IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2111

ALWIN C. TUMBLIN
Appellant,

v.

STATE OF FLORIDA
Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA (CRIMINAL DIVISION)

****

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FLORIDA STATUTES

MISCELLANEOUS

PRELIMINARY STATEMENT

Appellant, Alwin Tumblin, was the defendant at trial and will be referred to as the "Defendant" or "Tumblin". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the record on appeal will be by the symbol "R:", to the transcripts will be by the symbol "T:", to any supplemental record or transcripts will be by the symbols "SR:" preceding the type of record supplemented, to the evidence will be by the symbol "E:", and to Tumblin's initial brief will be by the symbol "IB", followed by the appropriate page number(s).

STATEMENT OF FACTS

Tumblin was indicted for first degree murder, robbery with a firearm, and possession of a firearm by a convicted felon on August 9, 2004 for a crime which occurred on May 24, 2004.[1] [R: 1-3]The trial began on June 16, 2007. The jury returned a verdict on June 18, 2007, finding him guilty of both charges; by special verdict form, they specifically found him guilty of both premeditated murder and felony murder. [R:2254-55]The penalty phase began on June 25, 2007. The jury recommended death by a vote of twelve to zero on June 26, 2007. [R:2324] The

[1]The third offense was severed and eventually dismissed.

trial court held a "Spencer"[2] hearing on August 17, 2007 and a sentencing hearing on September 25, 2007. The trial court sentenced him to death. [R:3996-4001] The court found three aggravators and afforded each great weight: (1) prior violent felony (1997 shooting deadly missile; 1997 battery on detention officer; 1998 attempted robbery; 1999 aggravated assault; 1999 battery on law enforcement officer); (2) felony murder/pecuniary gain (robbery); and (3) cold, calculated, and premeditated ("CCP"). [R:4016-31] No statutory mitigation was presented. Of the non-statutory mitigation offered, the trial court found: (1) Tumblin had a poor family life and upbringing (some weight); (2) Tumblin suffered from a poor mental state (below average intelligence; behavioral disorders; adolescent brain injury; and suicidal behavior in past) (little weight); (3) Tumblin loved his family and is loved in return (little weight); (4) Tumblin was well behaved in court (very little weight). [R:4031-47] He filed a notice of appeal.

On May 24, 2004 Tumblin spent the night with his girlfriend Theresa York ("York") at his sister Rhonda Tumblin's ("Rhonda") house in her bedroom. [T:4494] Rhonda's friend Anthony Mayes ("Mayes") and her neighbor Jean Nicole Smith ("Nikki") visited her that morning. [T:4467] A few days before Mayes had heard Tumblin instruct York to bring his piece and some clothes. [T:4176] Tumblin also began asking Mayes to assist him in a robbery. That morning, Mayes

[2]Spencer v. State, 133 So.2d 729 (Fla. 1961).

heard Tumblin tell York to call Wal-Mart about some bullets. [T:4657] York made a call and then left with Tumblin in their yellow taxicab looking car. [T:4179-81, 4486-7, 4657]

Upon their return, Tumblin took Mayes aside to talk him into acting as a lookout in exchange for $300. [T:4658] They left the house around noon with Tumblin driving the yellow car. [T:4179-81, 4486-7, 4657] Mayes saw him pull a gun from his waist and put it under the seat when they got in the car. They drove for 20 to 25 minutes before arriving at a garage called Jimmy's Auto Clinic, a place Mayes had never been to before. During the drive Tumblin told Mayes that "he was gonna kill everybody that exists as if whoever is in there." [T:4661, 4715]

Jimmy Johns ("Johns") was the owner and operator of Jimmy's Auto Clinic. [T:3808] On May 24, 2004 his three employees, including his stepdaughter, left for lunch by 12:20 PM. [T:3810-12, 3841-2] He had $400 to $500 in cash on him that day. [T:3807] He kept a wooden duck in the office with additional cash and mail. [T:3817]

Once at the garage, Tumblin parked the car in front and went into the service bay area. Mayes followed. Tumblin met Johns outside the office after Johns got off the telephone and asked about a car part. Tumblin then demanded money and Johns cooperated without resistance, handing him a wad of bills from his pocket. Tumblin took the money. He then pulled the gun from his waist, held it to Johns's

head, and said “what do you think about this?” He then fired at point blank range. [T:4662-5, 4866] A neighbor across the street heard the shot, saw a younger shorter black man run, and then a taller man leave in a taxi like car. She called 911 at 12:50 PM. [T:3894-8, 3911-13, and 4336]

With the shot, Mayes ran and Tumblin walked toward the office. [T:4666-69] A minute or so later, Tumblin exited the garage and left in his yellow car. He drove back to Rhonda’s house, driving up quickly. He came in but left the car running at the side of the house. He told York to park it in the back. [T:4179-81] Tumblin was sweating and acting crazy like there was something wrong. He said “The cracker dead and Head (Mayes) ran.” [T:4171-2, 4182-90] He had some money and envelopes. He dropped something metallic. At Tumblin’s direction, York and Rhonda opened some envelopes and then took them outside in a pan to burn them. [T:4182-90, 4490, 4493-4, 4506] Rhonda left but gave York and Tumblin a ride when she encountered them down the street. Tumblin was acting jittery and scared. [T:4191, 4498] When the three saw all the police activity and the helicopter, Tumblin said “the cracker must be dead.” [T:4501-2] They were arrested when they arrived at a gas station.

Tumblin’s gun was a .32 caliber revolver, which he had had for some time. [T:4627] The police recovered it under some clothes in the room Tumblin had slept in the night before. Remington ammunition was found under a pillow. [T:3992,

4264-70] It matched the caliber and brand of the shell and bullet found at the crime scene. [T:4289] The only way the gun would fire was if the cylinder was actively held in place. [T:4666-69, 4841-4] The shell casing found at the scene and the bullet from Johns's head were fired from that gun. [T:4849-58] The Ft. Pierce Wal-Mart only made one sale of .32 caliber ammunition on the morning of May 24, 2004; some Remington bullets were sold to someone with the same birth date as York. [T:4749-56, 4767] Tumblin's yellow Grand Marquis parked behind his house was identified as the car in front of the garage at the time of the shooting. [T:3903, 3909]

At the penalty phase the State introduced five of Tumblin's judgements of conviction: case no. 96-425 - shooting a deadly missile; case no. 96-438 - battery on detention officer; case 98-2374 - attempted robbery; case no. 98-4234 - aggravated assault and battery on law officer; and case no. 98-4507 - two counts of battery on law officers. [T:5262-78] The State also had witnesses testify to the facts of the attempted robbery and the two counts of battery on a law enforcement officer. In the attempted robbery, Tumblin pulled a gun on a man as he exited his truck. When the man refused to give him his possessions, Tumblin hit him in the face with the gun. Tumblin fired the gun when the man "reared" back. [T:5242-49] In the battery on officers, Tumblin attacked a correctional deputy when he entered the cell and broke the man's rib. [T:5279-81] Tumblin also attacked another two

deputies as they entered his cell although he did not injure them. [T:5282-84]

Johns's stepdaughters read their victim impact statements. [T:5292-95]

Tumblin only presented Dr. Riordan ("Riordan"), a psychiatrist and neuropsychologist. Riordan testified he reviewed Tumblin's school, jail, and DOC records as well as his mental health records. He testified that Tumblin had severe behavior problems by the time he was eight and entered the juvenile justice system when he was nine. He was angry and emotionally disturbed throughout his childhood. While he had continuous mental health care, no practitioner agreed on one diagnosis. He was a poor student throughout his school career which ended at the tenth grade. The schools labeled him emotionally handicapped and learning disabled. He achieved scores of 81 or 82 on his intelligence tests, which is below average by the scaling of the tests themselves but which the DSM-IV puts in the borderline intellectual range. Tumblin attempted suicide in the past. He also suffered a head injury as a result of a car accident when he was 14. Tests indicated that he had suffered brain damage in an area which controls impulse. Riordan diagnosed his with cognitive disorder which impairs his impulse control. [T:5316-99]

Riordan also outlined Tumblin's social and family history. His father was abusive and an alcoholic who left when Tumblin was five. He helped supervise his three younger siblings. The home had a lot of violence in it, including between the

children. Tumblin abused drugs and alcohol as a teenager. He has two daughters with whom he has maintained contact through his years in prison. Tumblin was close with his mother and a sister as well as with his children. [T:5318-32]

The State called Dr. Landrum ("Landrum") in rebuttal. He agreed that Tumblin had a dysfunctional and deprived childhood as well as a head injury from the car accident. Landrum said the injury did not cause Tumblin's antisocial behavior; that had started years before. He saw indications that Tumblin had impulse control disorder, conduct disorder, as well as anti-social personality disorder. [T:5432-66]

The only evidence given at the Spencer hearing were letters written by Johns's family members as well as a statement by Patricia Sanders. [T:5547-69]

SUMMARY OF ARGUMENT

Point I: The trial court properly allowed a prior consistent statement by Mayes into evidence when the defense repeatedly suggested that Mayes was not the author of the statement he gave the lead investigator.

