IN THE SUPREME COURT OF FLORIDA

FAUNCE LEVON PEARCE,

Appellant,

v. LOWER TRIBUNAL NO: 00-3110CFAES

STATE OF FLORIDA, APPEAL NO: SC02-476

Appellee.
_____/

AMENDED INITIAL BRIEF OF APPELLANT FAUNCE LEVON PEARCE

Appeal from the Circuit Court

of

Pasco County, Florida

Steven Herman, Esquire

Steven Herman, P.A.
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For Appellant

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STATEMENT OF THE CASE AND OF THE FACTS

On September 17, 1999, an indictment was filed in the lower court charging the Appellant and his co-defendant, Lawrence Joey Smith, with murder in the first degree and attempted murder in the first degree, a felony punishable by life imprisonment. The indictment alleged that the co-defendants on September 14, 1999, did, from a premeditated design, affect the death of Robert Crawford and attempt to kill Stephen Tuttle by use of a firearm (R-1). Mr. Pearce was arrested for this crime on September 22, 1999 (R-10). On August 9, 2000, the State filed its Notice of intent to seek the death penalty in this case as it related to Mr. Pearce (R-125).

The trial of this cause commenced on July 16, 2001 (T-1). The State's presentation begins with the testimony of Bryon Loucks (T-403), who testified that on September 13, 1999, the defendant approached him and indicated his interest in acquiring certain drugs. Specifically, the Appellant was looking for Mr. Loucks' son, Ken Shook. Ken Shook was at Mr. Loucks' home (T-439) and he testified that the Appellant approached him about purchasing some "gel tabs".

According to Mr. Loucks, his son called the victims, Stephen Tuttle and Rob Crawford, in his efforts to locate these drugs for the Appellant. The testimony of Stephen Tuttle (T-551) indicates that Mr. Shook perhaps first contacted one Amanda Havner who came over to the former's residence looking for the

gel tabs. Ultimately, Stephen, Rob and Amanda go over to Brian Loucks' residence.

Stephen Tuttle testifies that when he arrived at the Loucks' residence, the Appellant was there. He also indicated he observed the Appellant to be in possession of a gun.

All of the witnesses agreed that the Appellant gave Ken Shook the money, approximately $1,200.00, for the purchase of the gel tabs. Brian Loucks remembers the Appellant stating to Ken and the others, "This is your life. Make sure you bring back the drugs." Steven Tuttle recalled that the Appellant cautioned them to "Bring back the money or the drugs". The Appellant stayed at Brian Loucks' residence with him and the balance of the witnesses left.

Prior to leaving and according to the testimony of Tanya Barcomb (T-527), Stephen Tuttle had called her about obtaining the gel tabs. Ms. Barcomb testified that the witnesses came to her home. Ken Shook testified that he gave the money to Amanda Havner, who in turn when she arrived at Ms. Marcomb's residence, gave the money over to Tanya.

Unbeknownst to everyone, Ms. Barcomb had conspired with her boyfriend to rob the parties of the money. Amanda gave the money to Ms. Barcomb, who left her home and, thereafter, advised Amanda that they had been "jacked". The parties called Brian Loucks' residence and advised him that they had been robbed of the monies. Mr. Loucks' testified he told the Appellant what had occurred. He testified that the Appellant did not appear

angry as a result of this news, but commented that "they would have to pay the consequences." Stephen Tuttle testified that the witnesses went back to the Loucks' residence to tell the Appellant what he already knew.

Mr. Loucks testified that the gun in the Appellant's possession was a 40 caliber pistol. Mr. Tuttle testified that when they returned, the Appellant pulled the gun, threatened the parties and pointed it at them. Mr. Loucks indicated that the Appellant demanded that they all go in the office located on the Loucks' property, including Amanda Havner. He also states that the Appellant was waiving the gun around. In the midst of this, Mr. Loucks testified that the Appellant grabbed Amanda by the throat, put the gun to her head and slammed her head into the wall. He testified that the Appellant stated "I want my money, if not I'll blow your head off." However, the witnesses Stephen Tuttle and Ken Shook both remember Amanda standing up to the Appellant. Specifically, Ken Shook recalls the Appellant with the gun. However he testified that Mr. Pearce laid it on the counter and told Amanda to "shoot him". Mr. Shook describes Amanda having a knife and both he and Mr. Tuttle indicate that Amanda jumps in the face of the Appellant prior to his physical confrontation with her. Amanda testified that the Appellant was smoking a cigarette. She notices that Ken Shook has a knife and the defendant hands it to her, by putting it on the table in front of her. This is when she gets into the Appellant's face. It was after this that he became angry and grabbed and slammed

her against the wall. Both Ken Shook and Stephen Tuttle agree that the Appellant was angry. Mr. Tuttle adds that he felt he wasn't free to leave the premises, at that point.

