IN THE SUPREME COURT OF FLORIDA

QUAWN M. FRANKLIN,

Appellant,

v.

Case No. SC04-1267
Lower Tribunal No. 02-217-CF

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On February 1, 2002, a grand jury indicted Appellant for the first degree murder and attempted armed robbery of Jerry Lawley. (V1: R.8-9, 105-06). Prior to trial, defense counsel filed numerous motions based on Ring v. Arizona, 536 U.S. 584 (2002), challenging, among other things, the constitutionality of Florida's death penalty statute. (V2: R.250-69; 270-78; 279-86; 287-90; 352-54). After hearing argument from counsel on the various motions, the Honorable Judge Mark J. Hill, denied the majority of the motions.[1] (V6: T.11-96). The court presided over a jury trial between April 19, 2004 and April 23, 2004, and conducted the penalty phase on April 26, 2004.

The instant murder case was the culmination of a violent crime spree carried out by Appellant in December, 2001.[2] As will be discussed in more detail, infra at 8-9, Appellant shot and killed a pizza delivery man, John Horan, on or about December 18, 2001. (V10: T.915-19). Approximately ten days later, Appellant and codefendant Pamela McCoy committed a home invasion of a 75-year-old woman, Alice Johnson. Appellant struck Ms.

[1] The State did not object to Appellant's motion for findings of fact by the jury which resulted in the special jury advisory verdict form utilized in this case. (V4: R.597-99, 701-02; V6: T.89-91).

[2] Appellant had been granted conditional release from the Department of Corrections on October 1, 2001, approximately two and a half months before the December offenses.

Johnson in the head with a hammer and stole her 2000 Toyota Camry. (V10: T.919-32). Appellant pled guilty to first degree murder, kidnapping and armed robbery in the Horan case and pled guilty to burglary, robbery with a deadly weapon, and attempted felony murder in the Alice Johnson case. (SR1: R.41; 67).

Shortly after the Johnson home invasion,[3] Appellant and three others drove the stolen Toyota Camry to St. Petersburg for a brief visit. Antwanna Butler and her cousin, Adrian, accompanied Appellant and codefendant Pamela McCoy to St. Petersburg to visit members of Appellant's family. (V9: T.642-45). The group stopped at Appellant's cousin's house and Appellant went inside while the others waited in the car. (V9: T.645). In the late evening hours, Antwanna and her cousin told Appellant they wanted return to Lake County which made Appellant upset.[4] (V9: T.646-48). While Appellant was driving back to Lake County, he showed Ms. Butler a revolver. (V9: T.649-50). After stopping at a convenience store for some Black and Mild cigars, Appellant drove to Tally Box Road and stopped where the security guard, Jerry Lawley, was located. (V9: T.650-51).

[3] The Johnson home invasion occurred on or about December 27-28, 2001, and the murder of Jerry Lawley occurred on or about December 29, 2001.

[4] Appellant had to borrow $10 from a relative because they needed money for gas for the trip back to Leesburg. (V9: T.652).

Appellant pulled the car in next to the Jerry Lawley's car and Appellant asked the security guard for directions. (V9: T.653-54). After speaking to the guard for a couple of minutes, Appellant drove away and took the Butler cousins back to an apartment building near their home. (V9: T.655-56). Before they exited the car, Appellant told Antwanna Butler that he wanted to go back to St. Petersburg. He also stated that he was going "to get" the security guard. (V9: T.657).

Jerry Lawley worked for Elberta Crate and Box Factory as a security guard. Mr. Lawley had been a truck driver for the company, but after suffering a stroke and recovering, the company allowed him to serve as a night-time security guard. (V8: T.495-96). Edward Ellis, a truck driver for the company, recalled that on Saturday, December 29, 2001, in the early morning hours he returned to the factory and saw Mr. Lawley's car at the factory. Mr. Ellis did not see Mr. Lawley sitting in his car, but this was not unusual as Mr. Lawley made rounds every hour on foot. (V8: T.496-98). Mr. Ellis parked his truck at the factory and went to sleep in the truck cab. (V8: T.499-500).

At approximately 5:30 in the morning, Jerry Lawley approached Mr. Ellis' truck and began banging on the door,

saying he had been shot.[5] (V8: T.500-01). Mr. Ellis immediately called 911 from the factory's office and returned to Mr. Lawley. Mr. Ellis noticed that Lawley had driven his car over to where Mr. Ellis' truck was located. (V8: T.501-02). Mr. Ellis observed blood on the front and back of Lawley's shirt. Mr. Lawley was in pain and having difficulty breathing. (V8: T.502-04). Mr. Lawley told Ellis that a tall black male with a cap on his head had shot him after trying to rob him. Lawley further stated that the black male was driving a blue car. (V8: T.504-06).

Leesburg Police Department Officer Joseph Iozzi testified that he was familiar with Jerry Lawley because he had spoken to the night watchman while patrolling the area around Elberta Box and Crate Factory. (V8: T.507-08). On the night of Friday, December 28, 2001, at approximately 10:30 p.m., Officer Iozzi stopped and spoke with Mr. Lawley during his routine patrol. (V8: T.507-09). At 5:44 a.m. the next morning, Officer Iozzi received a call regarding a shooting at the Elberta property. When he arrived, Mr. Lawley was standing near his car in a great deal of pain. (V8: T.511). Mr. Lawley informed the officer

[5] As will be discussed in Issue III, infra, defense counsel objected to this testimony as hearsay, and the trial court overruled the objection. (V8: T.501; 512).

that he had been shot.[6] Mr. Lawley told the officer that a black male had approached him while he was on duty in his car and ordered him out the car at gunpoint. The black male told him to lie on the ground, and as he did, the male shot him in the back. (V8: T.513-14). The black male then went to Mr. Lawley's car and began searching the interior of his car. Mr. Lawley described the male as approximately six feet tall, thin, and wearing a knit cap. The black male left the scene in a newer model, blue, four door car, possibly a Pontiac. (V8: T.514-15).

During the early morning hours of December 30, 2001, St. Petersburg Police Department Officer Troy Achey, came across a blue 2000 Toyota Camry with two black individuals asleep in the car. (V8: T.550). Appellant was asleep in the driver's seat and thirteen-year-old Pamela McCoy was asleep in the passenger seat. (V8: T.551-56; 563). Appellant was wearing gloves on his hands and Officer Achey found a revolver under the driver's seat. (V8: T.554). Crime scene technicians found a spent .357 caliber shell casing[7] and five live rounds in the firearm and

[6] Defense counsel also objected to the victim's statements to Officer Iozzi.

[7] An expert witness testified that the cartridge casing was fired from the firearm found under Appellant's seat. (V9: T.786). The expert also testified that the bullet found at the scene of the murder was fired from the revolver as well. (V9: T.789). An expert in forensic serology further testified that the fired bullet had a blood stain on it which was consistent with the victim's DNA profile. (V9: T.751-55).

located a black knit skull cap in the vehicle's trunk. (V8: T.596; V9: T.617.).

Appellant was transported to the police department, and after being advised of his Miranda rights, Appellant gave a taped statement wherein he confessed to killing Jerry Lawley. (V8: T.555-56; 565-86). Appellant stated that he wanted to rob someone and he came across Mr. Lawley sitting in his car. (V8: T.579-80). Appellant had a revolver with him and ordered Mr. Lawley out of the car at gunpoint. Appellant went through his pockets and then shot him once because he "wanted to." (V8: T.580-81). Appellant stated that he wore his gloves at the time because he did not want to leave any fingerprints. (V8: T.583-84). Appellant stated that all four people[8] were in his car at the time of the crime. (V8: T.584-85). According to Appellant, they searched Mr. Lawley's car, but found nothing of value and decided not to take his car. (V8: T.584-86).

Approximately one month after the murder, while incarcerated at the Lake County Jail, Appellant called a

[8] In response to Detective Gary Gibson's question, Appellant initially stated that he had dropped off the others (presumably Antwanna and Adrian Butler) after first speaking with Mr. Lawley, but then Appellant stated that all four of them were together and they planned to split the money four ways. (V8: T.584-85).

In a subsequent interview with a newspaper reporter, Appellant stated that he dropped Antwanna and Adrian off after speaking with Mr. Lawley, and he and Pamela McCoy returned to commit the offenses. (V9: T.685-86).

newspaper reporter and arranged an interview. The reporter tape recorded the interview and the tape was played before the jury. (V9: T.669-91). Appellant told the reporter that he killed Mr. Lawley by shooting him. (V9: T.680-82). According to Appellant, Pamela McCoy talked to Mr. Lawley and made him get out of the car. (V9: T.680-81). While McCoy pointed the gun at Mr. Lawley, Appellant attempted to steal Mr. Lawley's car, but could not get it started. (V9: T.687-88). Appellant told the reporter that he took the gun from McCoy and shot Mr. Lawley. (V9: T.689-90).

Dr. Julia Martin, an associate medical examiner in Leesburg, testified that the bullet wound entered Mr. Lawley in his left back, and exited through his upper abdomen. (V9: T.693-97). Mr. Lawley's cause of death was from the loss of blood due to the gunshot wound and the damage done to his left lung and liver from the bullet. (V9: T.699-700).

Appellant did not present any evidence during the guilt phase. After hearing all of the evidence, the jury deliberated and returned a verdict finding Appellant guilty of attempted armed robbery with a firearm and first degree murder. (V10: T.876-77).

At the penalty phase proceeding, the State presented the video-taped testimony of Clarence Martin. During the early

morning hours of July 7, 1993, Mr. Martin was working in St. Petersburg stocking newspaper machines with the St. Petersburg Times when he was robbed at gunpoint by Appellant and another man. In fear that Appellant was going to shoot him, Mr. Martin stabbed Appellant in the stomach with a knife he carried in his fanny pack.[9] (V10: T.898-906). Appellant was convicted of robbery for this offense, and released on conditional release in October, 2001. (V10: T.907; 963).