Point II: The trial court properly denied the motion for mistrial since it sustained the defense objection, struck the testimony, and gave a curative instruction and found there was no prejudice to the defendant.

Point III: There was no discovery violation by the State in not disclosing Nikki's injury and use of pain medication. The court, however, held a sufficient Richardson inquiry and made the necessary findings that any violation was inadvertent, the information was trivial, and the defense suffered no prejudice.

Point IV: There was competent, substantial evidence supporting the court's finding that the murder was committed in a cold, calculated, and premeditated manner.

Point V: The trial court properly considered, evaluated, and found the non statutory mental health mitigation. The court did not use a nexus test in weighing and evaluating this evidence. Its findings were supported by the evidence and were not an abuse of discretion.

Point VI: The death penalty is proportional.

Point VII: Tumblin had the right to decide the defense penalty phase evidence presentation. He did not waive all mitigation so the court was not required to hold a hearing on that type of waiver.

Point VIII: The court properly evaluated and used the hearsay evidence at the penalty phase.

Point IX: The trial court properly allowed the victim impact evidence of John's wife strokes since that was an effect of the crime on the family members.

Point X: The trial court properly found and instructed on the prior violent felony aggravator since the crimes presented on this in the penalty phase were violent felonies.

Point XI: The trial court did not err in denying Tumblin's request for a special penalty phase verdict form and instructions for aggravators.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING SMITH TO TESTIFY TO MAYES'S PRIOR CONSISTENT STATEMENT.(restated)

Tumblin first challenges the trial court's decision to allow Lieutenant Smith ("Smith") to testify about the statement Mayes gave him which was consistent with his trial testimony. The statements were admitted to rebut a charge of recent fabrication. He contends, however, that the challenged statements were inadmissible hearsay and that its admission constitutes reversible error. He argues that the defense consistently challenged Mayes's credibility and his motive to lie throughout the trial. He claims that the defense attorney did not suggest that Mayes invented the story based upon what Smith told. The State disputes this. The trial court correctly allowed this testimony and did not abuse its discretion in doing so. This Court should deny this claim.

In his opening statement the defense counsel, Rusty Akins ("Akins"), began by attacking Rhonda's credibility. He essentially said that *all* the witnesses were lying or skewing their stories about Tumblin's actions. [T:3802-4] In addition, he specifically said that Mr. Mayes was "the admitted Co-Defendant in this case, who got his deal." [T:3804] During his cross examination of Mayes, Akins repeatedly hammered Mayes about the plea deal which was dependent on him telling the

truth, saying that the State will determine if he is telling the truth and will do so based on his statement to Hamrick. [T:4674-80] He then focused on Smith's summary given before Mayes gave his taped statement:

> Q. And you -- you recall that prior to you ever saying a word on tape to Investigator Hamrick, that Lieutenant Dennis Smith, One Man Gang, in front of you, summarized for Investigator Hamrick what you were about to say to Investigator Hamrick?
> A. No, sir.
> Q. Do you recall that?
> A. Yes, sir.
> Q. Okay. And it went something like Dennis Smith saying to -- in front of you, this, this and this happened, and you said, "Uh-Huh"; is that correct?
> A. Yes, sir.
> Q. And then Investigator Hamrick proceeded at that time to take a -- a taped statement where you **regurgitated** the same things that Lieutenant Smith had just gone over. Is that the way your taped statement went?
> A. Yes, sir.

[T:4678] (emphasis added) On re-direct the State then pointed out that a mere eight lines of the transcript were Smith's summary with the remainder being Mayes's own words. [T:4711-12] On re-cross, Akins returned to the topic:

> Q. Mr. Mayes, Ms. Park just talked about counting eight lines; is that correct?
> A. Yes, sir. Q. Now, in those eight lines, do you recall that Dennis Smith says in front of you –
> MS. PARK: Where are we?
> MR. AKINS Q. Dennis Smith says in front of you, prior to you giving your statement, "Just a quick review. He's gonna tell you about he ID'd Man. He's going to tell you about talking him into doing a robbery, about Theresa and Man going to Wal-Mart and getting some ammo, coming back. Him and Man going back in the room. Man boosting him up about -- to do the robbery, getting in the

> car. He's going to tell you that Man told him on the way to do the robbery that he was going to cap the old man if the old man busted. He was standing – he was about the length of this room, whatever room that is, from the two when Man shot the old man, that he stuck the gun almost to his head and shot him. The old man was looking right at him." Do you recall all of that?
> A. Yes, sir.
> Q. And you know what they did next, right? They sat and took your statement, didn't they?
> A. Yes, sir.

[T:4716-17] Akins repeatedly implied that Mayes's statement to Hamrick, and that was used to prosecute Tumblin, really came from Smith with Mayes only being the conduit. Only after that did the State seek the introduction of Smith's testimony about his contact with Mayes on the day of his formal taped statement as well as what he actually told him just before his that statement.

> Q. Before you -- before the -- before Jeff Hamrick and the interview began, what did Anthony Mayes tell you?
> A. He started talking out on the street and we -- I say "we" because we were all there, but he was primarily talking to me, and I -- I got him to -- quite honest, I got him to
> shut up out on the street. I really didn't want to -- to get started on whatever he had to say in those circumstances, so we got him to shut up. He was transported to the Detective Bureau. We contacted Detective Coleman who was on a -- who was not present, he was on a detail, and I sat in the room while we waited for Detective Coleman. And Mr. -- Mr. Mayes kept wanting to talk, so he was Mirandized, and I -- I kind of let him talk and hit the highlights of what he had to say. I did not want to get into a lot of details because I'm not the case agent, and I wanted him to do all that with the case agent.
> Q. So what did he tell you in those -- in those minutes that you were waiting for Detective Coleman to arrive? What did he tell you?
> A. I -- I was curious too, because he had said that out on the street so I think I asked him -- I don't think he just blurted that out. I think I asked him, "Why did you say – look right at me and say you wanted

> to talk to me," and he told me that his grandmother had told him that he needed to talk to me and tell me everything and -- and to be truthful.

[T:4778-79] After the State asked about Tumblin, Akins objected as hearsay. [T:4780] The trial court allowed the testimony as a prior consistent statement.

Admission of evidence is within the court's discretion, and its ruling will be affirmed unless there has been an abuse of discretion. Williams v. State, 967 So.2d 735, 748 (Fla. 2007); San Martin v. State, 717 So. 2d 462, 470-471 (Fla. 1998)(A trial court has wide discretion in areas concerning the admission of evidence and, unless an abuse of discretion can be shown, its rulings will not be disturbed.); Ray v. State, 755 So.2d 604 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Cole v. State, 701 So.2d 845 (Fla. 1997)."Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So. 2d 799, 806 (Fla. 2002); Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla. 2000); Huff v. State, 569 So.2d 1247 (Fla. 1990). The State submits that Tumblin has not demonstrated an abuse of discretion in the instant case.

Under section 90.801 (2)(b), Florida Statutes, a "prior consistent statement" is not hearsay and is admissible as substantive evidence if the declarant testifies at trial, is subject to cross examination concerning the statement, the statement is

consistent with his testimony, and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication. "The exception is based on the theory that once the witness's story is undertaken, by imputation, insinuation, or direct evidence, to be assailed as a recent fabrication, the admission of an earlier consistent statement rebuts the suggestion of improper motive and the challenge of his integrity." Van Gallon v. State, 50 So.2d 882 (Fla.1951); See also Peterson v. State, 874 So.2d 14 (Fla. 4th DCA 2004); Harris v. State, 843 So.2d 856 (Fla.2003); Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992).