Mr. Shook testifies that everybody calms down and the Appellant puts the gun down. Amanda Havner testifies that she went outside the residence with the Appellant, alone. All of the remainder of the witnesses remained in the residence, alone. She testifies that the Appellant agrees to let her leave. After that, the Appellant again goes outside of the residence with Stephen Tuttle, according to Brian Loucks. Again he leaves the remainder of the witnesses alone in the residence. Stephen Tuttle testified that when the Appellant took him outside, he was forced to his knees and the Appellant put a gun to his head. He continues to relate that the Appellant forced him to perform fellatio on him. While the Appellant was outside, Amanda called Tanya Barcomb. Tanya testifies that Amanda sounded upset, so she called her brother Joe Havner, even though Amanda told her not to do so. Joe Havner testifies (T-521) that he talks with his sister on the telephone and goes to the business, We Shelter America, which is where the Loucks' residence is located. He sees her drive out of the premises and follows her home. When he catches up with her, he describes her demeanor as hysterical.

After Amanda leaves the premises, Bryan Loucks, Ken Shook, and Stephen Tuttle all testify that things had calmed down. Amanda Havner testified that the Appellant told her that he

would take Stephen and Rob home and that he knew it was Tanya that had the money. She also described the Appellant as calm.

Bryan Loucks testifies, at this time, the Appellant makes a telephone call to someone identified as "Chippy" and indicates he believes he can get his money back. Bryan Loucks, Ken Shook, and Stephen Tuttle all testify that the Appellant makes another telephone call. That call was apparently made to Teddy Butterfield.

Mr. Butterfield testified at the trial that he was acquainted with the Appellant, a party by the name of Heath Brittingham and the co-defendant, Joey Smith (T-590). Mr. Butterfield testified that he was with Brittingham and Smith when he got a telephone call from the Appellant. He testified that Mr. Pearce asked him for his help and indicated that he had been "ripped off". He said that the Appellant told him to "get a piece." So he armed himself with a small handgun. After that telephone call Brittingham arms himself with a shotgun and Joey Smith obtains a 9 mm handgun. Mr. Butterfield states that the three of them went to We Shelter America.

Everyone agrees that those three arrive at the Loucks residence. Bryan Loucks and Ken Shook notice that both Teddy Butterfield and Joey Smith arrive with guns. Stephen Tuttle testifies that all three of them were armed. Ken Shook observes that they all appear to be under the influence of drugs. Mr. Butterfield testified that when he arrived at We Shelter

America, the Appellant appeared in a normal state to him.

Bryan Loucks testified that the Appellant indicated he was "taking the boys to 'rough them up'". But he understood that they all left to get the money back from Chippy. Mr Loucks agreed that the Appellant did not appear angry and he later advised the investigating detective that the Appellant indicated he would not hurt the boys.

Ken Shook testified that Joey Smith and the Appellant advised that they were going to take care of business at the motel (where the rip off occurred). He also understood that the Appellant was going to take the boys home. He even volunteered to go along. He concluded his testimony by adding that he had used Cocaine with the Appellant that particular evening.

Stephen Tuttle testified that he was forced into the car, but was not specifically threatened. He also understood that the plan was to go find the Appellant's money. Mr. Butterfield's recollection was that the defendant had indicated that the "kids" (Rob and Steve) were going to show them where the people lived who got ripped off. He concurred that he heard no threats made and observed that the kids "jumped" into the car.

When Heath Brittingham testified (T-626) he told of going to We Shelter America. He described everyone as acting calm when he arrived there. He told about taking a firearm with him and describes Joey Smith as being in possession of the 9 mm handgun. He also observed that the Appellant had the 40 caliber

handgun and that he was waiving it around. It was his testimony that the Appellant told the victim to get into the car. Mr. Butterfield agreed that the Appellant had a gun in his hand when he arrived at We Shelter America. He saw the Appellant and Joey Smith speak with each other, but had no knowledge of the content of their conversation. However, he described the Appellant as being in charge.

Stephen Tuttle testified that the Appellant was driving the car. Joey Smith was in the front passenger seat and Heath Brittingham and Teddy Butterfield were situated on both sides of him in the rear seat of the vehicle. He was sitting on Rob's lap. Stephen Tuttle testified that he heard no conversation between the Defendants. There were no threats made to him or to Rob. Teddy Butterfield and Mr. Brittingham both related that the co-defendants traded guns during the drive. As a result, Joey Smith takes possession of the 40 caliber pistol. He added that he had seen Joey Smith with this gun before. However, he was also aware that the Appellant kept the gun. He remembers Joey Smith asking the Appellant for the gun because his own jammed. Other than this, there was no conversation in the car. It was quiet. Heath Brittingham concurred with all of this testimony and what occurred in the vehicle.

Stephen Tuttle testified that the Appellant pulled the car over to the shoulder of the road. He said he was told to get out of the car, but doesn't recall by whom. Teddy Butterfield testified that it was the Appellant that told Tuttle to get out

of the car. At this point, Teddy Butterfield recalls the Appellant telling Joey Smith "Break his jaw. Teach him a lesson". Heath Brittingham remembers it as "Pop him the jaw for stealing my shit". Teddy Butterfield watches Joey Smith get out of the car. Heath Brittingham believes that the co-defendant stated "Fuck that" and he spun around and fired his gun. Butterfield remembers hearing the gun shot. Stephen Tuttle testifies that was when everything went dark. He later felt a hole in his head and concluded his testimony by indicating that after the shooting, he had memory problems.