While on conditional release in December, Appellant committed numerous other violent offenses, including the murder of Jerry Lawley and a pizza delivery man, John Horan. As discussed previously, supra at 1-2, Appellant was responsible for the murder of a Papa John's delivery man. John Horan was called out to deliver a pizza and was ambushed when he exited his car. (V10: T.943). Appellant bound Mr. Horan with duct tape, placed him back in the car and drove to Tally Box Road, where he removed Mr. Horan. As Mr. Horan was running from the vehicle and begging for his life, Appellant shot him once in the back. (V10: T.943). Appellant pled guilty to first degree murder, kidnapping and armed robbery. (SR1: R.67).

Approximately ten days after murdering John Horan, Appellant and Pamela McCoy went to 75-year-old Alice Johnson's

[9] After Appellant ran off and left the gun, the victim picked it up and realized that it was a cap gun. (V10: T.910).

house and asked her for directions. (V10: T.926-28). They left her house for a short time and returned and again asked for directions. Appellant then struck Ms. Johnson in the head with a hammer. (V10: T.929-30). Appellant and McCoy then stole Ms. Johnson's 2000 Toyota Camry. Law enforcement officers testified that duct tape was also involved in Ms. Johnson's case. (V10: T.921; 944-45). Detective Frank Hitchcock testified, over defense counsel's objection, that a doctor at the hospital stated that pieces of Ms. Johnson's "skull had been broken off and ended up down inside of her brain." (V10: T.947-48). Appellant pled guilty to burglary, robbery with a deadly weapon, and attempted felony murder in Ms. Johnson's case and apologized to her in court. (V10: T.933; SR1: R.41; 67).

Pamela McCoy testified for the State at the penalty phase proceeding and informed the jury of the events on the night of Jerry Lawley's murder. McCoy testified that while she was in St. Petersburg with Appellant and the Butler cousins, Appellant went into his cousin's house and returned with a gun wrapped in a bandanna. (V10: T.951-53). When they confronted Jerry Lawley, Appellant told him that "this is going to hurt for a minute and it's only going to take a second." (V10: T.953-54). Appellant then exited the car with his gun and made Mr. Lawley get on the ground. (V10: T.954-55). While Mr. Lawley was down

on his knees, he begged Appellant not to shoot him. (V10: T.956). After the murder, Appellant and McCoy went to her grandmother's house in Leesburg. Appellant told her to pack her clothes because she would not be able to return to Leesburg until she was 18 years old.[10] (V10: T.956-57).

Victim impact evidence was briefly presented from three witnesses: Linda Paulette (the victim's sister), Kay Lawley (the victim's sister-in-law), and Edward Ellis (the victim's friend and co-worker). Ms. Paulette testified that when her father passed away, Jerry Lawley was approximately 18 years old. Mr. Lawley began working and helped his mother out around the house. Mr. Lawley stepped into his father's role and taught his younger sister how to drive a car and spanked her when she got into trouble. (V10: T.973-74). Mr. Lawley served in the armed forces for 25 years and spent time in Vietnam during the war.[11] Ms. Paulette described her brother as a big teddy bear who loved everyone. (V10: T.978-89).

Edward Ellis was recalled during the penalty phase and presented victim impact evidence. Mr. Ellis had worked with

[10] At the time of the murder, Pamela McCoy was 13 years old. (V8: T.563).

[11] Kay Lawley, the victim's sister-in-law, testified that Mr. Lawley served two tours of duty in Vietnam. (V10: T.985). She also related Mr. Lawley's habit of purchasing items like glasses and school supplies for the neighborhood children. (V10: T.986).

Jerry Lawley for over ten years and testified that he had numerous friends at the factory where they worked. (V10: T.981-82). Mr. Lawley's death affected a number of the workers at the factory who knew him well.

After the State rested, Appellant attempted to call Minnie Thomas as a witness, but she did not want to testify and failed to show up at trial. Based on her testimony at a pre-trial deposition, the State and defense were able to work out a stipulation to read to the jury consisting of excerpts from her deposition as well as some additional material. (V11: T.1027-50). Ms. Thomas testified that Appellant was her "adopted" son. Appellant's mother dropped Appellant off with Ms. Thomas when he was six weeks old and he lived with her until he was eight years old. (V11: T.1047). Eventually, Appellant's mother showed up with a law enforcement officer and took custody of Appellant. Ms. Thomas did not see Appellant again until he was 15 years old. She went to St. Petersburg to see Appellant while he was in the Intensive Care Unit after being stabbed during the robbery of Clarence Martin. (V11: T.1047). After he was released from the hospital, Appellant went to prison. During the time that Appellant lived with Ms. Thomas, he never heard from his biological mother and did not know of her existence; in fact Appellant used the name Quawn Thomas. Appellant referred

to Ms. Thomas and her husband as his “mama” and “daddy.” (V11: T.1047-48).

Appellant testified at the penalty phase proceedings that he was born in St. Petersburg, but he grew up in Leesburg with his “mom” and “dad,” Minnie and George Thomas. (V11: T.1053). Appellant did not know about his biological mother until he was eight years old when she showed up with a police officer and took custody of him. (V11: T.1054-55). Appellant did not want to accompany his mother down to St. Petersburg, so members of his family physically held him down in the car on the way to St. Petersburg.

After being taken to St. Petersburg, Appellant soon started committing crimes and stealing bicycles in an attempt to return to the Thomases in Leesburg. (V11: T.1055-56). Appellant attempted to ride a bicycle to Leesburg numerous times, but was unsuccessful. He usually was arrested or became lost and called Ms. Thomas to come and get him. (V11: T.1055-57). As a result of his arrests for running away and thefts, Appellant first spent time in a juvenile facility when he was nine years old. When Appellant was twelve years old and placed in a group treatment program for juveniles, he was forced by older boys to perform sexual acts on them. (V11: T.1058-63). Appellant

eventually was placed in an adult prison when he was fifteen years old for a grand theft auto conviction. (V11: T.1065).

Appellant testified that when he was caught by the St. Petersburg Police Department for the instant crime, he confessed to everything because he was tired of running away and tired of his life. (V11: T.1068). Appellant spoke with the newspaper reporter and felt that if he confessed, he would die. Appellant had no desire to continue living and felt remorse over the situation. (V11: T.1068-69). Appellant informed the jury that he had pled guilty in the Alice Johnson attempted murder case and in the John Horan murder case and had expressed remorse in each case. He also apologized to Jerry Lawley's family while on the stand. (V11: T.1070-73).

On cross-examination, Appellant acknowledged that he had 29 juvenile contacts with the law, including an escape charge. (V11: T.1075-76). Appellant admitted to telling correction officers in 1996 that he had never been the victim of sexual abuse. Appellant testified that the reason he denied the sexual abuse was because it was embarrassing. (V11: T.1078).

SUMMARY OF THE ARGUMENT

In his first issue on appeal, Appellant argues that the trial judge erred in admitting hearsay evidence in the penalty phase in violation of his constitutional right to confront witnesses against him. Appellant failed to preserve this issue for appellate review based on his failure to make the proper objection below. Even if preserved, the State questions whether the evidence was an out-of-court "testimonial" statement admitted in violation of Crawford v. Washington, 541 U.S. 36 (2004). Additionally, even if this Court finds that the evidence was improperly admitted, the evidence was harmless beyond a reasonable doubt.

The trial judge acted within his discretion in admitting statements Appellant made to a newspaper reporter during an interview. Appellant told the reporter that he fled Leesburg after seeing a helicopter searching for him and that he was tired of living and being persecuted by people. Appellant asserts that the evidence concerning the helicopter was improperly admitted because it could allow the jury to speculate that Appellant's car was stolen or had been involved in other crimes. To the contrary, the jury knew that Appellant committed a murder in the early morning hours and law enforcement had a description of his car. Thus, there was no need to speculate

about his car given the facts. Furthermore, the evidence regarding Appellant's feelings was not improperly admitted because it was relevant to his reasons for calling a newspaper reporter and confessing his crimes. Finally, even if the evidence was improperly admitted, the error was harmless.

Appellant argues that the trial court erred in admitting hearsay statements made by the victim to a friend and responding police officer immediately after he was shot. Appellant's argument that the hearsay violated his constitutional right to confront witnesses against him was not preserved for appellate review by proper objection. Furthermore, Appellant forfeited any confrontation rights by killing the victim and ensuring his unavailability at trial. Finally, the statements made by the victim were excited utterances that were not testimonial. As such the admission of the statements did not violate the holding of Crawford v. Washington, 541 U.S. 36 (2004).

The trial judge properly refused Appellant's offer to stipulate to the aggravating circumstance of prior felony convictions. The State is entitled to present evidence of the prior offenses to allow the jury to make an informed recommendation of the appropriate sentence.

The court properly allowed the State to present victim impact evidence at the penalty phase. The brief evidence from

three witnesses was limited to the type of evidence specifically allowed under Florida Statutes, section 921.141(7).

The trial judge properly found that the murder of Jerry Lawley was committed in a cold, calculated and premeditated manner without the pretense of legal or moral justification. Appellant planned the murder by procuring a firearm in advance and searching for a vulnerable victim. Once he found the victim working in an isolated area, Appellant donned a pair of gloves to avoid leaving fingerprints and ordered the victim out of his car at gunpoint. Appellant told the victim that "this is going to hurt, but only for a minute," and as the victim was kneeling to the ground and begging for his life, Appellant coldly shot him in the back because Appellant "wanted to." This murder was not done in an act of emotional frenzy, but was a killing carried out as a matter of course.