While Akins argued to the trial court that he never implied that Mayes made that statement because Smith fed it to him, the record clearly shows otherwise. One of the repeated and primary thrusts of his cross examination of Mayes was that Mayes told Hamrick what he did because Smith so instructed him. In his initial cross, Akins charged Mayes with "regurgitating"[3] what Smith told him; the clear implication, to the State, the trial court, and the jury, was that those words and that story was not his but Smith's. This theme continued on re-cross when Akins specified exactly what Smith said, ending with "And you know what they did next,

[3]regurgitate: "to give back or repeat, esp. something not fully understood or assimilated: to regurgitate the teacher's lectures on the exam." (Random House Unabridged Dictionary); "to throw or pour back or out from or as if from a cavity - regurgitate food- memorized facts to regurgitate on the exam." Webster's Dictionary.

right? They sat and took your statement, didn't they?" When questioning Smith, Akins spent some time pointing out that Smith did not tape or record Mayes's statement in any way although he had the ability to do so. Once again, he raised the specter that Mayes had not told Smith those facts but rather Smith directed Mayes to this fabricated story. The trial court properly allowed the testimony about the prior statement. Dufour v. State, 495 So. 2d 154, 160 (Fla. 1986)(trial court could allow introduction of State witness's former statement as prior consistent testimony tending to rebut implications of improper motive or recent fabrication, where defense had raised those implications through impeachment during cross-examination); Shellito v. State, 701 So.2d 837, 841 (Fla. 1997)(Statement made by trial witness to police officer incriminating defendant was admissible as prior consistent statement of witness to counter inference raised during cross-examination of witness of recent fabrication based on information obtained from newspaper reports); Parks v. State, 644 So.2d 106 (Fla. 4th DCA 1994)(Prior consistent statements are admissible to rebut charges of improper influence and fabrication against witness.); Nussdorf v. State, 508 So.2d 1273 (Fla. 4th DCA 1987)(Based on defendant's argument that victim's testimony was product of improper influence and thus a fabrication, tape recording of victim's prior consistent statement was admissible, notwithstanding defendant's claim in prior consistent statement was made after undue influence had already occurred; tape

recording was made months before trial, and victim testified that prosecutor had helped her to remember and talked with her about case the day prior to trial.); Dendy v. State, 896 So.2d 800 (Fla.4th DCA 2005)(Tape recorded statement of witness following attack on victim was admissible in murder trial as prior consistent statement, where at trial the defense raised at least the implied charge that witness fabricated his story in return for leniency.).

Tumblin's reliance on Peterson v. State, 874 So.2d 14(Fla. 4th DCA 2004) is not persuasive on this case's factual scenario. In Peterson the defense was that the victim was trying to steal the defendant's girlfriend from him, before the crime even occurred. Since he wanted Peterson out of the way, he falsely identified him when he was a victim of a drive-by shooting. The motive to fabricate pre-existed the crime itself, thus, the defense claim of consistent fabrication undercut any prior consistent identification to the police. Simply because Mayes was involved in this crime did not mean that there was any indication in the evidence of a consistent motive to fabricate; merely being a suspect is not enough since this Court has repeatedly allowed the prior consistent statements of co-defendants in when attacked for accepting plea bargains.[4]

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[4]Pagan v. State, 830 So.2d 792 (Fla. 2002)(holding tape recording of conversation between two state witnesses, containing prior consistent statements as to one witness' testimony, was not hearsay, where recording was admitted to rebut defense claim that witness at issue had recently fabricated his testimony in response to state's offer of plea agreement and influence of media coverage;

Moreover, as detailed above, Akins clearly accused Tumblin of baldly repeating what Smith said, thus marking that a point at which Tumblin had a motive to fabricate to please Smith, one separate from any he may have had earlier. In Chandler v. State, 702 So.2d 186 (Fla. 1997) this Court allowed the admission of a statement made by defendant's daughter in 1992, essentially saying that defendant had told her that he could not return to Florida because police were looking for him in connection with the murders of three women as a prior consistent statement rebutting defendant's suggestion that daughter's 1994 paid television appearance motivated her trial testimony, despite the fact that defendant also alleged that his daughter had acquired separate motive to fabricate in 1990. The daughter testified and was subject to cross-examination, and the statement pre-dated one alleged motive to fabricate. Id. p. 197-98. This is the same type of situation in this case. This Court should find the trial court did not abuse its

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witness had been questioned by defense counsel concerning his motive in testifying and his belief that lying to save one's life was justifiable, and had admitted that he had initially lied to police in order to protect defendant and had lied under oath in a separate proceeding for protective order); Rodriguez v. State, 609 So.2d 493, 500(Fla. 1992)(defense counsel's reference to a plea agreement with the state during cross-examination was sufficient to create an inference of improper motive to fabricate); Jackson v. State, 599 So.2d 103, 107 (Fla. 1992) (taped statement admissible to rebut the inference codefendant had a motive to fabricate in light of agreement to testify against Jackson); Alvin v. State, 548 So. 2d 1112, 1114(Fla. 1989) (tape recording of statement made by witness to police shortly after he was stopped by police was admissible in murder prosecution to rebut inference that witness had fabricated story implicating defendant because State granted him immunity in exchange for his testimony).

discretion and properly allowed this testimony.

The improper admission of prior consistent statements is also subject to harmless error analysis. Anderson v. State, 574 So. 2d 87, 93 (Fla. 1991); Chandler, 702 So.2d at 198. Even if the testimony was admitted in error, it was harmless. Tumblin arranged to have his gun and ammunition available before he left the morning of the murder. [T:4176, 4657]He left around noon in the car identified as the one at the garage at the time of the crime. [T:4179-81, 4487, 4657, 3903, 3909] A man similar to Tumblin, and not Mayes, was seen leaving the scene after the shooting and after Mayes left. [T:3894-8, 3911-13, 4336] The murder weapon was found in his bedroom along with bullets matching the type purchased that morning by his girlfriend. [T:3992, 4264-70, 4749-56, 4767] The killing bullet came from that gun. [T:4849-58] Tumblin came home shortly after noon sweating, acting crazy, and panicky. He had envelopes which his sister and girlfriend burned; the garage was missing a stack of envelopes. [T: 4171-2, 4182-90, 4490-4, 4506] There was substantial evidence proving Tumblin's participation and guilt in the murder. It also corresponded and substantiated Mayes's testimony. Any error was harmless. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). This Court should affirm.

POINT II

THE TRIAL COURT PROPERLY DENIED TUMBLIN'S MOTION FOR MISTRIAL.

Tumblin next alleges that the trial court erred in not granting his motion for a mistrial based on Lieutenant Smith's ("Smith") comment that Mayes would tell the truth. He argues that Mayes's testimony was crucial and his credibility was under defense attack. He claims that he is entitled to relief under Acosta v. State, 798 So.2d 809 (Fla. 4th DCA 2001) and that the trial court misread the case. He argues that Smith improperly bolstered Mayes's credibility and, given the lack of other evidence of Tumblin's guilt, the damage was not repaired by the curative instruction. The State submits that the court properly denied the motion. There was substantial evidence proving Tumblin's guilt in addition to Mayes's testimony and, thus, the fairness of the trial was not in jeopardy. The State asks this Court to affirm.

Smith testified about his contact and interview with Mayes. He relayed that when he arrested Mayes on July 9, 2004 Mayes began immediately talking; Smith tried to stop him so he could get him back to the station and give his statement to the lead investigating officer, Detective Coleman. At that time Mayes related that his grandmother told him to talk to Smith and to be truthful. [T:4776-80] Tumblin did not object to that testimony. Once at the station, Mayes gave Smith a non

recorded statement as they waited for Coleman.

> Q: "Did you then recount that or summarize that statement that he gave you to Detective Coleman and Investigator Hamrick when they returned."
> "Answer: Yes.
> "Question: Did you -- when you recounted this -- when you recounted his version, did you add anything or suggest anything he should say in the future?
> "Answer: Only -- no, nothing in particular that he should say. I did assure Detective Coleman in front of Mayes that I felt like Mayes would -- would tell him the truth."