Butterfield and Brittingham testify that Joey Smith got back in the car. They both recall the Appellant asking "Is he dead?" Joey Smith responds, "I shot him in the head". They both described the Appellant driving his car a couple of hundred yards and pulling over to the side of the road again. There was no conversation. They watch as Joey Smith gets out of the car again. Rob also gets out of the car.

Both Butterfield and Brittingham reveal that they didn't know what was going to happen to Rob. They didn't expect Joey to shoot him. However, Teddy Butterfield recalls the Appellant telling Rob to get out of the car. Heath Brittingham hears Rob say "No. Please No". Teddy hears two shots and sees a flash. Heath Brittingham testifies that he saw Joey Smith make the second shot. They both testify that Joey Smith gets back in the car. He turns to Butterfield and Brittingham and tells them "Snitches are bitches. Bitches deserve to die." Heath

Brittingham remembers this too. Both Butterfield and Brittingham testified that they all drove across a bridge and Joey Smith threw the gun out and into the water. They went home and later were taken into the Sheriff's office for questioning. They were taken to the bridge to describe how the weapon was thrown and to assist in recovering it. Both agreed that they were told that if they cooperated they would not be charged with any crimes related to these offenses.

Later, Deputy Nathan Long testified that he dove off of the Howard Franklin Bridge and located the weapon and its spring (T-515). Thereafter followed the witness, Chris Trumble, a firearms expert, who concluded that the projectiles located by the crime scene technician (T-710), were fired from the weapon recovered from the bay. (T-758). The medical examiner testified that the decedent was first shot in the arm and then in the head (T-740). She opined that this latter wound was the fatal one and that the decedent was conscious only 20 to 60 seconds and was dead within a few minutes. The presentation of the State's case concluded shortly thereafter.

The record reflects that counsel for the Appellant attempted during the cross-examination of Heath Brittingham, to offer a prior statement that the witness gave to an investigating officer prior to the trial (T-653). Attorney Ivey was attempting to elicit from Mr. Brittingham that the Appellant had made certain statements regarding his intentions towards the victims. Counsel for the Appellant offers the video tape of the

witnesses statement into evidence and in an effort to impeach him (T-661). The point of defense counsel's inquiry was to establish that no one in the car expected Joey Smith to shoot the boys. The Court denied the introduction of the tape into evidence and a transcript was proffered (R-364).

The Appellant's Motion For Directed Verdict was denied (T-812). The defense began their presentation with the testimony of Technician Whonstetler and by having her identify the video tape of Heath Brittingham's statements to the detective. Thereafter, the detective was called to testify (T-823). He reviews the video and testifies in a proffer as to its contents. This includes Mr. Brittingham's statements to him that the Appellant had asked of the co-defendant what he was doing at the time that the victims were shot. In addition, that witness stated to the detective that the Appellant had no knowledge of what was going to happen to the victims and the co-defendant jumped out of the car, reached back in, grabbed the kid and shot him. Defense counsel's attempts to offer the video tape into evidence were rejected by the Court (T-848). The trial court ruled that the defendant could not impeach the witness based upon his indication that he did not recall his prior testimony.

The defendant elects not to testify at his trial (T-857). The jury instructions are agreed upon (T-1000). The jury deliberates and finds the Appellant guilty, as charged, of murder in the first degree in Count I of the Indictment and a lessor included offense of attempted murder in the second degree

in the second count of the Indictment. A judgment is entered by the Court accordingly (R-424). The penalty phase of the trial proceeds. The State relies upon the evidence presented in its case in chief and the defendant opts to present no evidence or argument regarding the sentence. The jury renders an advisory sentence to the Court by a ten (10) to two (2) vote that it should impose the death penalty upon the Appellant (R-430). The Appellant's counsel files his motion for new trial which alleges, in part, the following grounds: that the State failed to prove that the homicide occurred with premeditation; that there was no showing of the Appellant's co-participation with the co-defendant in killing the victim and attempting to kill the other; that there was no showing that the Appellant ordered or conspired with the co-defendant to commit or attempt to commit the homicide alleged; and that the Court erred in disallowing the video tape of Heath Brittingham as impeachment of his prior testimony. The motion was denied.

The Court conducted the Spencer hearing for the Appellant on January 3, 2002 (R-553). The Defendant again elects to present no evidence, testimony or argument. The Court entered its sentencing order (R-472) and sentences the Appellant to death. This occurred on February 14, 2002 (R-569). The Appellant timely filed his Notice of Appeal on February 15, 2002 (R-500) and amended said notice on February 18, 2002 (R-507).