Additionally, the trial judge properly found that the murder was committed for pecuniary gain. Appellant attempted to rob the victim of his money and car because Appellant was out of money and almost out of gas in the stolen car he had been using for the last day or two. Clearly, a motive for the murder was financial gain.

Lastly, Appellant's argument that Florida's death penalty statutory scheme is unconstitutional under Ring v. Arizona, 536

U.S. 584 (2002), is without merit and has been repeatedly rejected by this Court.

ARGUMENT

ISSUE I

APPELLANT HAS FAILED TO PRESERVE ANY ISSUE REGARDING THE ADMISSION OF HEARSAY EVIDENCE DURING THE PENALTY PHASE ON THE GROUNDS THAT IT VIOLATED HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM.

Appellant argues that the trial court erred in allowing hearsay evidence during the penalty phase because it violated his constitutional right to confront witnesses. Specifically, Appellant complains that the trial judge erred in overruling his objection during the testimony of Leesburg Police Department Detective Frank Hitchcock. The prosecutor asked the detective if he knew about the injuries sustained by an elderly victim, Alice Johnson, after Appellant repeatedly struck her in the head with a hammer. Defense counsel objected to the question on the grounds that the detective was not qualified to describe the victim's injuries: "Your Honor, I'm going to object. The detective is not a doctor, a physician." (V10: T.947). Defense counsel never objected to the detective's testimony on hearsay grounds and did not argue that the detective's testimony would violate Appellant's Sixth Amendment right to confront witnesses. Thus, the State submits that Appellant has failed to preserve the instant issue for appellate review.

During Detective Frank Hitchcock's penalty phase testimony, the prosecuting attorney asked the witness about his investigation into one of Appellant's prior felony offenses:

> Q. While that's being accomplished, Sergeant Hitchcock, can you tell us a little bit about the extent of the injuries that Ms. Johnson suffered as a result of being struck repeatedly with this hammer?
>
> MR. NACKE [Defense counsel]: Your Honor, **I'm going to object. The detective is not a doctor, a physician.**
>
> MR. GROSS [Prosecutor]: He certainly in a sentencing proceeding is entitled to tell us what the extent of the victim's injuries are.
>
> THE COURT: Overruled, Mr. Nacke. Go ahead.
>
> BY MR. GROSS:
>
> Q. What was the extent of her injuries as a result of the blunt trauma to her head?
>
> A. In speaking with a doctor at the hospital, he told me that his main concern was the fact that pieces of her skull had been broken off and ended up down inside of her brain.

(V10: T.947-48). Defense counsel's objection to the prosecutor's question was specifically directed at the witness' qualification to answer the question regarding the victim's injuries: "The detective is not a doctor, a physician." Because defense counsel did not object when the detective testified to the information he obtained from a doctor at the hospital, and did not argue to the trial court that his constitutional right to confront witnesses had been violated based on the admission of this evidence, the instant issue has not been preserved for appellate review.

The law is well settled that in order for an issue to be preserved for appellate review, the issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Appellant argues on appeal that the trial court erred in admitting Detective Hitchcock's testimony because it violated his constitutional confrontation rights as recently interpreted by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004). Because Appellant did not timely present this argument to the trial judge below, the State submits that the issue has not been preserved for appeal.[12] See Anderson v. State, 863 So. 2d 169, 180-81 (Fla. 2003) (finding defendant's argument was not preserved for appeal when he presented a different argument to the trial court); Occhicone v. State, 570 So. 2d 902, 905-06 (Fla. 1990) (stating

[12] Admittedly, *prior* to trial, Appellant filed a motion seeking to bar the State from using hearsay evidence at the penalty phase as allowed by Florida Statutes, section 921.141(1). Appellant also moved to have the statute declared unconstitutional because it violated his constitutional right to confront witnesses. The trial court denied the motion. (V2: R.355-59; V6: R.31-32). The filing of this pre-trial motion has not preserved the instant issue for appellate review. See generally Lawrence v. State, 614 So. 2d 1092, 1094 (Fla. 1993) (the contemporaneous objection rule applies to evidence about other crimes, and even if a prior motion in limine has been denied, the failure to object at the time the collateral crime evidence is introduced waives the issue for appellate review).

that claim was not preserved for review where defense counsel failed to object on specific grounds advanced on appeal); Bertolotti v. Dugger, 514 So. 2d 1095 (Fla. 1987); Steinhorst, supra; Mencos v. State, 30 Fla. L. Weekly D1738 (Fla. 4th DCA July 20, 2005) (holding that defendant's hearsay objection did not preserve argument on appeal that hearsay violated his right to confrontation).

If this Court addresses the issue preserved for review, the State submits that the trial court acted within its discretion in denying defense counsel's objection relating to the detective's qualifications to express an opinion on the victim's injuries. This Court has previously stated that the admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000).

In this case, the court acted within its discretion in overruling defense counsel's objection to the question posed to Detective Hitchcock regarding the victim's injuries. The prosecuting attorney asked the detective to tell the jury about the extent of the victim's injuries based on Appellant's act of repeatedly hitting her in the head with a hammer. A detective

who apparently had some knowledge of the crime[13] could properly offer his opinion of the injuries that he may have observed. In Floyd v. State, 569 So. 2d 1225, 1231-32 (Fla. 1990), this Court held that law enforcement officers' testimony regarding their opinions of the crime scene and the victim's injuries were admissible lay witness opinion testimony under Florida Statutes, section 90.701, because the testimony was "within the permissible range of lay observation and ordinary police experience." Likewise, the trial court properly overruled defense counsel's qualification objection because the detective could have given his opinion of the victim's injuries based on his observations and experience. Admittedly, however, the detective did not respond to the prosecutor's question with an answer based on his own observations of the victim's injuries,

[13] Appellant asserts in his brief that the detective was investigating the crime and obtaining statements in order to utilize them in court. The record does not support such an assertion. Detective Hitchcock testified that he was intimately involved with the Horan murder investigation, but based on his answers to other questions, it appears that he did not have much knowledge of the Alice Johnson case. (V10: T.942). Detective Hitchcock testified that he "believed" the first person to find the victim was her brother. (V10: T.944). When shown a crime scene photograph with the victim covered by a towel or blanket, the detective did not know who placed the item on the victim. (V10:T.944). Contrary to Appellant's assertion, there is simply no indication in the present record that the detective was "investigating" the Alice Johnson case when a doctor spoke to him at the hospital.

but instead relayed information to the jury based on his conversation with a doctor at the hospital.

In Crawford v. Washington, 541 U.S. 36 (2004),[14] the United States Supreme Court found that the admission of "testimonial" hearsay statements pursuant to the "adequate indicia of reliability" test espoused in Ohio v. Roberts, 448 U.S. 56 (1980), violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The Roberts Court had allowed hearsay evidence in a criminal trial, even absent the opportunity for the defense to cross-examine the witness, if the declarant was unavailable, and if the evidence either fell within one of the "firmly rooted hearsay exceptions," or was otherwise shown to have "particularized guarantees of trustworthiness." Roberts, 448 U.S. at 66-74. The Crawford Court held, however, that the Confrontation Clause excludes from evidence any out-of-court "testimonial" statements unless, first, the witness is unavailable, and second, the defense is provided with a prior opportunity to cross-examine the declarant. The Crawford Court did not set forth a comprehensive definition of "testimonial," finding only that "it applies at a minimum to prior testimony at a preliminary hearing, before a

[14] The Crawford opinion was issued on March 8, 2004, and Appellant's trial took place on April 19-23, 2004.

grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68.

Appellant asserts that Detective Hitchcock's investigation of the crime lead to him obtaining information from a hospital doctor, and as such, was testimonial in nature. The State questions whether the evidence was testimonial. Although the Crawford Court left the definition of "testimonial" for another day, the Court did identify three kinds of statements that could be properly regarded as testimonial statements: (1) "'ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'"; (2) "'extrajudicial statements . . . contained in formalized testimonial material such as affidavits, depositions, prior testimony, or confessions'"; and (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Crawford, 541 U.S. at 51-52 (citations omitted). Clearly, statements taken by police officers during a formal interrogation are testimonial, id. at 52-53, but as noted in footnote 12, supra, it is unclear whether the detective was actually investigating the case when he spoke with a doctor at

the hospital. Perhaps, had defense counsel raised an objection on confrontation grounds, the parties could have made a better record on this point. See Mencos v. State, 30 Fla. L. Weekly D1738 (Fla. 4th DCA July 20, 2005) (stating that "[a]n objection specifically based on Crawford serves to focus the trial court's attention on the salient inquiry required by that decision, i.e., whether the evidence is 'testimonial,' whether the witness is 'unavailable,' and whether there was a 'prior opportunity for cross-examination.'"). Furthermore, this was clearly not an "interrogation," as discussed in Crawford. See Crawford, 541 U.S. at 53 n.4.

There is nothing in the record to indicate that the doctor's statement to Detective Hitchcock was made in response to a question from the detective. The statement may have been made after contact initiated by the doctor, or it may have simply been a spontaneous statement by the doctor. Applying the three formulations discussed in Crawford, it is doubtful that the doctor's statement was testimonial. There is no indication in the record that the declarant's statement was "a pre-trial statement that [the] declarant would reasonably expect to be used prosecutorially." Id. at 51-52. The statement clearly does not fall within the second category of extrajudicial statements contained in "formalized testimonial materials."

Finally, there is no indication that the doctor's statement was made "under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Id.; see also Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004) (applying Crawford's three formulations in an attempt to determine whether a declarant's statement to a law enforcement officer was testimonial). Because the record is unclear whether the doctor's statement was testimonial, this Court should find that Appellant has failed to show any error.