[T:4780-81] The trial court sustained Tumblin's objection and struck the testimony. [T:4785-91] Tumblin also asked for a mistrial based upon Acosta. The court offered a curative instruction and later read the following which the parties jointly proposed. [T:4785-91, 4996-9] "You are hereby instructed that the believability or credibility of all witnesses testifying in this case is within the exclusive province of the jury. Please disregard any suggestion to the contrary." [T:4997] The trial court declined to grant a mistrial, reasoning that this case was factually and legally distinguishable from Acosta. [T:4963-90] The trial court did not abuse its discretion in so ruling.

A ruling on a motion for mistrial is subject to an abuse of discretion standard. Smith v. State, 866 So.2d 51, 58-59 (Fla. 2004); Anderson v. State, 841 So.2d 390 (Fla. 2002); Smithers v. State, 826 So. 2d 916, 930 (Fla. 2002); Gore v. State, 784 So.2d 418, 427 (Fla. 2001). A motion for mistrial should be granted only when necessary to ensure the defendant receives a fair trial. See Goodwin v.

State, 751 So.2d 537, 546 (Fla. 1999). "A motion for a mistrial should only be granted when an error is so prejudicial as to vitiate the entire trial." England v. State, 940 So.2d 389, 401-2 (Fla.2006); see Hamilton v. State, 703 So.2d 1038, 1041 (Fla.1997) ("A mistrial is appropriate only where the error is so prejudicial as to vitiate the entire trial."). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable.... [D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court." Trease v. State, 768 So.2d 1050, 1053 n. 2 (Fla.2000)(quoting Huff v. State, 569 So.2d 1247, 1249 (Fla.1990)). Thus, Tumblin is entitled to a new trial only if Smith's statement deprived him of a fair and impartial trial or materially contributed to the conviction Spencer v. State, 645 So.2d 377, 383 (Fla.1994). That is not the case.

In Acosta the defendant was charged with forgery in which two other people were involved but not charged. The evidence against Acosta relied solely on the testimony of the uncharged co-defendant. The officer testified that he did not pursue an investigation of her, including comparing her handwriting to that on the check, since he believed her story. Based upon his belief, the witness was never charged with the crime and was not subject to cross examination concerning trading her testimony for a "deal." The handwriting expert could not conclusively say that Acosta wrote the check since there were significant unexplained

dissimilarities in the writing. Acosta moved for a mistrial; the trial court denied it and instructed the jury to disregard the evidence. Given that the witness's testimony was crucial to tying Acosta to the check, the appellate court said that the error could not be harmless. The case is clearly distinguishable from the facts of this case. Acosta, 798 So.2d 809.

Mayes's testimony, while certainly important, was not the sole evidence of Tumblin's guilt in the robbery and the actual shooting. The car used in the crime was a very distinctive one which looked like a taxicab; Tumblin and York were the two people who used that car. [T:4179-81, 4486-7, 467] Tumblin left Rhonda's house in that car around noon, immediately before the robbery at the garage. [T:4179-81, 4486-7, 4657] Witnesses from the surrounding businesses observed that car at the garage at the time of the shooting and described a man fitting Tumblin's description driving it away. Those same witnesses corroborated Mayes's statement that he ran immediately after the shooting while Tumblin followed a short while later. [T:3894-8, 3911-13, 4336] He drove up to Rhonda's house quickly immediately after, left the car running in the yard, and then told York to park it behind the house. [T:4179-81] Police then found that car with its hood still warm; it was affirmatively identified as the car parked at the garage during the shooting. [T:3903, 3909, 3980, 4161]

After running into the house that morning, Tumblin had money and envelopes in his hands; York burned the envelopes. [T:4182-90, 4490, 4493-4, 4506] The garage lost some business correspondence during the robbery. Tumblin was sweating and acting crazy, like something was wrong, when he returned. [T:4171-2, 4182-90] During the drive, he seemed jittery, scared, and panicky when he saw the police helicopter and other activity. He made two separate statements that "the cracker" was dead. [T:4191, 4498, 4501-2] This evidence firmly links Tumblin to the robbery.

The gun used to kill Johns belonged to Tumblin. Rhonda testified that she had seen it with him previously and identified the gun the police recovered as his. [T:4507-9] Tumblin told York to bring it to him a few days before the crime. On the morning of the crime, he and York bought Remington bullets from Wal-Mart. [T: 4176, 4657] The casing and bullet found at the garage were the same brand that Wal-Mart sold that morning. They and the bullet taken from Johns's head were fired from that very gun. [4849-58] On the day of the robbery, the police recovered the gun in the bedroom Tumblin was using as well as Remington bullets. [T:3992, 4264-70] Mayes did not return to Rhonda's house after the shooting, only Tumblin did. This evidence proves Tumblin had the gun and was the actual shooter.

Furthermore, Smith made an isolated statement which the court struck. As the court noted, Smith did not have an unvarnished reputation given his "moniker

of Gang of One" and where he testified in civilian clothes. Mayes admitted his involvement in the robbery and the shooting from his first contact with the police. The defense vigorously impeached him with his inconsistent statements and his plea deal. [T:4973] Given that, the trial court found that one person's opinion of Mayes would not reasonably affect the jurors' independent assessment of him. [T:4973-4] This situation is quite different from that in Acosta where the lead detective not only vouched for the only witness fingering the defendant but tailored the entire investigation on his belief in her truthfulness. The court here specifically instructed the jury that they were the only arbiters of the credibility of the witnesses. It also noted that in voir dire the jurors had agreed not to give more weight to police testimony than to other testimony. [T:4972-4] It is presumed the jury follows the court's instruction. Crain v. State, 894 So.2d 59, 70 (Fla. 2004). The jury's verdict was not reasonably tainted by this isolated comment.

A similar situation to the one presented in this trial occurred in Salazar v. State, 991 So.2d 364 (Fla. 2008). There a detective commented that he was trying to find the truth in his investigation. This Court held that the trial court did not abuse its discretion in denying the motion for mistrial or even the objection. It noted that the detective did not claim to have found the truth, as the officer in Acosta did. Id. 991 So.2d at 372-4. Smith did not opine to the jury that he believed Mayes, only that he hoped Mayes would tell the truth to Coleman. Importantly, he

did not say that Mayes had told him the truth either, as the officer in Acosta did. Smith also did not say that Mayes was a truthful person. Cf. Whitted v. State, 362 So.2d 668 (Fla.1978) (holding that it was error to allow evidence of a witness's good character for veracity unless it has been impeached but declining to express an opinion as to whether error was reversible).

This trial court's assessment of the evidence was correct when it determined that this comment, which was stricken, did not undermine the validity of the trial given the other evidence of Tumblin's guilt. Its decision to deny a mistrial was proper and not an abuse of discretion. This Court should deny this claim.

POINT III

THE TRIAL COURT CONDUCTED AN ADEQUATE RICHARDSON HEARING AND ANY ERROR WAS HARMLESS. (restated)

Tumblin next contends that the trial court failed to conduct a Richardson[5] hearing for an alleged discovery violation and, thus, committed reversible error. He argues that the State improperly failed to disclose that Nikki had been a victim of a shooting and was taking hydrocodone at the time she testified. He further argues that the failure prejudiced him because the jury might feel sympathy for her, that his ability to inquire and impeach her were affected, and that she might have been

[5]Richardson v. State, 246 So.2d 771 (Fla. 1971).

incompetent or adversely affected. The State asserts that this was not a discovery violation, the trial court conducted an adequate Richardson inquiry, and that the defense suffered no prejudice from this development. This Court should deny relief.

The State submits that this was not a discovery violation since the information the witness was shot and on pain medication had no exculpatory value. However, given the history of this particular case, the trial court determined that the State should have disclosed medication use to the defense. Upon inquiry from the court and the defense, Nikki said that she had just disclosed the medication information that morning and suffered no ill effects from it.

> THE COURT: Ms. Ruth, is there -- how are you feeling now physically? THE WITNESS: I feel fine.
> THE COURT: Okay. How long ago did you get injured that required these medications?
> THE WITNESS: I got shot on the 21st.
> THE COURT: 21st of May?
> THE WITNESS: Yes -- yeah, 21st.
> THE COURT: Where were you shot?
> THE WITNESS: I got shot in my leg, and it traveled to my stomach. I had surgery on my stomach.
> THE COURT: Okay. Are you going to be all right for the rest of this afternoon on the medication dose you just took?
> THE WITNESS: I'm going to be fine, sir.
> THE COURT: All right. Do you feel as though you're in any way dizzy or nauseous, or is there anything about your -- how you're feeling psychologically right now that should make us feel concerned about your ability to testify?
> THE WITNESS: No, sir.
> THE COURT: Ready to finish answering questions?
> THE WITNESS: Yes, I am.