SUMMARY OF ARGUMENT

The Appellant first argues that the Court erred in its refusal to permit him to impeach the witness, Heath Brittingham, by showing his previous statements given to Detective Moe. The Appellant argues that when this witness testified to facts material in the case, it should have been provable by way of impeachment that he had previously made statements relating to the same facts which were inconsistent with his testimony offered at trial. Defense counsel had two alternatives: (1) drawing out in the cross examination of Mr. Brittingham his previous inconsistent statements or, (2) as occurred in this case where he failed to remember it, the making of the statement should have been allowed to be proved by the tape or the testimony of Detective Moe. The Appellant should have been authorized to present this testimony of the witness upon the notion that doubt existed as to the truthfulness of both statements. The Court's refusal to permit the Appellant to introduce the prior statement of Heath Brittingham, regarding what he failed to recollect at the time of his testimony at the trial was prejudicial error.

The evidence of premeditation established by the State to support the Appellant's conviction consisted of circumstantial evidence from which the jury inferred premeditation. However, this evidence was not inconsistent with all reasonable hypotheses of innocence or with other inferences that reasonably could be drawn from the evidence. The State's failure to

exclude every reasonable hypothesis that the homicide occurred other than by premeditated design of Appellant fails to sustain the jury's verdict of first degree murder. The events that lead up to the killing of the victim did not show a fully formed conscious purpose on the part of the Appellant to slay him.

The Appellant's felony murder conviction should also be reversed for insufficient evidence. Although the State showed that the Appellant was present at the time the kidnapping murder took place, the circumstantial evidence presented in this cause was wholly inadequate to sustain the conviction. This Court should hold that the murder was an independent act of Joey Smith, the Appellant's co-felon. There was not sufficient evidence to sustain that the homicide was committed in furtherance of a joint felony, and therefore, was not a felony murder.

The trial court also erred in applying the aggravating circumstances it did in the present case, to-wit: That the homicide occurred while the co-defendants were engaged in a felony and that the homicide occurred in a cold, calculated and premeditated manner. The State failed to sustain that the capital felony was committed while the Appellant was engaged, or was an accomplice, in the commission of, or in an attempt to commit a kidnapping. The facts of this case do not establish proof beyond a reasonable doubt of the specified felony. In addition, the cold, calculated and premeditated factor should not have been applied here. The law requires that it be proved

as a heightened form of premeditation and greater than that premeditation required for the homicide. Elements to prove this were missing in this particular case. Without them, the factor is not established or proven.

ISSUE I

THE TRIAL COURT ERRED IN ITS REFUSAL TO PERMIT APPELLANT TO IMPEACH HEATH BRITTINGHAM BY SHOWING HIS PREVIOUS STATEMENTS.

The homicide and attempted homicide occurred in this case along a roadway in Pasco County, Florida. Appellant was driving the automobile occupied by the co-defendant, Joey Smith, witnesses Heath Brittingham and Teddy Butterfield and the victims, Stephen Tuttle and Robert Crawford. The record reflects the testimony of Stephen Tuttle, Teddy Butterfield and Heath Brittingham, as to their recollections of what occurred on that roadside.

It should be apparent from an examination of the record that one crucial fact around which the jury's determination of its verdict revolves was the intent and knowledge of the Appellant regarding what was going to happen to the victims when they left We Shelter America, and later, his alleged knowledge of the co-defendant's intentions prior to shooting both of the victims. There was testimony in this cause that the goal of this drive was to recover the Appellant's money which he had lost in a drug deal gone bad. The evidence alsoshowed it was his expressed intent to return the victims to their homes and that if any harm was to come to them, it would have amounted to a battery only. It was clear from the record that the Appellant had minimal conversation with his co-defendant, if any, prior to their leaving the Loucks' residence. Equally consistent was the testimony of all of the car's occupants, that there was no

conversation during the course of the ride.

Thus, when the Appellant pulled the car over to the shoulder of the road, there was no evidence or testimony to establish his knowledge that Joey Smith was going to shoot either Stephen Tuttle or Robert Crawford.

Teddy Butterfield testified that the Appellant told Stephen Tuttle to get out of the car and Joey Smith to "Break his jaw. Teach him a lesson." In his direct testimony, Heath Brittingham fails to include certain statements of the Appellant which mitigated against his knowledge and intention to harm either one of the victims. Counsel for the Appellant attempts to refresh the witness's recollection by using his statements to the investigating detective and given shortly after the incident occurred. When this is disallowed, defense counsel proffers the former testimony of Mr. Brittingham (R-364). This included indications that no one in the car expected Joey Smith to shoot either of the victims.

After Heath Brittingham testified at the trial as a witness for the State, the Appellant's counsel unsuccessfully attempted to introduce his statement set out in the video tape for the purpose of demonstrating to the jury that he had previously recollected certain statements of the Appellant, which mitigated against his involvement and responsibility in these crimes. Although the trial court did permit a few questions of this witness, when Mr. Brittingham indicated he did not recollect what he told the detective previously, the Court did not permit

introduction of the transcript or the video tape to establish his prior testimony. The lower court's ruling was incorrect and this cause should be reversed for a new trial to include this evidence. Excluding this statement was prejudicial error. The trial court's ruling enabled the questions of the Appellant's participation and knowledge of the crime to go to the jury without complete evidence of the witness's observations and testimony regarding the Appellant's statement on the evening in question.