Furthermore, while this Court has noted that the Sixth Amendment right of confrontation applies at the penalty phase, this Court has held that the admission of hearsay testimony that a defendant had a fair opportunity to rebut did not violate this right. Rodriguez v. State, 753 So. 2d 29, 44-46 (Fla. 2000); Waterhouse v. State, 596 So. 2d 1008, 1016 (Fla. 1992) (trial court properly permitted retired detective to testify regarding details of a prior murder because hearsay is admissible in penalty phase proceeding and counsel had an opportunity to cross-examine the detective). As noted in Rodriguez, the details of prior felony convictions are admissible in the penalty phase proceeding provided the defendant has a fair opportunity to rebut any hearsay:

> [T]he defendant's interest in cross-examining the witness is less compelling where the testimony

> concerns a prior felony conviction. The defendant previously had the opportunity to cross-examine fact witnesses during the trial for the prior felony. The transcripts of the prior trial are also available to rebut the hearsay testimony describing the prior conviction. This is analogous to cases allowing a penalty phase witness to summarize prior testimony because the defendant had the opportunity to cross-examine the declarant during the original proceeding. See Knight v. State, 721 So. 2d 287, 293 (Fla. 1998); see also Lawrence v. State, 691 So. 2d 1068, 1073 (Fla. 1997).

This Court has recently reiterated, post-Crawford, that hearsay evidence is still permissible in the penalty phase, provided the defendant has the opportunity to rebut the hearsay testimony. See Dufour v. State, 905 So. 2d 42, 62-63 (Fla. 2005) (finding that the trial court did not err in allowing a Mississippi prosecutor to summarize a pathologist's testimony regarding the victim's wounds in Dufour's penalty phase proceeding because defense counsel had the opportunity to cross-examine the prosecutor, "thereby undermining the contention that he was not afforded an opportunity to rebut [the prosecutor's] hearsay testimony"). As such, the State submits that Crawford was not violated in the instant case because Appellant, like Dufour, had the opportunity to cross-examine the detective. Additionally, as this Court noted in Rodriguez, Appellant had the opportunity to confront the fact witness during his previous trial.[15]

[15] Appellant pled guilty during the middle of Alice Johnson's trial. (V10: T.92-33).

Even if this Court finds that the doctor's statement was testimonial and that the statement violated Appellant's Sixth Amendment right to confront witnesses against him, the admission of the statement is harmless beyond a reasonable doubt. See Delaware v. Van Arsdall, 475 U.S. 673 (1986); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Mixon v. State, 899 So. 2d 496 (Fla. 1st DCA 2005); Mencos v. State, 30 Fla. L. Weekly D1738 (Fla. 4th DCA July 20, 2005). Immediately prior to the detective's testimony, the State presented the testimony of the victim, Alice Johnson. She testified that in 2001, she was 75 years of age and was very active in her community and could stand, walk, and drive. After Appellant struck her in the head with a hammer, perhaps on more than one occasion, she lost consciousness. (V10: T.926-30). After her recovery, she has been confined to a wheelchair and has been unable to resume her active role in the community. (V10: T.930-31). Obviously, common sense and the victim's testimony established that she suffered serious injuries to her head after Appellant struck her repeatedly with a hammer. The fact that Detective Hitchcock testified that a doctor informed him that pieces of her skull were lodged into her brain was not a grand revelation to the jury and this information, along with the prosecutor's brief mention of it in closing argument, was not so prejudicial as to

require reversal for a new penalty phase. Given the evidence introduced by the State in the penalty phase, there is no doubt that any error in allowing the officer to testify regarding the doctor’s comments was harmless error.

ISSUE II

THE TRIAL JUDGE ACTED WITHIN ITS DISCRETION IN OVERRULING APPELLANT'S OBJECTION TO PORTIONS OF HIS STATEMENT TO A NEWSPAPER REPORTER.

During his incarceration in the Lake County Jail while awaiting trial on the current charges, Appellant contacted a newspaper reporter and subsequently gave an interview confessing to numerous offenses. (V9: T.670-676). Prior to trial, the State and defense counsel agreed to redact certain portions of the interview. (SR2: R.827-28). Defense counsel, however, had remaining objections to a few of the passages in the interview, and after hearing argument from counsel, the trial judge denied Appellant's motion to exclude these passages. (SR2: R.827-35). At trial, when the State introduced the tape of Appellant's statement to the reporter, defense counsel renewed his objection to the passages.

The specific portions of the taped statement that Appellant objected to are as follows:

> [Reporter]: Why have you decided to confess now?
> [Appellant]: I'm tired of life, man. I'm tired of being – I'm tired of being treated just like an animal.
> ...
>
> [Reporter]: What else do you remember from that night?
> [Appellant]: Uh, man, we just left, man. Just – just left from there, you know? Saw a helicopter in the air looking – looking for the car we was in, and we was hiding, and then we left.
> [Reporter]: Uh-huh.

> [Appellant]: We left to St. Pete.
> . . .
>
> [Reporter]: So now – so now what? I mean, you're back here. What's gonna happen?
> [Appellant]: I don't know. I don't care. You know what I mean? Whatever happens, you know, happens. I'm just saying, you know, I did it. Ain't no sense in me holding that in. You know, I did it. You know, I did my part, you know? I ain't denying it no more, and that's it, and everybody out there want to look at me and find me guilty anyway. I did it, but, so what, you know? They the cause of that there. The people, the world, the world, life, life itself. It's – I hate – I hate living. I just hate life. I mean, I'm tired of – I'm tired of everything. I'm tired of people watching me, tired of people hating me, you know what I mean? I'm tired of people. You know what I mean? Things people do, you know? I'm tired of everything.

(SR2: R.828-32). Defense counsel objected to the questions dealing with what was in Appellant's heart on relevancy grounds and objected to the portion regarding hiding from the helicopter on the grounds that the jury may speculate that the car was stolen or that the car had been used for some other crime. (SR2: R.830, 833). The trial judge denied the objections and admitted the statements during the trial over defense counsel's renewed objection. (SR2: R.828-32; V9: T.676).

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So.

2d 845 (Fla. 1997). The State submits that the trial judge acted within its discretion in admitting Appellant's statements to the newspaper reporter.

With regard to Appellant's statement about hiding from a helicopter, Appellant argues that the court's ruling unfairly prejudiced the guilt phase of his trial because it "implied" that Appellant had committed the collateral crime of grand theft and "could have been confused by the jury as an indication of the commission of other crimes." Initial Brief of Appellant at 36, 37. The record is silent on any sound basis for such speculation. To the contrary, the jury knew that the victim survived the shooting long enough to give a description of Appellant and the car he was driving to a lay witness and a law enforcement officer. Furthermore, reading Appellant's statement in context, it is clear that the helicopter was near the murder scene. Thus, the jury would not have had any reason to speculate on anything other than the obvious conclusion; Appellant committed a murder in the early morning hours and law enforcement officials were out looking for the perpetrator. The evidence of Appellant hiding and fleeing to St. Petersburg was arguably relevant given his subsequent arrest in St. Petersburg while seated behind the driver's seat of the Camry.

Likewise, the evidence of Appellant's motivation for confessing to a newspaper reporter was relevant and not unduly prejudicial. Appellant's statements that he was tired of living and tired of being persecuted were apparently part of his motivation in calling a newspaper reporter and confessing his crimes. Even if this Court finds that the statements were not relevant, any error in admitting Appellant's statements were harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The evidence of Appellant's guilt in the instant case was overwhelming. Appellant argues that the evidence about his feelings undoubtedly contributed to the jury's alienation of him as a human being and led the jury to sentence him to death. Contrary to Appellant's assertions, the jury's guilty verdict and unanimous recommendation of the death sentence was based on the facts of this case and the consideration of all the evidence presented in the penalty phase. The jury was fully aware of Appellant's violent crime spree, committed shortly after being released from prison for a violent assault. Appellant committed a cold-blooded, execution style killing of a pizza delivery man, committed a violent assault on an elderly victim with a hammer, and then, true to his previous form, committed another execution style killing of the victim in the instant case. When the jury

weighed the significant aggravation in this case against the slight non-statutory mitigation presented, the vote was unanimous that Appellant deserved the death penalty. The jury's guilty verdict and death recommendation were in no way influenced by Appellant's statement to the newspaper reporter that he was tired of living.

ISSUE III

THE TRIAL COURT'S RULING ON APPELLANT'S HEARSAY OBJECTION DID NOT RESULT IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES.

Appellant asserts that the trial court erred in overruling his hearsay objections when Edward Ellis and Leesburg Police Department Officer Joseph Iozzi testified to statements made by the victim immediately after he was shot. Appellant argues the trial court's ruling resulted in a violation of his Sixth Amendment right to confront witnesses against him. The State submits that Appellant has failed to preserve the instant issue for appellate review, and even if preserved, the issue is without merit.

Appellant objected at trial on hearsay grounds (V8: T.501; 512), but did not apprize the lower court of his current argument that the testimony violated his constitutional right to confront witnesses. Accordingly, the State submits that Appellant has failed to preserve the instant issue for appellate review. As noted in Issue I, supra, the law is well settled that in order for an issue to be preserved for appellate review, the issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). In

Mencos v. State, 30 Fla. L. Weekly D1738 (Fla. 4th DCA July 20, 2005), the Court specifically held that defense counsel's hearsay objection did not preserve an argument on appeal that the hearsay violated his right to confrontation. Despite the fact that a hearsay objection is "closely related" to the right of confrontation, the court found that "closely related" was not the proper standard. An objection on the right to confront "serves to focus the trial court's attention on the salient inquiry required by [the Crawford] decision, i.e., whether the evidence is 'testimonial,' whether the witness is 'unavailable,' and whether there was a prior opportunity for cross-examination." Mencos, 30 Fla. L. Weekly at 1738. Because Appellant did not properly preserve the instant issue, this Court should deny his claim.