THE COURT: Any questions from anybody?
MR. AKINS: Yes, sir.
PROFFERED EXAMINATION
BY MR. AKINS: Q. You obviously let Ms. Park know you'd been shot?
A. Huh?
Q. Ms. Park, the lady sitting right here.
A. She didn't know until I got here.
Q. She didn't know until you got here?
A. To Fort Pierce.
Q. Did you ask her "What do I do if I, you know, if I'm hurting and I need medication?"
A. I was gonna take medication when I was out on the bench, but I didn't take it because I thought I would be fine. But by me having a nerve messed up in my leg, by me sitting in one spot a long time, that's when it started bothering me.
Q. My question to you was, did you ask Ms. Park or -- I don't know if you're dealing with a victim's advocate. I don't know who you're dealing with. But did you ask anybody, you know, "If I need to take my medication, what should I do?"
A. I didn't think it was a problem. I ain't think I was gonna be in this predicament to ask somebody, so no, I did not ask somebody.
Q. You didn't think you were gonna be a witness in the case?
A. I knew I was gonna be a witness to my (sic) case, but I didn't know as to me sitting on the stand I would be in pain to take medication, I didn't know that.
Q. When you were being prepared for your testimony, did anyone suggest to you that there might be things you shouldn't say and to use caution?
A. Use caution for me needing medication?
Q. As to what to say in front of this jury.
A. That's why I was trying to speak to someone else and then you tried to put me on the spot.
Q. Well, do you think that's what you're supposed to do is -- how about advise the Court you need a break? Doesn't that make sense?
A. That's what I was trying to do. That's what I really was trying to do, wasn't I? I was really trying to, "Excuse me, um, what do I need to do?" I said, "I need my medication." Right, ma'am?
DEPUTY FOLBRECHT: I didn't hear anything.
THE WITNESS: I was whispering to these people, "I need somebody

> --" you know, what I'm saying? "I need attention." But you put me on the spot so I went ahead and told everybody what I need to do. I'm not going to lie.
> BY MR. AKINS: Q. Back to the question I asked you. You had medication. You thought you might need medication?
> A. I need medication. I know I need medication.
> Q. Did you ask anyone prior to taking the stand, "Hey, if I get in a problem, what do I do"?
> A. No, I didn't.
> Q. Okay. Did you tell them you're on medication?
> A. This morning I did, yes.
> Q. Okay.
> THE COURT: Anything else?
> MR. AKINS: Not of this witness.
> THE COURT: All right, motion for mistrial is denied. This witness can continue to testify. I find she's competent and capable to go forward. You can make any issue of it if you like. Do you all need a break before we bring the jury back in?

[T:4213-16]

Given the colloquy the court had with the State, the defense, and Nikki's testimony, it covered the necessary areas specified in Richardson. It found that there was a discovery violation regarding Nikki's potential competence as a witness, although the State had just learned of the information just before she testified. The State did not intentionally withhold information it knew to be discoverable; rather, the State did not consider the information relevant to the facts at trial and certainly not exculpatory. [T:4201-2] With no evidence to the contrary, the court accepted the State's response. "I haven't seen any official misconduct here. ... You know, a witness in the case said something that does not prejudice the Defendant in any way." [T:4206] Furthermore, since the court found Nikki

competent to testify, any violation was indeed trivial and did not affect her testimony or Tumblin's ability to cross-examine her.

The court conducted an adequate hearing in accordance with Richardson by considering whether there was a discovery violation which was inadvertent or willful, whether it was trivial or substantial, and whether it affected Tumblin's ability to prepare his case. Richardson, 246 So.2d at 775. A court has broad discretion in determining whether a defendant was prejudiced and in determining what measure would best remedy the situation. See State v. Tascarella, 586 So.2d 154, 157 (Fla. 1991); Lowery v. State, 610 So.2d 657, 659 (Fla. 1st DCA 1993); Poe v. State, 431 So.2d 266, 268 (Fla. 5th DCA 1989). The court has discretion to determine if a violation would result in harm or prejudice to the defendant. See Barrett v. State, 649 So.2d 219, 222 (Fla. 1994). The court found the discovery violation to be inadvertent, trivial to the issues at trial, and did not prejudice the defense. The court did not abuse its discretion.

The court also properly found that Nikki was competent to testify. She informed the court that she felt no psychological effects from the pain medication nor was she in incapacitating pain if she took her medication when needed. She was oriented and responded appropriately to all the questions posed to her. Her simple affirmative response when the State reworded her quote of Tumblin's statement is not evidence of incompetence; she answered that Tumblin was in the

courtroom which was the essence of the question. The competency of a witness to testify is a determination left to the sound discretion of the trial court, and absent an abuse of discretion, the trial court's decision will not be disturbed. Baker v. State, 674 So.2d 199 (Fla. 4th DCA 1996); Hawk v. State, 718 So.2d 159 (1998). It is within the sound discretion of the trial judge to determine the competence of a witness to testify. Simmons v. State, 683 So.2d 1101 (Fla. 1st DCA 1996); Baker, supra; State v. Green, 733 So.2d 583 (Fla. 1st DCA 1999). A witness is incompetent to testify if the trial court determines the witness is: (1) unable to communicate to the jury; (2) unable to understand the duty to tell the truth; or (3) unable to perceive and remember events, and a witness is presumed competent to testify until the contrary is established. Rutherford v. Moore, 774 So.2d 637 (Fla.2000); McCoy v. State, 853 So.2d 396 (Fla.2003). The court did not abuse its discretion in making this finding given Nikki's behavior and responses.

Since the court conducted a proper Richardson hearing, this Court merely reviews for abuse of discretion, not the standard of "presumed prejudice" noted in Cox v. State, 819 So.2d 705, 712 (Fla. 2002) and State v. Schopp, 653 So.2d 1016, 1020 (Fla. 1995) where there was a violation and no Richardson hearing conducted. However, if this Court finds error, it is harmless under State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). The lack of information could not have affected Tumblin's strategy either at trial or with this witness. Nikki's

shooting was unconnected with Tumblin and the jury was so informed. There was absolutely nothing tying him to that incident. Additionally, defense counsel had the information about the shooting *before* he finished cross examining her. He asked for and was granted a brief continuance. [T:4216] If he wished to question her or argue about any potential bias she had to people who shot others, he certainly could have done so, which he did not do. He also could have pursued impeaching her with her medication or pain since the jury was aware of both and the court allowed it. [T:4201, 4205-6] A medical professional could only give general information about the effect of the drug. The actual effect, if any, was observable by the jury and counsel and known by Nikki who could have been, and was, questioned. There was no prejudice since these areas of questioning and argument were available to the defense during the trial. This Court should deny relief and affirm.

POINT IV

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON AND THEN FOUND THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

Tumblin next asserts that the trial court erred in finding the aggravator that the killing was committed in a cold, calculated, and premeditated ("CCP") manner. He argues that the killing: was spontaneously done without reflection; was an

unplanned, impulsive act; and did not have the necessary heightened premeditation. The State disagrees and submits that the CCP aggravator was supported by substantial, competent evidence. This court should affirm.

Whether an aggravating circumstance exists is a factual finding analyzed under the competent, substantial evidence standard of review. In reviewing challenges to the finding of an aggravator in a capital murder case, this Court must determine whether there is substantial, competent record evidence to support the found aggravator. See, Hildwin v. State, 727 So. 2d 193, 196 (Fla. 1998), cert. denied, 528 U.S. 856 (1999); Gordon v. State, 704 So. 2d 107 (Fla. 1997); Larzelere v. State, 676 So. 2d 394 (Fla. 1996). It "is not [the Florida Supreme] Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt—that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Alston v. State, 723 So. 2d 148, 160 (Fla. 1998) (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997)); Boyd v. State, 910 So.2d 167, 191 (Fla. 2005). Competent substantial evidence is tantamount to legally sufficient evidence, and the Court assesses the record evidence for its sufficiency only, not its weight. Almeida v. State, 748 So.2d 922, 931 (Fla. 1999).