The right of a defendant to impeach a witness by introducing evidence of a material prior inconsistent statement is recognized by statute, Section 90.614, Florida Statutes. The transcript of Mr. Brittingham's testimony indicates that the conditions to introduction of the transcription or tape had been met. The Appellant had a right to counteract that witness's trial testimony regarding material facts with the introduction into evidence of his prior statement.

McCormick On Evidence states:

> When a witness has testified to facts material in the case, it is provable by way of impeachment that he has previously made statements relating to these same facts which are inconsistent with his present testimony. The making of these previous statements may be drawn out in cross examination of the witness himself, or if on such cross examination the witness has denied making the statement or has failed to remember it, the making of the statement may be proved by another witness.
>
> The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement is true

> but rather upon the notion that taking one way on the stand and another way previously is blowing hot and cold and raises a doubt as to the truthfulness of both statements.

The trial court's improper treatment of the proffered statements was an error that was prejudicial to the Appellant. As in Wingate v. New Deal Cab Company, 217 So.2d 612(Fla. 1st DCA 1969), the Appellant showed that the transcript or tape should have been placed in evidence. It is well established that a trial court can allow impeachment of testimony by using a statement given to an investigating officer. See Walter v. State, 272 So.2d 180 (Fla. 3rd DCA 1973). As in that case, counsel for the Appellant laid the proper predicate for the introduction of this impeachment. The Appellant established that Mr. Brittingham had given a statement to the investigating officer on the day of his being taken to the Sheriff's Department after the victim's death. Mr. Brittingham testified that he did not remember all of the substance of his statement to the officer. The trial court concluded that the impeachment was improper because the witness stated that he did not remember the prior statement. Under the State's theory of this case, the co-defendants conspired to kill both of the victims. Under the defense's theory of the case, the Appellant had insufficient prior knowledge of Joey Smith's intentions when he shot both Mr. Crawford and Mr. Tuttle.

Many of the State's witnesses testified as to the Appellant's state of mind immediately before the deaths,

describing in detail his stated purpose. The Appellant argues that the impeachment testimony was relevant to rebut the State's allegations as to his motive behind the drive and as such it was admissible to help settle the state of mind of the Appellant. The written transcript of Brittingham's video taped statement and the taped statement itself reflect that he had advised the Sheriff's Detective Moe that the Appellant had no knowledge of Joey Smith's intent when they rode together in the automobile. Thus, when confronted, with the statement and Brittingham was unable to recall his actual statement to Detective Moe, the transcription or tape should have been allowed into evidence as the most accurate account of his response on the night in question. See Fleming v. State, 457 So.2d 499 (Fla. 2nd DCA 1984). The Fleming case, applying Section 90.614(2), Florida Statutes, provides that extrinsic evidence of a witness's prior inconsistent statement is admissible for purposes of impeachment when a witness, having been directed to his prior statement and offered an opportunity to explain or deny it, "denies making or does not distinctly admit that he has made the prior inconsistent statement." During his cross examination of Brittingham, counsel for the Appellant established this witness's inability to recall his specific statement to Detective Moe. This laid the necessary foundation for the subsequent introduction of the transcription or tape establishing that statement. The Assistant State Attorney supported the exclusion of the proffered evidence by the Court

on the grounds that Brittingham's statement to the Detective was not inconsistent with his trial testimony. The State asserted that by establishing only that Mr. Brittingham could not recall his testimony, the attorney for the Appellant could not continue in his efforts to impeach him with this prior statement.

If the statements could have been entered into evidence, it would have established evidence on a point which cannot be considered immaterial in this case. The Fleming case established that when a defendant is on trial for murder in a case based entirely on circumstantial evidence, the impeachment should have been permitted to establish any inconsistency or any impeachment which the disclosure might have possessed.

Because the trial court improperly limited the Appellant's cross examination of a key prosecution witness, this matter should be reversed and remanded for a new trial. The case of Kimbal vs. State, 537 So.2d 1094 (Fla. 2nd DCA 1989) also supports the Appellant's contention that the trial court committed reversible error by failing to afford him an adequate opportunity to impeach Brittingham's credibility. That Court, citing Williams v. State, concluded that "....prior inconsistent statements may be oral and unsworn and may be drawn out on cross examination of the witness himself and, if on cross examination the witness denies, or fails to remember making such a statement, the fact that the statement was made may be proved by another witness." Counsel for the Appellant attempted to lay the proper predicate for impeachment as required by Kimbal in

restating the actual statements by Mr. Brittingham to the detective. Counsel for the Appellant asked Mr. Brittingham if he recalled giving the statement to the Detective. Although the witness responded affirmatively to these questions, the trial court prevented the Appellant's attorney from actually confronting the witness with his prior inconsistent statement. Thus, any failure of the Appellant's attorney to lay the proper predicate was caused by the trial court's refusal to permit it.

See also Pugh v. State, 637 So.2d 313 (Fla. 3rd DCA 1994). There the Court cited Section 90.614(2), Florida Statutes as providing:

> "Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement and the opposing party is afforded an opportunity to interrogate him on it, or the interest of justice otherwise required. If a witness denies making or does not distinctly admit that he has made the prior inconsistent statement, Extrinsic evidence of such statement is admissible."