Even if this Court addresses Appellant's unpreserved issue, Appellant is not entitled to relief because he forfeited any possible confrontation rights. It was Appellant's act of murdering the victim, Jerry Lawley, that caused him to be unavailable to testify. The "forfeiture by wrongdoing doctrine" is an equitable exception to both the rule against hearsay and the Confrontation Clause. See Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1031 (1998) ("If the accused's own wrongful conduct is

responsible for his inability to confront the witness, then he should be deemed to have forfeited the confrontation right with respect to her statements.”). The forfeiture by wrongdoing doctrine creates a hearsay exception when the party, who is objecting to the hearsay, caused the declarant to be unavailable. The United States Supreme Court has long endorsed the forfeiture by wrongdoing doctrine and reaffirmed that position in Crawford. Reynolds v. United States, 98 U.S. 145 (1878) (recognizing that Sixth Amendment Confrontation Clause rights could be waived by a party’s misconduct in a bigamy case where the defendant prevented the marshal from serving the subpoena on his second wife by falsely representing that the second wife was not present); Crawford v. Washington, 541 U.S. 36, 62 (2004) (stating that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds”). Appellant may not kill the declarant and then assert that the State violated his confrontation rights by not producing the declarant at trial. Thus, any possible confrontation violation was forfeited by Appellant’s act of murdering Jerry Lawley.

Additionally, as noted in the discussion of Crawford in Issue I, supra, the Court’s decision only applies to “testimonial” statements that are introduced against a criminal

defendant. The State submits that Jerry Lawley's statements to Edward Ellis were not testimonial. In this case, Appellant objected to Edward Ellis' testimony describing statements made by Jerry Lawley immediately after he had been shot. The trial court overruled Appellant's hearsay objection.[16] Mr. Ellis testified that, while he was sleeping in his truck at the Elberta Box and Crate Factory, he was awakened by his friend, Jerry Lawley, who was pounding on his truck and yelling that he had been shot. (V8: T.500-01). The victim told Mr. Ellis that he was in a great deal of pain and Mr. Ellis could tell that he was having difficulty breathing. (V8: T.501-04). Mr. Ellis asked Lawley who had shot him, and Mr. Lawley stated that he had never seen the person before, "he was just a tall black guy with a hat on his head" that attempted to rob him. (V8: T.504-06). Mr. Lawley stated the person was driving a new blue car similar to the victim's car. (V8: T.504-05).

Immediately after Mr. Ellis testified for the State, the State presented the testimony of the responding officer, Leesburg Police Department Officer Joseph Iozzi. Officer Iozzi testified that he received a call for a shooting and arrived at the scene and observed the victim leaning on his car in a great

[16] A trial court's ruling on the admissibility of evidence is governed by the abuse of discretion standard of review. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000).

deal of pain. (V8: T.511). Officer Iozzi approached the victim and asked him what had occurred and the victim stated that he had been shot. Mr. Lawley proceeded to inform the officer that a black male had ordered him out of his car at gunpoint. Mr. Lawley was complying with the gunman's request to get on the ground, when he was shot in the back. (V8: T.513-14). The black male then rummaged through Mr. Lawley's car and eventually left in another vehicle. Mr. Lawley described the individual as a thin, tall black male wearing a knit cap, and driving a new model, four-door blue car, possibly a Pontiac. (V8: T.513-15).

The trial court overruled Appellant's hearsay objection to both Mr. Ellis' testimony and Officer Iozzi's testimony based on Florida Statutes, section 90.03(1), (2), and (3). (V8: T.512). Appellant argues on appeal that the court's ruling violated Crawford because the three exceptions cited by the trial judge are no longer viable after the Crawford decision. As previously noted, Appellant did not preserve this issue and has also forfeited any confrontation rights by causing the victim to be unavailable for trial. Furthermore, Crawford does not prohibit the introduction of the victim's statements to Edward Ellis and Officer Iozzi.

Jerry Lawley's statements to Edward Ellis were clearly excited utterances, admissible under Florida Statutes, section

90.803(2).[17] On appeal, Appellant does not challenge the finding that the statements were excited utterances, but rather, argues that the admission of excited utterances violates his Sixth Amendment right to confront the witnesses against him.

In Lopez v. State, 888 So. 2d 693 (Fla. 1st DCA 2004), the court conducted a similar inquiry and began by examining whether the out-of-court statements made by the victim of a kidnapping to the responding police officer were excited utterances, and if so, whether the admission of such evidence violated the defendant's confrontation rights. The court found that Florida law permits the admission of excited utterances as an exception to the hearsay prohibition provided: (1) there was an event startling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event. Id. at 696-97. The Lopez court found that the victim's statements to the officer made six to eight minutes after being kidnapped at gunpoint met these conditions. Likewise, Jerry Lawley's statements to Edward Ellis immediately after being robbed and shot qualify as an excited utterance.

[17] Arguably, the statements could also satisfy the "spontaneity" component of section 90.803(1), but the State agrees with Appellant that the majority of the victim's statements were not admissible under 90.803(3), then-existing physical condition.

When analyzing the defendant's confrontation rights under Crawford, the Lopez court found the victim's statements were "testimonial." Lopez, 888 So. 2d at 697-701. In finding that that the victim's statements to a police officer were "testimonial," the court distinguished these types of comments from cases involving non-government officials:

> A spontaneous exclamation to a friend or family member is not likely to be regarded as testimonial. See, e.g., People v. Vigil, 104 P.3d 258, 2004 Colo. App. LEXIS 1024, 2004 WL 1352647 (Colo. Ct. App. 2004) (holding that an excited utterance a child made to his father immediately after a sexual assault was not testimonial); Demons v. State, 277 Ga. 724, 595 S.E.2d 76 (Ga. 2004) (holding that an excited utterance made to a friend was not testimonial); State v. Manuel, 275 Wis. 2d 146, 2004 WI App 111, 685 N.W.2d 525 (Wis. Ct. App. 2004) (holding that a statement the declarant made to his girlfriend was not testimonial). These statements were not made to a person in authority for the purpose of accusing someone, or in the words of the Supreme Court, to "bear testimony" against someone. In contrast, a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made.

Lopez, 888 So. 2d at 699-700. Clearly, the Lopez court correctly found that excited utterances made to friends are not testimonial. Crawford, 541 U.S. at 51 ("An accuser who makes a *formal* statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance

does not."). Clearly, Jerry Lawley's statements to his friend immediately after being shot were not made with an expectation of use at a later trial. See discussion of Crawford's three types of statements that are properly regarded as testimonial, supra at 24. As such, these statements do not violate Appellant's confrontation rights.

Admittedly, the issue of whether Jerry Lawley's statements to Officer Iozzi constitute testimonial statements presents a murkier picture. As noted, the First District Court of Appeal in Lopez would find that such statements are testimonial. See also Howard v. State, 902 So. 2d 878 (Fla. 1st DCA 2005) (finding that victim's statements to police officer were excited utterances but met the definition of testimonial hearsay under the third example set forth in Crawford); Manuel v. State, 30 Fla. L. Weekly D1248 (Fla. 1st DCA May 16, 2005) (victim's statement to police officer in response to direct questioning was testimonial). However, numerous other jurisdictions have found to the contrary. See Hammon v. State, 829 N.E.2d 444 (Ind. 2005) (holding that statements to investigating officers in response to general initial inquiries are nontestimonial but statements made for purposes of preserving the accounts of potential witnesses are testimonial; "testimonial statements are those where a principal motive of either the person making the

statement or the person or organization receiving it is to preserve it for future use in legal proceedings"); State v. Davis, 111 P.3d 844 (Wash. 2005) (finding that emergency 911 calls should be assessed on a case-by-case basis and the call must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness); State v. Wright, 701 N.W.2d 802 (Minn. 2005) (adopting case-by-case approach to determining whether victim's statement to police officer during initial investigation violates Crawford).

Despite the approach this Court takes in dealing with this issue, the record supports the conclusion that Jerry Lawley's statements in response to Officer Iozzi's questions were not testimonial. Jerry Lawley's excited utterances at the scene of the crime to the responding officer were not made in contemplation of its use in a future trial. Even if this Court were to find that the statements made to Officer Iozzi were testimonial, any error in admitting the statements was harmless given the other properly admitted evidence. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As noted, the statements made to Edward Ellis were nontestimonial and were very similar in nature to those made to Officer Iozzi. Furthermore, the evidence that Appellant committed the instant offenses was overwhelming. When

apprehended shortly after the murder, Appellant was driving a new, blue four door Toyota Camry with a knit hat in it and containing the firearm used to shoot Jerry Lawley. In addition to the substantial evidence linking Appellant to the murder, the State introduced two of Appellant's confessions to the murder; one to law enforcement officials and another to a newspaper reporter. Given the State's evidence, there is no question that the allegedly improper hearsay evidence was harmless beyond a reasonable doubt.

ISSUE IV

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY REFUSING TO ACCEPT APPELLANT'S OFFER TO STIPULATE TO THE AGGRAVATING FACTOR OF PRIOR VIOLENT FELONY CONVICTIONS.

Prior to the commencement of the penalty phase, Appellant offered to stipulate to the aggravating circumstance relating to his previous violent felony convictions. (V10: T.891-93). The trial judge ruled that the State was allowed to present the details of the prior violent felonies despite Appellant's willingness to stipulate. (V10: T.893). Appellant argues that the trial judge reversibly erred in allowing the State to present this evidence.

Appellee submits that the trial court acted within its discretion in allowing the State to present evidence to establish the existence of the aggravating circumstance of prior violent felony convictions. The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000); Zack v. State, 753 So. 2d 9, 25 (Fla. 2000); Cole v. State, 701 So. 2d 845 (Fla. 1997). This Court has previously held:

> [I]t is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the

> use or threat of violence to the person rather than the bare admission of the conviction. Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.

Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); see also Dufour v. State, 905 So. 2d 42, 62-63 (Fla. 2005).

Appellant's reliance on Old Chief v. United States, 519 U.S. 172 (1997) and this Court's decision in Brown v. State, 719 So. 2d 882 (Fla. 1998) is misplaced. These cases both involved a defendant willing to stipulate to a prior conviction in a prosecution for felon in possession of a firearm. In Old Chief, the Court stated that a federal district court abuses its discretion in refusing a defendant's offer to stipulate to a prior felony conviction, and instead "admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." Old Chief, 519 U.S. at 174. This Court followed the Old Chief analysis in Brown and concluded that "in view of the limited purpose for which evidence of prior convictions in felon-in-possession cases is offered, trial and appellate courts should be relieved of making discrete and subjective value judgments in dealing with what should be a

routine submission of prior felony conviction evidence." Brown, 719 So. 2d at 888.

Appellant argues that this Court should extend the Old Chief rationale to the penalty phase of a capital case. If this Court were to follow Appellant's argument, a defendant would be allowed to simply stipulate to the existence of certain aggravators, thereby eviscerating the State's ability to present its statutorily-authorized penalty case. Florida Statutes, section 921.141 provides that *any* evidence relevant to the nature of the crime and the character of the defendant, including evidence relating to aggravating circumstances, is admissible in a penalty phase. § 921.141(1), Fla. Stat. (2000). The purpose of a penalty phase proceeding, unlike the purpose of a prosecution for felon-in-possession, is to allow the jury to make an informed recommendation on the appropriate sentence. As such, the jury is entitled to hear evidence in its evaluation of the defendant's character. See Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998) (holding that "it is appropriate during penalty proceedings to introduce details of a prior violent felony conviction rather than the bare admission of the conviction in order to assist the jury in evaluating the character of the defendant and the circumstances of the crime"); Elledge v. State, 706 So. 2d 1340, 1344 (Fla. 1997) (stating that trial

court properly refused defendant's offer to stipulate to prior violent felony convictions).

In the factually similar case of Cox v. State, 819 So. 2d 705 (Fla. 2002), the defendant argued that the introduction of testimony from victims of his prior violent felonies was contrary to the holding in Old Chief and resulted in a deprivation of his rights to due process and a fair trial. This Court reiterated that is has never "construed Old Chief to have established a rule of law that those found guilty of first-degree murder may simply stipulate to prior violent felony convictions and thereby prohibit the State from introducing any evidence thereof whatsoever." Cox, 819 So. 2d at 716. In Cox, the State presented testimony from two victims of a convenience store robbery, a couple beaten during a home invasion, and the testimony of Bonnie Primeau who was viciously raped by Cox. This Court, in affirming the trial court's discretionary decision to allow the testimony despite the defendant's offer to stipulate, found that each of the victims tersely related the crimes against them and was able to do so without any emotional display. Id. at 715-16.

In the instant case, the State presented the videotaped testimony of Clarence Martin, the victim of Appellant's robbery attempt in 1993. The State further presented the brief

testimony of Alice Johnson, the victim who Appellant struck in the head with a hammer when he burglarized her home and stole her car. Finally, the State presented testimony from a law enforcement officer summarizing the murder of John Horan, a pizza delivery man. During the law enforcement officer's testimony, the State moved into evidence, over defense counsel's objection, crime scene photographs from the prior offenses; two photographs of John Horan and one photograph of Alice Johnson.[18] (V10: T.917-19; 922-25).

Similar to the situation in Cox, the testimony in the instant case was without emotional display[19] and simply involved a brief recitation of the facts surrounding the prior crimes. Because the evidence was probative and not overly prejudicial,

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[18] The introduction of the crime scene photographs were permissible and did not violate Appellant's constitutional rights as briefly alleged by Appellant in his Initial Brief. See Initial Brief of Appellant at 48; Dufour v. State, 905 So. 2d 42, 73-74 (Fla. 2005) (photographs of prior murder were admissible in penalty phase because they were relevant to defendant's prior felony conviction).

[19] The only emotional display apparently came from Appellant "acting up." Appellate counsel's statement in his brief that "Franklin created a disturbance in the courtroom by pointing out the hopelessness of his situation," is not entirely accurate. Initial Brief of Appellant at 55. The record on appeal indicates that, at a bench conference, the judge questioned defense counsel about his client because it "looks like he's starting to react." (V10: T.934). At the bench conference, defense counsel noted that his client felt his situation was helpless and the court took a recess to allow counsel an opportunity to confer with Appellant. The record does not support a finding that Appellant ever created a "disturbance" in front of the jury.

the trial court properly refused to accept Appellant's offer to stipulate to the aggravators. Even if this Court finds that the trial judge abused its discretion in admitting this testimony, the State submits that the error was harmless. See Hudson v. State, 708 So. 2d 256, 261 (Fla. 1998) (stating that any confrontation error of officer's testimony regarding prior violent felony was harmless because the introduction of the certified copy of the judgment reflecting the defendant's guilty plea established beyond a reasonable doubt the aggravating circumstance of prior conviction for a felony involving the use or threat of violence); Mendoza v. State, 700 So. 2d 670, 678 (Fla. 1997) ("We have found that erroneously admitted evidence concerning a defendant's character in a penalty phase is subject to a harmless error review under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)."); Henry v. State, 649 So. 2d 1366, 1368-69 (Fla. 1994) (finding harmless error when court erroneously admitted testimony concerning an autopsy report of prior murder to establish the aggravating factor of prior violent felony because there was no reasonable possibility that the outcome would have been different in the absence of this error).

ISSUE V

THE TRIAL JUDGE ACTED WITHIN ITS DISCRETION IN ALLOWING THE STATE TO PRESENT VICTIM IMPACT EVIDENCE.

Prior to trial, Appellant filed numerous motions seeking to prohibit or limit victim impact evidence. (V3: R.549-88). After hearing arguments on the motions, the trial court denied Appellant relief. (V6: R.83-87). During the penalty phase, prior to the introduction of any victim impact evidence, defense counsel renewed his objection to the introduction of such evidence. (V10: T.969-71; 980-81). The trial court denied Appellant's objection and the State presented testimony from the victim's sister, Linda Paulette, a co-worker and friend, Edward Ellis, and the victim's sister-in-law, Kay Lawley. (V10: T.971-86). Appellant now argues on appeal that the trial court abused its discretion by allowing the introduction of victim impact evidence and Appellant further urges this Court to recede from its decision in Windom v. State, 656 So. 2d 432 (Fla. 1995).

In Windom, this Court noted that both the Florida Constitution in Article I, Section 16, and the Florida Legislature in section 921.141(7), instruct that victim impact evidence is to be heard in considering capital felony sentences. Id. at 438; see also Payne v. Tennessee, 501 U.S. 808 (1991) (holding that evidence and argument relating to the victim and the impact of the victim's death on the victim's family were

admissible at a capital sentencing hearing). This Court stated that the procedure for addressing victim impact evidence, as set forth in section 921.141, does not impermissibly affect the weighing of the aggravators and mitigators or interfere with the constitutional rights of the defendant. Windom, 656 So. 2d at 438.

Appellant argues that the trial court abused its discretion in allowing the State to present evidence from the three witnesses regarding the loss of Jerry Lawley. The law is well settled that a trial court's decision on the admissibility of evidence is subject to the abuse of discretion standard of review. Blanco v. State, 452 So. 2d 520, 523 (Fla. 1984). In the instant case, the trial court acted within its discretion in allowing the three witnesses to briefly testify regarding Jerry Lawley's uniqueness as a human being and the resultant loss his murder had on community members. See Huggins v. State, 889 So. 2d 743, 765 (Fla. 2004) (upholding the trial court's admission of victim impact evidence presented during the penalty phase from three witnesses -- the victim's husband, mother, and best friend -- regarding their relationship with the victim and the loss they suffered due to her murder). The evidence presented in this case was limited to the type of evidence specified in section 921.141(7), Florida Statutes.

Even if this Court were to find any error in the admission of the victim impact evidence, given the strong case in aggravation and the relatively weak case for mitigation, the error is harmless beyond a reasonable doubt. Alston v. State, 723 So. 2d 148, 160 (Fla. 1998). The aggravating factors in this case included: (1) that Appellant committed the instant murder while under the sentence of imprisonment; (2) Appellant has been previously convicted of another capital felony and numerous felonies involving the use of violence; (3) the crime was committed for pecuniary gain; and (4) the murder was committed in a cold, calculated and premeditated manner. The court did not find any statutory mitigation, but found a number of nonstatutory mitigating factors. (V4: R.759-71). Thus, because Appellant has failed to show an abuse of the trial court's discretion in admitting the victim impact evidence, this Court should affirm the trial court's discretionary ruling.

ISSUE VI

THE TRIAL JUDGE PROPERLY FOUND THAT THE MURDER OF JERRY LAWLEY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellant asserts that the trial court erred in finding that the murder was committed in a cold, calculated and premeditated murder without any pretense of moral or legal justification (CCP). The State submits that the trial judge properly found the CCP aggravator given the facts of the instant case.