Under the competent, substantial evidence standard of review, the appellate court pays overwhelming deference to the trial court's ruling, reversing only when that ruling is not supported by competent and substantial evidence. If there is any evidence to support those factual findings, the lower court's findings will be affirmed. When it comes to facts, trial courts have an institutional advantage; they can observe witnesses, hear their testimony, and see/touch the evidence. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998) (recognizing judge, sitting as fact finder, has superior vantage point).

Initially, the State must point out that Tumblin has not sufficiently pled his objection to the CCP instruction as given by the trial court. To the extent Tumblin fails to plead this point fully by identifying the error and any resulting harm, this Court should find the matter insufficiently pled. Failure to fully address an argument necessitates that the matter be deemed waived. Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990) (opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper v. State, 856 So.2d 969, 977 n.7 (Fla. 2003); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

Further, the trial court gave the standard instruction for this aggravator to the jury without objection. [T:5470, 5518-19]. To preserve for review a challenge to a jury instruction, an objection must have been raised below or an alternate

instruction offered. See San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997); Hodges v. State, 619 So.2d 272 (Fla. 1993). If an issue is not preserved, fundamental error must be shown. This Court should reject the matter as unpreserved. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

A review of the elements of the facts presented at trial support the instruction given and the finding of the CCP aggravator. This court has reasoned:

> In order to establish the CCP aggravator, the evidence must show that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (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.
>
> ... While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." ... The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." ... However, CCP can be indicated by the circumstances if they point to 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.

Philmore v. State, 820 So.2d 919, 933 (Fla. 2002) (quoting Farina v. State, 801 So.2d 44, 53-54 (Fla. 2001).

As the trial court stated: “The deliberate nature of Alwin Tumblin’s actions establishes that the murder was not prompted by emotional panic, frenzy or a fit of rage.” [R:4026-27] It characterized the murder as an “execution style” slaying. Tumblin waited to pull out his gun until after Johns had given him his money

without resistance or complaint. He had to hold the cylinder closed in order to get the gun to fire. He held it to Johns's head, saying "what do you think about this?", and then shot Johns at point blank range as evidenced by the stippling on his skin. This evidence establishes that the killing was "cold."

In his brief, (IB 54) Tumblin discusses the testimony that he was nervous, sweating, and jittery when he was driving around *after* the murder. His actions afterwards do not reflect his attitude *before* the murder; they merely reflect his attitude about being caught given the multitude of police personnel and activity in the area. Even a cold blooded murderer does not wish to be apprehended. This is certainly not evidence that the killing was committed without reflection in a spontaneous manner. See Power v. State, 605 So.2d 856, 865 (Fla. 1992).

Tumblin also attacks the trial court's finding that the murder was calculated. Calculation is a "careful plan or prearranged design to kill anyone during the robbery." Rogers v. State, 511 So.2d 526, 533 (Fla.1987). Tumblin's planning of this crime can be seen by his getting the gun, buying some bullets for it, and recruiting Mayes to assist him as a lookout. Furthermore, Tumblin scouted out the target beforehand and chose the time the fewest people were present during the day. He drove Mayes to the auto shop without speeding or any sign of nervous driving. [T:4710-16] While driving he told Mayes that he was going to kill whoever was present at the robbery. Once at the shop, Tumblin robbed Johns

successfully and without resistance. Only then did he pull out his gun, taunt the victim, and then shoot him in the head.

Tumblin emphasizes Mayes's use of the words "exist" and "resist" and argues that the trial court was bound to the "resist" statement. Essentially, he is asking this Court to reweigh the evidence rather than determining if competent, substantial evidence supported the trial court's findings. The evidence supported the finding that the killing was calculated. Tumblin's actions during the crime show that he intended to kill the victim no matter what actions the victim did, which corresponded with Mayes's trial testimony. In fact, the victim immediately complied with Tumblin's orders and handed the money directly to him. He did not hesitate nor did he try to thwart Tumblin's robbery in any way. This factual scenario is consistent with Mayes's testimony at trial that Tumblin said he planned to kill anyone present. The evidence showed that Tumblin came to the scene with a gun, loaded with live rounds he had just purchased, and discussed killing the victim prior to the robbery itself. Once on the scene, he proceeded rob the victim by demanding money. The victim complied, *even before Tumblin pulled out his gun*. Tumblin had the money and the victim was just standing there. It was at that point that Tumblin removed the gun from his waistband, pointed it at the victim's head at point blank range, said "what do you think about this?" to the victim, and then calmly shot him in the head. There was no precipitating action during this

time line; there is no evidence that Tumblin impulsively shot Johns from fear, anger, or even stomach upset. The evidence showed that he thought about killing him beforehand, robbed him without difficulty, and then shot him in accordance with his previously articulated desire to kill. No reasonable hypothesis existed that the killing was an impulsive act.

The cases Tumblin cites are distinguishable and not persuasive. The situation here is very different from that in Holman v. State, 603 So.2d 111 (Fla. 4th DCA 1992) since the ambiguous testimony there was whether the defendant had encouraged or discouraged the crime. Here, Tumblin's statement to Mayes clearly showed he was planning to rob and to kill; he was the primary, not a sideline actor. Guzman v. State, 721 So.2d 1155 (Fla. 1998) is distinguishable because there the defendant did not bring a weapon to the crime scene and only acted when his victim, who had been asleep, woke up and tried to get up. Here, Johns did nothing unanticipated to trigger Tumblin; he did everything Tumblin asked. The prior statements used to help prove CCP in Hardy v. State, 761 so.2d 761 (Fla. 1998), Young v. State, 579 So.2d 721 (Fla. 1991), and Perry v. State, 801 So.2d 78 (Fla. 2001) were made long prior to the killings and were not specifically connected with the murder. Here, Tumblin came with a weapon, which he loaded, immediately before the robbery said that he would kill the victim, and then killed with no precipitating event or justification. There is no evidence that Tumblin

panicked or acted impulsively; on the contrary, after the shooting, rather than fleeing, he went into the shop's office to find more cash and items of value to steal. Tumblin clearly was considering and planning on killing someone during the robbery, before the robbery ever occurred. His actions during the killing are consistent with a plan to kill rather than only to kill if offered resistance. There was no evidence to support a finding that this killing was impulsive but there was competent, substantial evidence to support the finding that the killing was calculated.

Finally, the evidence also supports the finding of heightened premeditation. The facts outlined above also provide sufficient evidence for this aggravator.

> Premeditation can be established by examining the circumstances of the killing and the conduct of the accused. The CCP aggravator 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." *Swafford v. State*, 533 So.2d 270, 277 (Fla.1988). In a number of cases, we have cited the defendant's procurement of a weapon in advance of the crime as indicative of preparation and heightened premeditated design. *See, e.g., Bell v. State*, 699 So.2d 674, 677 (Fla.1997) (purchasing a gun after stating that he intended to kill the victim); *Thompson v. State*, 648 So.2d 692, 696 (Fla.1994)(explaining that defendant took precaution of carrying a gun and a knife with him to meeting with victims); *Wuornos v. State*, 644 So.2d 1000, 1008 (Fla.1994) (noting that defendant had armed herself in advance of attack on victim); Huff v. State, 495 So.2d 145 (Fla.1986) (stating that defendant brought murder weapon to the scene of the crime); *Davis v. State*, 461 So.2d 67 (Fla.1984) (same); *Eutzy v. State*, 458 So.2d 755, 757 (Fla.1984) (finding that defendant procured gun in advance). Taking a victim to an isolated location or choosing an isolated location to carry out an attack can also be indicative of a plan or

> prearranged design to kill. *See, e.g., Thompson* (driving victims to an isolated area and forcing them to lie on the ground); *Wuornos* (luring victim to isolated location). **Lack of resistance or provocation by the victim can indicate both a cold plan to kill as well as negate any pretense of justification**. *See, e.g., Thompson* (noting that there was no indication that one of the victims resisted the defendant); *Eutzy* (noting no evidence of a struggle); *Williamson v. State*, 511 So.2d 289 (Fla.1987) (finding no pretense of justification for stabbing fellow inmate where victim had made no threatening acts toward defendant). The manner in which a murder is carried out can also indicate a cold and calm plan. *See, e.g., Eutzy* (shooting victim once in the head execution-style).