During cross examination, Heath Brittingham testified that he did not remember his responses that he gave during his statement to Detective Moe. Since he did not distinctly admit to making the prior statements, the extrinsic evidence of this statement which was contained on the transcript or in the tape was admissible. The Appellant should have been allowed to offer the portions of Mr. Brittingham's statement into evidence. Because the testimony of Brittingham was critical to the State's case, any attack on his credibility could have effected the

verdict, as in Pugh.

The Appellant asserts that the trial court erred in disallowing evidence of Heath Brittingham's prior inconsistent statements given to the detective. As established in MBL Life Assurance Corporation v. Suarez, 768 So.2d 1129 (Fla. 3rd DCA 2000), when a witness states that he does not recall questions asked or answers given at previous times, the law provides that extrinsic evidence of the prior statement is admissible. Counsel for the Appellant established a sufficient predicate under Section 90.614(2) to allow for the admission of Brittingham's prior inconsistent statements. Counsel for the defendant could authenticate both the transcript and the tape through the testimony of the crime scene technician and the detective. Counsel met the foundational requirements of this section and as indicated in MBL, "the interest of justice" otherwise required it. In that case, the Court found that it would only have been fair and justice could only be served, if the Appellant was given the opportunity to impeach the witness's credibility by showing what he had previously stated. As there, this trial court had no legitimate reason for preventing the jury from hearing Brittingham's prior inconsistent statements. The judge's failure to do so clearly was not harmless and kept the jury from considering all of the relevant evidence in this case. We ask that this court find that the trial court clearly abused its discretion.

ISSUE II

DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION?

Premeditation may be established by inference from circumstantial evidence. However, this evidence must be inconsistent with any reasonable hypotheses of innocence or with every other inference that reasonably could be drawn from the evidence. See Fisher v. State, 715 So.2d 950(Fla. 1998). Therefore, if the State's proof fails to exclude every reasonable hypothesis that the homicide occurred other than by a premeditated design, a verdict of first degree murder cannot be sustained.

The State here attempts to establish the Appellant's premeditation by pointing out his short conversation with the co-defendant prior to the parties travelling by automobile to the scene of the crime. However, it offers no evidence as to the content of this conversation.

The State also suggests that the Appellant's action in driving the victim to a lightly travelled road and stopping the car, allowing the co-defendant and victims to exit, also shows his intent to participate in the act of the co-defendant which followed.

The Appellant does not demand that the jury in this case believe his version of the facts on which the State has produced conflicting evidence. However, this conviction should not stand

based upon a brief and unknown conversation between the co-defendants or the supposition that the Appellant had knowledge of what the co-defendant intended to do when the victims exited the motor vehicle and were shot by him. There were not sufficient facts submitted to the jury upon which the trial court should have allowed them to consider possible verdicts for premeditated first degree murder. Unlike Spencer vs. State, 645 So.2d 377 (Fla. 1994), the issue of whether a premeditated design to kill was formed by the Appellant prior to the killing should not have been a question for the jury based upon the circumstantial evidence presented in this case.

The evidence here relied upon by the State was not inconsistent with every reasonable inference of premeditation. See Miller, 770 So.2d 1144 (Fla. 2000). And, the State certainly did not exclude all reasonable hypotheses that the homicide occurred other than by a premeditated design on the part of the Appellant. See also Long vs. State, 689 So.2d 1055(Fla. 1997). The events that lead up to the killing of Robert Crawford and the attempted homicide of Stephen Tuttle failed to show a fullyformed conscious purpose on the part of the Appellant to kill the victims.

As established in Long, supra, although whether the circumstantial evidence in a prosecution for premeditated first degree murder is inconsistent with any other reasonable inference is a question of fact for this jury; nevertheless, the jury's verdict on the issue must be reversed on appeal if it is

not supported by competent, substantial evidence.

From the mode or manner of killing established in this cause, this was not evidence from which premeditation could be inferred by the jury. The conduct of the Appellant prior to the homicide evidenced that he merely wished, at worst, to cause some battery to be committed upon the victims.

As in the case of Mungin vs. State, 689 So.2d 1026 (Fla. 1995), the Court here erred in denying the Appellant's motion for Judgment of Acquittal as to premeditation. Although the State presented evidence that supported premeditation, the evidence was also consistent with a killing that occurred on the spur of the moment, in that there were no statements indicating that the Appellant intended to kill the victim and there was no continuing attack upon Mr. Crawford that would have suggested premeditation.