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

> Quawn Franklin obtained the .357 magnum revolver used in this crime from a residence in St. Petersburg. He selected a vulnerable victim open to attack. Mr. Lawley was a 61 year old unarmed stroke victim who was alone in an isolated location. Quawn Franklin learned of the victim's vulnerability while he engaged Mr. Lawley in a conversation, during his first visit to the scene that night. As he was leaving the scene the first time, Quawn Franklin announced that he intended to return to "get" the victim. He later admitted that he wore gloves during this crime to avoid leaving prints. During both incidents, the victim had ample opportunity to see Mr. Franklin's face and the car he was driving and interestingly, Quawn Franklin didn't bother to cover his face, or to park the stolen car out of sight.
>
> The testimony of the medical examiner indicated that both of Mr. Lawley's knees were scraped indicating he was on his knees or nearly so when he was shot. Mr. Lawley told the truck driver, Mr. Ellis, and the first officer on the scene, Joe Iozzi,

that he was ordered from the car, told to get on the ground, and as he was doing so and [sic] he was shot. Then the tall thin black male rummaged through his car and left.

The bloodstain on the ground at the scene is consistent with the victim lying face down over that spot long enough for the blood to seep through Mr. Lawley's sweatshirt and accumulate on the pavement. Pam McCoy recalls that while the deceased was in his car, Quawn Franklin said "This is gonna hurt, but only for a minute." With that, Quawn Franklin exited Ms. Alice Johnson's stolen blue Camry, pointed the revolver at Mr. Lawley, ordered him out of his car and onto his knees. While in that defenseless position, Mr. Lawley pleaded, "Please don't shoot me. Please don't kill me." and Quawn Franklin coldly shot him in the back anyway, he says "Because I wanted to."

This aggravator has been defined as a killing that "was the product of cool and calm reflection, not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the defendant had no pretense of moral or legal justification." Jackson v. State, 648 So. 2d 85 at 89 (Fla. 1994), Evans v. State, 800 So. 2d 182 at 192 (Fla. 2001).

Premeditation can be established by examining the circumstances of the killing and the conduct of the accused. Florida Standard Jury Instructions in Criminal Cases, Instruction 7.2. Quawn Franklin anticipated he might leave prints at the scene, so he wore gloves. He didn't bother to prevent the victim from seeing him, or hearing him, or seeing his car, because clearly Quawn Franklin never intended for Mr. Law1ey to survive. This is confirmed by the matter-of-course manner of Mr. Lawley's shooting, as he was doing exactly what Quawn Franklin told him to do.

The coldness of this crime is borne out by the image of Mr. Lawley, completely at Quawn Franklin's mercy, kneeling before him, begging for his life. What this Court finds most remarkable was there was no fit of rage, no emotional frenzy, no panic involved in this decision of Quawn Franklin's, any more than in his decision to put on the gloves. Each event was a

> solution to a problem; the problem of fingerprints was solved by putting on gloves; the problem of possibly being identified would be solved by shooting the defenseless Mr. Lawley in the back and killing him.
>
> No pretense of moral or legal justification for the murder has even been suggested by this defendant, much less proven and one must remember the defendant said that he shot him "Because I wanted to."
>
> The CCP aggravator has been upheld in cases with facts similar to, but certainly less cold, than these. Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) (defendant armed herself in advance, lured victim to an isolated location, shot him to steal his valuables.); Thompson v. State, 648 So. 2d 692 (Fla. 1994) (killer armed himself before meeting the victims, took them to an isolated spot, made them get on the ground, shot female victim without any struggle); ("The cold, calculated and premeditated murder . . . can also be indicated by such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a murder carried out as a matter of course."); Huff v. State, 495 So. 2d 145 (Fla. 1986) (Killer armed himself ahead of time, selected a secluded location to commit the murders); Wickham v. State, 593 So. 2d 191 (Fla. 1991) (Victim picked at random in an isolated location, shot while on ground begging for his life during a robbery attempt);
>
> The Court gives this circumstance very great weight.

(V4: R.762-65).

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997) (footnote omitted), 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."

In order to prove that a murder was committed in a cold, calculated and premeditated manner, the State must show that the murder was (1) the product of a careful plan or prearranged design; (2) the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (3) the result of heightened premeditation; and (4) committed with no pretense of moral or legal justification. Rodriguez v. State, 753 So. 2d 29 (Fla. 2000). Appellant argues that the court erred in finding this aggravating circumstance because the murder was not planned and was not the result of heightened premeditation. The State submits that the evidence in the record clearly supports the trial court's finding that the murder was committed in a cold, calculated and premeditated manner.

Appellant accuses the trial court of taking "extraordinary literary license" in finding that Appellant's statement that he was going to return and "get" the security guard evidenced a plan to commit murder. Initial Brief of Appellant at 64. To

the contrary, Appellant's actions clearly indicate that he planned to kill Jerry Lawley. After securing a .357 revolver from a residence in St. Petersburg, Appellant and his three passengers drove up to the victim in an isolated location and engaged him in conversation. When Appellant left the scene and dropped off two of his passengers, he informed them that he was going to go back and "get" the victim. When Appellant returned to the area, he donned a pair of gloves to ensure that he left no fingerprints behind. Appellant returned to the Elberta Box and Crate Factory in the stolen Toyota Camry and although he wore a skull cap and bandana, Appellant made no attempt to hide his face. Appellant again approached the victim and told him, "this is going to hurt, but only for a minute." Appellant then forced the victim from his car at gunpoint and ordered him to his knees. As the victim was knelling on the ground and begging for his life, Appellant shot him in the back because he "wanted" to.

Obviously, any "extraordinary literary license" involved in this case is not contained in the trial court's sentencing order, but rather in Appellant's brief submitted to this Court. Appellant's assertion that Appellant simply wanted to rob the victim and the shooting was an impulsive act is unsupported by

the facts of this case.[20] Appellant secured a firearm, scouted the scene by conversing with the victim, informed his cohorts of his plan to "get" the victim, and donned a pair of gloves before the murder. Any doubt that this was a planned murder showing heightened premeditation vanishes when considering these facts and Appellant's own statement to the victim that it was only going to hurt for a minute.

This Court has previously stated that a cold, calculated, premeditated murder can be indicated by circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. Bell v. State, 699 So. 2d 674, 677 (Fla. 1997). All of these factors are present in the instant case. Appellant secured the .357 handgun prior to the murder. There was absolutely no resistance on the part of Jerry Lawley, and the killing was carried out as a matter of course. In addition to procuring a weapon prior to the murder, Appellant verbally expressed his intent to both Pamela McCoy and the victim. Although the semantics of his statements do not conclusively establish Appellant's intent to kill Mr. Lawley, the surrounding circumstances support the finding of CCP.

[20] Appellant's argument that the shooting was "impulsive," is further weakened when considering Appellant's prior crimes, including the factually similar murder of John Horan.

Appellant's actions and statements establish that the murder was committed in a cold, calculated, and premeditated murder without any pretense of moral or legal justification. See McCray v. State, 416 So. 2d 804 (Fla. 1982) (applying the CCP aggravator to those murders which are characterized as execution-style murders); Thompson v. State, 648 So. 2d 692 (Fla. 1994) (upholding CCP aggravator where defendant armed himself before meeting the victims, took them to an isolated spot, forced them to the ground, and shot one of the victims without any struggle). Accordingly, this Court should find that competent, substantial evidence supports the trial judge's finding of CCP and affirm the court's sentence.

Even if this Court were to strike the CCP aggravator, any error would be harmless. See Diaz v. State, 860 So. 2d 960 (Fla. 2003) (striking HAC aggravator, but affirming death sentence based on two other aggravating factors and five mitigating factors); Hill v. State, 643 So. 2d 1071 (Fla. 1994) ("When this court strikes one or more aggravating circumstances relied upon by a trial judge in sentencing a defendant to death, we may conduct a harmless error analysis based on what the sentencer actually found in determining whether the sentence of death is still appropriate."). In this case, even if this Court were to strike the CCP aggravator, the other three remaining

significant aggravators would outweigh the slight mitigation presented in this case. Appellant was under a sentence of imprisonment at the time of the murder, he committed the murder for pecuniary gain, and he had previously been convicted of numerous other violent felony offenses, including another first-degree murder conviction for a similar killing. Thus, any error in finding CCP is harmless.

ISSUE VII

THE TRIAL JUDGE PROPERLY FOUND THAT THE MURDER OF JERRY LAWLEY WAS COMMITTED FOR PECUNIARY GAIN.

Appellant argues that the trial court erred in finding that the murder was committed for pecuniary gain and contends that the taking of money or property was not the motive for the murder. Contrary to Appellant's assertion, the State submits that the trial court properly found this aggravator based on the evidence presented by the State.

In finding this aggravating circumstance, the trial judge stated:

> On the night of the murder, the defendant admitted that: 1) he had no money; 2) was driving a car stolen from Ms. Alice Johnson; 3) was running low on gas; 4) admitted he went through Mr. Lawley's pockets; 5) admitted he went through Mr. Lawley's car; [and] 6) admitted to trying to steal Mr. Lawley's car. See Jones v. State, 612 So. 2d 1370 (Fla. 1996). The jury found by a vote of 12 to 0 that the State proved this aggravating circumstance beyond a reasonable doubt and the Court gives this factor moderate weight.

(V4: R.762). As previously noted, this Court does not reweigh the evidence to determine whether the State proved the aggravating circumstance beyond a reasonable doubt, but rather, reviews the entire 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. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). In

this case, the trial court properly applied the correct rule of law and substantial, competent evidence supports the lower court's finding that the murder was committed for pecuniary gain.

This Court has stated that the pecuniary gain aggravator is applicable in cases where the killing is motivated, at least in part, by a desire to obtain money, property or other financial gain. Jones v. State, 690 So. 2d 568, 570 (Fla. 1996). In this case, the evidence established that Appellant intended to rob and murder Jerry Lawley. Appellant was forced to borrow $10 from a relative in St. Petersburg in order to put gas in the stolen Camry so he could drive Antwanna Butler, her cousin, and Pamela McCoy back to Leesburg. Appellant did not have any money, and once in Leesburg, he had only approximately a quarter of a tank of gas remaining in the stolen Camry. (V9: T.652). By his own admission, Appellant wanted to rob someone. (V8: T.579). After briefly conversing with the victim, Appellant drove to a nearby apartment complex and dropped off the Butler cousins. Appellant was determined to return to St. Petersburg. He told Antwanna Butler that he was going to return to the Elberta Box and Crate Factory and "get" the security guard. (V9: T.657).