Franklin v. State, 965 So.2d 79, 98 -99 (Fla.,2007)(emphasis added). That case's facts are instructive.

> The killing in the instant case has all of the hallmarks of CCP. Franklin procured a weapon earlier in the day, long before he actually chose his victim. Franklin engaged the victim in conversation earlier in the night and was able to assess the surroundings and the victim's situation, i.e., a single individual in an isolated location. Franklin stated his intent to return to the location and "get" the victim. When he arrived at the scene, Franklin again voiced his intent to shoot the victim when he told McCoy that "this is gonna hurt, but only for a minute." There was no resistance or struggle by the victim, who complied with Franklin's order to get out of his car and down on the ground and asked Franklin not to shoot him. However, while the victim was complying with Franklin's orders, Franklin shot him in the back without provocation. Further, Franklin took no precautions to hide his face or his vehicle from the victim, but he did wear gloves in order to avoid leaving his fingerprints at the scene. All of these facts are supported by sufficient competent evidence in the record, either through witness testimony, forensic evidence, or Franklin's own confessions.

Id. Similarly, Tumblin bought ammunition for his broken gun. He told Mayes he was going to kill anyone present. He made no effort to hide his identity. He

committed the robbery and Johns fully cooperated. He only then drew the gun, held the cylinder in place to ensure it shooting, and voiced his intent when he asked Johns "what do you think about this?" and finally shot Johns at extremely close range. "What is required is a heightened form of premeditation which can be demonstrated by the manner of the killing. Those that are executions or contract murders fit within that class." Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988) citing Routly v. State, 440 So.2d 1257 (Fla.1983), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). Competent, substantial evidence supported the court's finding.

Tumblin points to a number of cases where this Court disapproved the CCP aggravator. The facts of all of these cases failed to establish the calculation element necessary for this aggravator. In Thompson v. State, 619 So.2d 261, 266 (Fla. 1993) there was no evidence of advance planning of the assault or murder. The defendant in Wyatt v. State, 641 So.2d 355 (Fla. 1994) already had a gun with him well before the crime. His statement indicated a spur of the moment decision. In Wyatt v. State, 641 So.2d 1336 (Fla. 1994) there was no indication of prior planning. The facts of the previous crimes in Power show a plan to rape but not to kill. Power, 605 So.2d at 866. In Hamblin, the defendant did not have a conscious intent to kill before the robbery; it came about during the course of the crime. Hamblin, 527 So.2d at 805.

Finally, even if this Court finds that CCP was not an appropriate aggravator, the error is harmless. The merged aggravators of felony murder/pecuniary gain and prior violent felonies remain. This Court has affirmed such sentences. Pope v. State, 679 So.2d 710, 716 (Fla.1996)(sentencing proportional with two aggravators, two statutory mental health mitigators and several nonstatutory mitigators). Furthermore, the trial court stated: "Not only does this Court find that the totality of the aggravating circumstances in this case far outweigh the totality of the mitigating circumstances; but, the Court expressly finds that each of the three (3) statutory aggravating circumstances, when considered alone, outweighs the totality of the mitigating circumstances established in this case." [R:4055]

The trial court had competent, substantial evidence supporting its finding of CCP. This Court should affirm.

POINT V

THE TRIAL COURT PROPERLY EVALUATED, FOUND, AND WEIGHED TUMBLIN'S MENTAL HEALTH MITIGATION EVIDENCE. (restated)

Tumblin argues that the trial court erred finding and weighing of the mental health mitigation evidence. He contends that since the evidence was "undisputed" the court was bound to find that Tumblin suffered from brain damage and had a borderline intellectual range. He also asserts that the court improperly required a

nexus between the mental health issues and the crime in order to consider it as a mitigator. The State disputes that the court used such a test. Further, this claim is meritless as the court followed the dictates of Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000).

This Court in Campbell v. State, 571 So.2d 415 (Fla. 1990), established the relevant standards of review for mitigating circumstances: 1) whether a circumstance is truly mitigating in nature is a question of law and subject to *de novo* review; 2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and 3) the weight assigned to a mitigator is within the judge's discretion. See Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000); Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding an established mitigator may be assigned "little or no" weight); Mansfield v. State, 758 So.2d 636 (Fla. 2000); Alston v. State, 723 So.2d 148, 162 (Fla. 1998); Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996); Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990)(finding judge may reject claimed mitigator if record contains competent substantial evidence to support decision).

Credibility, resolution of controverted facts, and the weight to be assigned to the trial evidence is within the province of the trier of fact. See Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986); Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981). The trial judge, sitting as the fact finder, has the superior vantage point to see and

to hear the witnesses and to judge their credibility. See, Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998) Cf. Martinez v. State, 761 So.2d 1074, 1080 (Fla. 2000) (recognizing trier of fact has responsibility of determining weight to be given evidence). As stated in Foster v. State, 679 So.2d 747, 755 (Fla. 1996): "[E]xpert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." (citations omitted, emphasis supplied). See Windom v. State, 886 So.2d 915 (Fla.2004) (holding appellate court will not substitute its judgment for that of trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence as long as the trial court's findings are supported by competent substantial evidence).

The trial court found that Tumblin sustained a head injury from a car accident when he was a teenager and had some resulting brain injury. [R:4042] That injury was substantiated by: statements to Riordan from Tumblin, his mother, and his sister; medical and hospital records; and Tumblin's statement to Landrum.[T:5344-46, 5437] The court did not find the other purported head injuries since Tumblin himself denied those to Landrum. [T:5438, R:4043] Both

experts agreed that Tumblin had substantial behavioral problems including criminal activity since he was a young child, long before the head injury. [T: 5318-20, 5333-34, 5437] Riordan conducted a number of tests which indicated some brain damage and one showing some impulse control problems. [T:5348-51] Tumblin presented no evidence substantiating those tests, for example no testimony from teachers or counselors and no PET scans. Riordan essentially said that the brain injury resulted in brain damage which included some impulse control issues. The court, as the trier of fact, was unconvinced. It found:

> that an adolescent brain injury may have caused or contributed to some; [sic] but, [sic] certainly not all, of his anti-social behaviors since that injury. Accordingly this Court is reasonably convinced that this non-statutory mitigating factor has been established. ... [T]he entire plan. preparation, and execution of the robbery and murder of Jimmy Johns indicated that these crimes were the product of a coherent plan which was methodically carried out with intentional and non-impulsive behavior on the part of the Defendant."

[R:4045] The crime itself denied any impulsivity in Tumblin's behavior when he planned and carried out these crimes, thus undermining the existence of brain damage as testified to by Riordan. There was competent, substantial evidence to support the court's findings and the court conducted a detailed evaluation of the evidence and the mitigator as outlined in Campbell.

The trial court was not bound to believe and to accept an uncontroverted opinion by Riordan when it was belied by the other evidence in the case. Foster, 679 So. 2d at 755; see also Walls v. State, 641 So. 2d 381, 390-91 (Fla. 1994)

(reasoning that opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking"). In Bryant v. State, 785 So. 2d 422, 435-6 (Fla. 2001) this Court affirmed that an asserted mitigator was not established because "the evidence in this case does not show that Defendant acted impulsively or had impaired judgment" since there was no evidence of any manifestation of Bryant's alleged brain damage with respect to his criminality other than the testimony from Bryant's expert. Id. p. 436. Like Bryant, Tumblin's actions in the crime showed *impulse control* since he planned and selected the target. "The decision as to whether a particular mitigating circumstance is established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So. 2d 450, 453(Fla. 1991); Preston v. State, 607 So. 2d 404 (Fla. 1992). Moreover, a court does not need to find mental mitigation just because of expert testimony alone. See Provenzano v. State, 497 So. 2d 1177 (Fla. 1986). Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. See Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994). As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. Provenzano, 497 So. 2d at 1184. The trial court's findings on whether Tumblin was brain damaged were supported by competent, substantial

evidence and should be affirmed.

The trial court also found Tumblin had below average intelligence but not borderline intellectual functioning.[T:4042] It based that decision on Riordan's own testimony.