Premeditation did not exist in this cause as there was insufficient proof of the Appellant's reflection as to the nature of the act that was committed. See Bell vs. State, 768 So.2d 22 (Fla. 1st DCA 2000). See also Green vs. State, 715 So.2d 940 (Fla. 1998). Appellant contends that the evidence was insufficient to support his conviction for premeditated murder, given the State's failure to exclude the reasonable hypothesis that the co-defendant, Joey Smith, acted independently and rapidly in his shooting of the victims. As in Cummings vs. State, 715 So.2d 944 (Fla. 1998), the State failed to show that while the Appellant had a motive to exact retribution against

the victims, an intent to kill, rather than to frighten the individuals or cause injury, was not established. Here, the Appellant was not aware of the nature of the act to be committed by his co-defendant, Joey Smith. As in Carpenter vs. State, 785 So.2d 1182 (Fla. 2001), there was insufficient evidence to warrant the trial court's submission of the Appellant's case on the theory of premeditation. The evidence did not exclude the reasonable hypothesis that the victim was killed, without premeditation, and by the hand of the co-defendant acting impulsively and independently and without the knowledge of the Appellant. See also Burttram vs. State, 780 So.2d 224 (Fla. 2nd DCA 2001). Again, the evidence here does not establish that the Appellant knew the co-defendant's intentions when he stepped from the automobile. There was no proven conversation or statements made by the Appellant showing any knowledge as to what might occur.

ISSUE III

DID THE TRIAL COURT ERR IN FAILING TO DIRECT A VERDICT AS TO THE CHARGE OF FELONY MURDER?

Any felony murder conviction established in this case against the Appellant should be reversed for insufficient evidence. Although the State showed that the Appellant was in the car at the time of the kidnapping murder, this circumstantial evidence was wholly inadequate to sustain the conviction of the Appellant, where it was not proved that he communicated with the co-defendant. See Rodriquez vs. State, 571 So.2d 1356 (Fla. 2nd DCA 1990). There, the Court held that where a murder is an independent act of a co-felon, and not committed in furtherance of the joint felony, the defendant could not be convicted of felony murder. That Court cited Brian vs. State, 412 So.2d 347 (Fla. 1982). There is no evidence to establish that the homicide was committed in furtherance of the kidnapping. Also, there is affirmative evidence established on behalf of the Appellant that the homicide here was an independent act of Joey Smith.

As the State failed to establish that the Appellant was an aider or abetter of any underlying kidnapping, there was no proof of the Appellant's intent to participate in a kidnapping. Failure to establish this intent should result in an overturning of the Appellant's conviction. See Shockey vs. State, 338 So.2d 33(Fla. 3rd DCA 1975). In order to apply the felony murder rule to obtain the conviction of a principal for the act of his

associate, it must be shown that the confederate's extra criminal act was committed in furtherance of prosecution of the initial common criminal design. See Hampton vs. State, 336 So.2d 378 (Fla. 1st DCA 1976). It was not established beyond a reasonable doubt in this case that Joey Smith's action in killing Robert Crawford was done so in furtherance of any kidnapping or any common criminal design. Although this can be inferred from the testimony and evidence presented in this case, there is no affirmative evidence that establishes this to the extent necessary to defeat a motion for a directed verdict.

ISSUE IV

THE COURT ERRED IN ESTABLISHING THE AGGRAVATING CIRCUMSTANCE OF THE APPELLANT BEING ENGAGED IN A FELONY IN ORDER TO SUPPORT HIS SENTENCE OF DEATH.

Section 921.141(5)(d), Florida Statutes, supports the establishment of the aggravating factor of a defendant being engaged in a felony at the time of the commission of a homicide. This includes the capital felony being committed while a defendant is engaged in any kidnapping, which arguably, is the only basis for the State's case in this matter.

As a result, the elements of this aggravating circumstance are:

1. The Appellant committed a capital felony, and

2. At the time of the commission of the capital felony, the Appellant was an accomplice in the commission of the crime of kidnapping.

Thus, this statute provides for an aggravating circumstance if the Appellant was committing or attempting to commit a kidnapping at the time of the homicide. Only if the facts of the case establish proof beyond a reasonable doubt of this specified felony can this aggravating circumstance be properly found. The case of Delap vs. State, 440 So.2d 1242(Fla. 1983) requires that the State must prove that the kidnapping was a dominant motive for the murder in this case. See also Clark vs. State, 609 So.2d 513(Fla. 1992).

In Enmund vs. Florida, 458 US 782, 102 S.Ct. 3368, 73

Lawyer's Edition 2nd 1140(1982), the United States Supreme Court held that the death penalty may not be invoked for a co-felon where he himself did not either kill, attempt to kill, or intend that a killing take place. Certainly, the Appellant did not kill or attempt to kill Robert Crawford in this case. In addition, it has not been established beyond a reasonable doubt that the Appellant intended that a killing take place. Enmund went on to hold that a defendant may only be sentenced to death where the actual killing is done by a co-felon, where the defendant himself either attempted to kill or intended to kill someone. As these circumstances have not been proved beyond a reasonable doubt in this cause, the Eighth Amendment prohibits the employment of the death penalty to the Appellant in this case.

ISSUE V

DID THE TRIAL COURT ERR IN CONCLUDING THAT THE HOMICIDE OCCURRED IN A COLD, CALCULATED AND PREMEDITATED FASHION SO AS TO ESTABLISH AN ADDITIONAL AGGRAVATING CIRCUMSTANCE AGAINST THE APPELLANT?

Section 921.141(5)(i), Florida Statutes establishes that an aggravating circumstance is created where the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court failed to recognize that this factor has to be something more than the premeditation element of first degree murder. This Court has gone through many stages of interpretation in an effort to limit the applicability of this factor.