As the trial judge properly found, Appellant had no money and was running low on gas in the stolen car. While armed and wearing gloves, Appellant approached Jerry Lawley and told him to get on the ground. While the victim was lowering himself to the ground and begging for his life, Appellant shot him once in the back. By his own admission, Appellant went through the victim's pockets and rummaged through his car. Appellant told a reporter that his intent was to steal the victim's car so he could switch stolen cars, but he was unable to get the victim's car moving. (V9: T.681-88). Appellant also mentioned splitting any money that he might get as a result of the robbery.[21] (V8: T.585).

Clearly, the evidence in this case supports the conclusion that the murder was motivated, at least in part, by the desire to obtain money or property belonging to Jerry Lawley. Appellant, by his own admission, had a desire to rob the victim

[21] As previously noted in footnote 8, supra at 6, Appellant's two statements were contradictory on some levels. Appellant told Detective Gary Gibson that he was accompanied by McCoy and the Butler cousins during the murder and Appellant mentioned splitting any money four ways. Appellant also denied that he wanted to steal Jerry Lawley's car. (V8: T.585-86). However, when speaking with a news reporter, Appellant stated that it was just him and McCoy that returned to the scene to commit the offense. Appellant also stated that he planned to steal the victim's car. (V9: T.681-88).

The victim told Leesburg Police Department Officer Joseph Iozzi that, after being shot, Appellant rummaged through his car and then drove off in another car. (V8: T.513-14).

of his money and his vehicle. This Court has previously held that killing for the purpose of obtaining a car constitutes commission of a murder for pecuniary gain. See Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992) (stating that the pecuniary gain aggravator was properly found where the murder was committed to steal the victim's truck); Medina v. State, 466 So. 2d 1046, 1050 (Fla. 1985) (holding that pecuniary gain aggravator was properly found where the murder was committed in order to obtain the victim's car).

Appellant argues that the evidence does not support the pecuniary gain aggravator because the murder was simply an afterthought to the attempted robbery. Appellant claims that the robbery attempt was over when the victim was shot. Contrary to Appellant's assertion, the attempted robbery[22] was an ongoing episode that took place before, during, and after the victim was shot. Appellant pulled a gun on the victim and forced him to the ground. While lowering himself to his knees, Appellant shot the victim in the back. The victim remained on the ground bleeding while Appellant searched his pockets and automobile. Obviously, if the victim had attempted to thwart the attempted robbery, Appellant would have fired additional shots.

[22] The jury convicted Appellant of attempted armed robbery based on the evidence that he attempted to steal property from the victim. The victim did not have any money and Appellant was unable to steal his car.

Furthermore, the evidence established that Appellant intended to rob and kill the victim from the outset. Appellant made no attempts to hide his face, despite wearing a stocking cap and bandana, because he did not plan to leave any witnesses. In addition to examining the circumstances of the crime, Appellant's own statements to law enforcement officers and to the newspaper reporter demonstrate his intent to both rob and kill the victim.

Appellant's argument that the murder was simply an afterthought to the robbery is without merit. In Beasley v. State, 774 So. 2d 649, 662 (Fla. 2000), this Court stated that when a defendant raises an "afterthought" argument,

> [T]he defendant's theory is carefully analyzed in light of the entire circumstances of the incident. If there is competent, substantial evidence to uphold the robbery conviction, and no other motive for the murder appears from the record, the robbery conviction will be upheld. Conversely, in those cases where the record discloses that, in committing the murder, the defendant was apparently motivated by some reason other than a desire to obtain the stolen valuable, a conviction for robbery (or the robbery aggravator) will not be upheld.

In this case, a review of the totality of the evidence indicates that the motive for the murder was a desire to obtain Jerry Lawley's money and his automobile. Appellant's argument that the murder was simply an afterthought is contradicted by the evidence in this case. Accordingly, this Court should affirm

the trial court's finding that the murder was committed for pecuniary gain. See Bowles v. State, 804 So. 2d 1173 (Fla. 2001) (holding that when there is no other apparent motive for the murder other than as part of the taking of a victim's property, the pecuniary gain aggravator is applicable); Shellito v. State, 701 So. 2d 837 (Fla. 1997) (upholding pecuniary gain aggravator when defendant stopped the victim at gunpoint and demanded money, shot victim, and searched his pockets but obtained no money).

Even if this Court were to hold that the trial court erred in finding the pecuniary gain aggravating factor, any error would be harmless given the other significant aggravating factors present in this case. The remaining aggravating factors greatly outweigh the slight mitigation presented in this case. The fact that Appellant committed the instant murder in a cold, calculated, and premeditated manner, while under the sentence of imprisonment, coupled with his significant history of violent felony convictions, including another first-degree murder conviction, clearly outweighs the nonstatutory mitigation presented in this case. The mitigation found in the case involved: (1) factors surrounding his upbringing; (2) his confinement in adult prison at the age of fifteen; (3) the fact that he was stabbed by the victim of one of his robbery

attempts; (4) his cooperation with law enforcement and taking responsibility for his crimes; (5) his offer to plead guilty in exchange for a life sentence; (6) he confessed to other crimes committed just prior to this offense and apologized to all of the victims' families and showed what might be considered as remorse; (7) he entered pleas to the other cases; (8) Appellant did not have any person voluntarily appear on his behalf at the penalty phase; and (9) his codefendant, Pamela McCoy, received a 35 year prison sentence for her role in the instant murder. Based on the insubstantial mitigation and the significant aggravating factors, including CCP, one of the most serious aggravators set out in the statutory sentencing scheme, Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999), this Court can find that any error in finding pecuniary gain is harmless. See Hill v. State, 643 So. 2d 1071, 1073 (Fla. 1994).

Furthermore, although not argued by appellate counsel, the State submits that Appellant's death sentence is proportionate. This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to

determine if the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the aggravating and mitigating evidence established in the instant case demonstrates the proportionality of the death sentence imposed. As previously discussed, the four substantial aggravating factors in this case greatly outweigh the slight mitigation found by the trial court. A review of other death penalty cases establishes that Appellant's death sentence is proportionate. See Shellito v. State, 701 So. 2d 837 (Fla. 1997) (where defendant had a substantial record of prior violent crimes and committed three robberies in the days before the murder, and mitigation is slight, death is not disproportionate for a robbery/murder); Mendoza v. State, 700 So. 2d 670 (Fla. 1997) (when 25 year old defendant kills a robbery victim with a single gunshot, and defendant had a prior robbery conviction, death is proportionate); Pope v. State, 679 So. 2d 710 (Fla. 1996) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed two statutory mitigating circumstances of commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct and several nonstatutory

mitigating circumstances); Melton v. State, 638 So. 2d 927 (Fla. 1994) (holding death penalty proportionate where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed some nonstatutory mitigation); Heath v. State, 648 So. 2d 660 (Fla. 1994) (affirming defendant's death sentence based on presence of two aggravating factors of prior violent felony and murder committed during course of robbery, despite the existence of the statutory mitigator of extreme mental or emotional disturbance). Accordingly, this Court should affirm Appellant’s death sentence.

ISSUE VIII

APPELLANT'S CONSTITUTIONAL CHALLENGE TO FLORIDA'S DEATH PENALTY STATUTE IS WITHOUT MERIT.

In his last issue on direct appeal, Appellant challenges the trial court's denial of his motion to declare Florida's death penalty statute facially unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). As this is a purely legal issue, appellate review is de novo. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

Appellant acknowledges that this Court has repeatedly rejected his claim that Ring invalidated Florida's capital sentencing procedures, but Appellant raises the issue in order to avoid any procedural bars. As Appellant's argument has been consistently rejected, there is no error presented in the trial court's denial of his motion to declare Florida's capital sentencing statute to be unconstitutional. See Marshall v. Crosby, 30 Fla. L. Weekly S399 (Fla. May 26, 2005) (noting that this Court has rejected Ring in over fifty cases); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

Even if some deficiency in the statute could be discerned, Appellant has no legitimate claim of any Sixth Amendment error on the facts of this case. In this case, the trial court granted Appellant's motion for findings of fact by the jury which resulted in the special jury advisory verdict form utilized in this case. (V4: R.597-99, 701-02; V6: T.89-91). In this case, the jury unanimously found the existence of each of the four aggravating circumstances which were subsequently found applicable by the trial judge. Thus, Appellant cannot complain of a Sixth Amendment violation given the fact that the jury unanimously found each of the aggravating factors. See Ring, 536 U.S. at 612 ("What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.") (Scalia, J., concurring).

Finally, Appellant's Ring claim is without merit in the instant case given his prior felony convictions. Since the defect alleged to invalidate the statute - lack of jury findings as to an aggravating circumstance - is not even implicated in this case due to the existence of the prior felony convictions, Appellant has no standing to challenge any potential error in the application of the statute. See Marshall v. Crosby, 30 Fla. L. Weekly S399 (Fla. May 26, 2005) (citing the numerous cases wherein this Court rejected Ring arguments when the defendant

had a prior felony conviction); Winkles v. State, 894 So. 2d 842 (Fla. 2005) (rejecting Ring claim when defendant has prior felony conviction and rejecting argument that aggravating factors must be charged in the indictment). Accordingly, this Court should deny Appellant's Ring claim.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Christopher S. Quarles, Assistant Public Defender, Public Defender's Office, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this _____ day of September, 2005.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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