has repeatedly recognized the right of a competent defendant to waive the presentation of mitigating evidence. See e.g., Pettit v. State, 591 So. 2d 618 (Fla.), cert. denied, 506 U.S. 836 (1992); Anderson v. State, 574 So. 2d 87 (Fla.), cert. denied, 502 U.S. 834 (1991); Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988); Chandler v. State, 702 So. 2d 186 (Fla. 1997); Wuornos v. State, 676 So.2d 966 (Fla. 1995).

insignificant non-statutory mitigation); Darling v. State, 808 So. 2d 145 (Fla. 2002)(death sentence proportional for murder committed while defendant was engaged in sexual battery, defendant previously convicted of prior violent felony and record did not support finding of immaturity or significant mental deficiency). This sentence is proportionate and should be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State respectfully asks this Honorable Court to affirm the judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Steven Herman, Esquire, Steven Herman, P.A., 38537 Fifth Avenue, Zephyrhills, Florida 33540, this _____ day of March 2003.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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COUNSEL FOR STATE OF FLORIDA