Starting with Jackson vs. State, 648 So.2d 85(Fla. 1994), this Court has delineated four elements which must be proven beyond a reasonable doubt before the factor is established. This is a strict and clearly defined approach to evaluating whether the evidence proves the factor. See Walls vs. State, 641 So.2d 381 (Fla. 1994).

Here, the State failed to first show that the "killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." See Jackson, supra. Second, the state failed to show that the murder was a product of a "careful plan or prearranged design to commit murder before the fatal incident." Also see Jackson, supra.

Third, this same case requires "heightened premeditation," or that which is over and above what is required for unaggravated first degree murder. The State has failed to prove beyond a reasonable doubt any evidence of a careful plan, prearranged design or that heightened premeditation required by Jackson.

The state of mind of the Appellant is critical to the analysis of the evidence for this aggravating circumstance. Impulsive killings during a felony do not qualify for circumstances of cold, calculated and premeditated. See for example Rogers vs. State, 511 So.2d 526(Fla. 1986). The act of the co-defendant Joey Smith in shooting Robert Crawford was contrary to the established intent of the Appellant and the others present when it occurred. It was clearly contradictory to the Appellant's affirmative statement to only "rough up" the decedent. The co-defendant took it upon himself to shoot the decedent and the act occurred in a split second after he exited the motor vehicle.

The "coldness" or the "calm and cool reflection" element is simply missing in this case on the part of the Appellant. See Richardson vs. State, 604 So.2d 1107(Fla. 1992).

As previously stated, to support cold, calculated and premeditated, the evidence must prove beyond a reasonable doubt that the murder was calculated-committed pursuant to "...a careful plan or prearranged design to kill..." The fact that the underlying felony may have been fully planned ahead of time (the kidnapping) does not qualify the crime for the cold,

calculated and premeditated factor if the plan did not also include the commission of the murder. See Barwick vs. State, 660 So.2d 696(Fla. 1995); Geralds vs. State, 601 So.2d 1157(Fla. 1992); Lawrence vs. State, 614 So.2d 1092(Fla. 1993); Reviera vs. State, 561 So.2d 536(Fla. 1990); Jackson vs. State, 498 So.2d 906(Fla. 1986); and Hardwick vs. State, 461 So.2d 79(Fla. 1984).

In addition, it is clear that a plan to kill cannot be inferred from a lack of evidence - a mere suspicion is insufficient. See Besaraba vs. State, 656 So.2d 441(Fla. 1995); Gore vs. State, 599 So.2d 978(Fla. 1992); Lloyd vs. State, 524 So.2d 396(Fla. 1988). Also, if the evidence can be interpreted to support cold, calculated and premeditated, but also a reasonable hypothesis other than a planned killing, that factor has not been proven. See Geralds vs. State, 601 So.2d 1157(Fla. 1992) and Eutzy vs. State, 458 So.2d 755(Fla. 1976).

Lastly, simply proving a premeditated murder for purposes of guilt is not enough to support the cold, calculated and premeditated aggravating circumstance - this Court has required greater deliberation and reflection. See Walls vs. State, 641 So.2d 381(Fla. 1994). This Court has rejected cold, calculated and premeditated even though the victim suffered several gun shot wounds. See Hamilton vs. State, 547 So.2d 630(Fla. 1989).

In conclusion, when evidence of the cold, calculated, and premeditated aggravating factor is circumstantial this evidence must be inconsistent with any reasonable hypothesis which might

negate the aggravating factor. See Mauhn vs. State, 714 So.2d 391 (Fla. 1998).

CONCLUSION

The death penalty in this case should be vacated for the State's failure to establish beyond a reasonable doubt all of the aggravating factors relied upon by the Court for imposing this penalty.

In addition, the Court should reverse and remand this case to the trial court with direction that a directed verdict be entered as to the first degree capital murder charge involving the victim, Robert Crawford. The basis of this conclusion is the State's failure to establish beyond a reasonable doubt that the Appellant intended to participate and had knowledge of those acts of his co-defendant, Joey Smith, when he did not kill or attempt to kill the victim, Robert Crawford. In addition, this direction can be based upon the State's failure to prove beyond a reasonable doubt that the capital crime occurred in a premeditated fashion.

Finally, the matter should be additionally reversed and remanded for a new trial for the Appellant on both counts of the indictment for the failure of the trial court to allow counsel for the Appellant to impeach the witness Heath Brittingham with his prior statements. The attorney for the Appellant established the appropriate predicate to accomplish this

impeachment for the witness's failure to recall his statements given to Detective Moe. It was only by the prevention of the trial court of his use of a transcript or the video tape of this witnesses testimony to the detective, that caused prejudicial error in this matter. The Appellant's inability to produce this witnesses recollections of his intentions and statements during the course of the homicide, severely prejudiced the considerations the jury was to make regarding his knowledge and participation in that killing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the **Office of the Attorney General**, 2002 N. Lois Avenue, Suite 700, Westwood Center, Tampa, FL 33607-2366 this _____ day of December, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Amended Initial Brief complies with the font requirements of Rules of Appellate Procedure 9.210(a)(2).

_____
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