> Q. You performed the Wechsler Intelligence Adult Test or the Adult Intelligence Test?
> A. Yes.
> Q. The Wechsler?
> A. Yes.
> Q. And what was the score that you came up with?
> A. He had a full scale I.Q. score of 81.
> Q. And did you see some DOC record that indicated a similar score?
> A. Yes.
> Q. What was that?
> A. I believe it was an 82.
> Q. And when you're scoring that, does Wechsler have a certain scale that you use?
> A. Well, it's called the Wechsler Adult Intelligence Scale, Third Edition.
> Q. Well, when you perform that test and you get a score, how do you make that determination what's average -- you know, average intelligence, below average intelligence, borderline or retarded? What number does Wechsler recommend?
> A. I don't have that reference in front of me, but for diagnostic purposes it's not Wechsler's scale that's used, it's actually the numbers from the scale correspond to numbers in the diagnostic book which I have –
> Q. Right.
> A. -- here.
> Q. But are you familiar with what Wechsler recommends with their own test?
> A. I -- I would -- I have been familiar with it. I wouldn't want to quote it without having the source in front of me.
> Q. If I told you that 81/82 would fall in the below average range, does that sound right to you?
> A. I would think that he would say that, yes, below average.

Q. Certainly not retarded?
A. No, not that score.
Q. And with Wechsler it wouldn't be borderline on the ones they recommend with their test?
A. I believe you're correct on that.

[T:5379-81] As the court pointed out, Riordan did not explain the DSM-IV-TR manual's definition of or criteria for "Borderline Intellectual Range" when he claimed Tumblin's IQ scores fell within it. Riordan did not convince the court here. As noted extensively above, the trial court did not have to accept Riordan's assertion when the test itself ranked Tumblin as below average, not borderline. Once again, the court also found the way he committed the crime itself contradicted that Tumblin was operating within the borderline intellectual functioning. [R:4042] The trial court's decision was supported by the evidence presented at the trial and was proper. Foster, 679 So. 2d at 755.

A weight assignment is reviewed under the abuse of discretion standard. Cole v. State, 701 So.2d 845, 852 (Fla. 1997); Globe v. State, 877 So. 2d 663, 676 (Fla. 2004); Francis v. State, 808 So.2d 110, 141(Fla. 2001) (noting that the weight to be assigned to a mitigating factor lies within the sound discretion of the trial court); Mansfield v. State, 758 So.2d 636 (Fla. 2000); Campbell, 571 So.2d at 420 (noting the relevant weight assigned a mitigator is within the sentencing court's province). Appellate courts give substantial deference to the court's ruling, finding abuse only if it is unreasonable. Canakaris v. Canakaris, 382 So.2d 1197, 1203

(Fla. 1980); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000).

Tumblin also complains that the trial court improperly linked the mental health evidence with the crimes. The trial court, however, evaluated the mental health evidence in determining if the mitigation existed and what weight to give it in light of the rest of the trial evidence. Robinson v. State, 761 So. 2d 269, 277 (Fla. 1999) (affirming trial court's decision to give little weight to existence of brain damage because of the "absence of any evidence that it caused [the defendant's] actions on the night of the murder"). Here, the court properly considered and evaluated the evidence in assigned weight to the mitigators; it did not simply reject it as the court did in Eddings v. Oklahoma, 455 U.S. 104, 113 (1982). The court here assessed the weight of the mental health evidence in light of Tumblin's actions during the crime. The trial court has the discretion to assign weight to mitigators and may use the facts of the crime in doing so. Foster, 679 So. 2d at 755; Walls, 641 So. 2d at 390-91. The trial court did not abuse its discretion in weighing the mental health mitigation evidence.

Tennard v. Dretke, 542 U.S. 274 (2004) and Smith v. Texas, 543 U.S. 37 (2004) do not support Tumblin on this issue. In both, the U.S. Supreme Court held the Texas penalty scheme did not allow the jury to consider and to give effect to the mitigation evidence as constitutionally required since it imposed a threshold screening test for it to even be considered, thereby improperly limiting the type of

mitigation the jury could consider. The jury, and courts, should be allowed to consider all types of mitigation. The trial court here did not apply a "nexus" test to *even* consider the mitigation; rather it made a determination based on the evidence whether a mitigator was established and then assigned its weight in light of the facts of the case. It found Tumblin had below average intelligence, a brain injury, and past suicidal behavior. As argued above, the court determined that the crime facts essentially negated some of the mitigation of low intelligence and lack of impulse control which led it to assign little weight to the mental health mitigation evidence. "The facts of this case do not strongly support the notion that this mitigating circumstances significantly reduces Alwin Tumblin's degree of culpability for the murder of Jimmy Johns." [R:4045] "We have never denied that gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." Tennard, 542 U.S. at 286. The trial court did not abuse its discretion in weighing the mental health mitigator nor did it employ an improper nexus test. This Court should affirm.

POINT VI

THE DEATH SENTENCE IS PROPORTIONAL (restated)

Tumblin contends that his death sentence is not proportional based on the trial court's erroneous finding of the CCP and refusal to find certain mental health issues mitigating. (83-84). Also, Tumblin asserts that the sentence imposed upon his co-defendant Mayes based on a plea agreement renders the death sentence disproportional. Contrary to Tumblin's position, the trial court's decisions regarding aggravation and mitigation were proper as asserted by the State in **Points IV and V** (reincorporated here) and, as a result, the sentence is proportional. However, even if the CCP aggravator is unsupported and the mental health mitigation should have been given greater weight, the sentence remains proportional. Likewise, Mayes's sentence has no bearing on Tumblin's since Mayes was less culpable; he was not the shooter and he pled to second-degree murder. This Court should affirm.

Proportionality review is a consideration of the totality of the circumstances in a case compared with other capital cases. Urbin v. State, 714 So.2d 411 (Fla. 1998). It is not a comparison between the number of aggravators and mitigators but is a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990). The function is not to reweigh the factors but to

accept the jury's recommendation and the judge's weighing. Bates v. State, 750 So.2d 6, 14 (Fla. 1999).

> However, in cases where more than one defendant is involved in the commission of the crime, this Court performs an additional analysis of relative culpability. Underlying our relative culpability analysis is the principle that equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment. *See Ray v. State*, 755 So.2d 604, 611 (Fla.2000). *See also Jennings v. State*, 718 So.2d 144, 153 (Fla. 1998) ("While the death penalty is disproportionate where a less culpable defendant receives death and a more culpable defendant receives life, disparate treatment of codefendants is permissible in situations where a particular defendant is more culpable.") (citation omitted).

Shere v. Moore, 830 So.2d 56, 61-62 (Fla. 2002). See also Mordenti v. State, 630 So.2d 1080 (Fla. 1994) (noting codefendant received immunity for testimony and finding no disparate treatment); Downs v. State, 572 So.2d 895 (Fla. 1990) (finding no disparate treatment where codefendant testified against the defendant under a grant of immunity). Yet, in Garcia v. State, 492 So.2d 360 (Fla. 1986), this Court upheld a prosecutor's discretion in plea bargaining with a less culpable codefendant and indicated such action does not violate proportionality principles. See also Diaz v. State, 513 So.2d 1045 (Fla. 1987); Brown v. State, 473 So.2d 1260 (Fla. 1985). Shere v. Moore, 830 So.2d 56, 63, n.9 (Fla. 2002).

Here, the jury unanimously recommended death. Following that recommendation the trial judge found four aggravators, merged into three: (1) prior violent felony; (2) felony murder (robbery merged with pecuniary gain; and (3)

CCP. It rejected the statutory mental health mitigator of under the influence of extreme mental/emotional disturbance at the time of the crime based on the deliberate actions of Tumblin, the testimony of the state's mental health expert, and the fact Tumblin did not include this mitigator in his sentencing memorandum. Non-statutory mitigation was found and weighed as follows: (1) poor family life (some weight); (2) poor mental state (below average intelligence-behavioral disorders-anti-social/impulsive conduct-brain injury-suicidal behavior) (little weight); (3) ability to overcome his environment (little weight); (4) well-behaved during trial and court proceedings (very little weight). [R:4007-55]. In weighing the aggravation and mitigation, the trial court concluded that "each of the three (3) statutory aggravating circumstances, when considered alone, outweighs the totality of the mitigating circumstances established in this case." (emphasis in original) [R:4055]. Additionally, the court found Tumblin was the instigator of the crimes and the shooter of the victim.

Tumblin points to Woods v. State, 733 So.2d 980, 992 (Fla. 1999); Crook v. State, 813 So.2d 68 (Fla. 2002) (Crooks I); and Crook v. State, 908 So.2d 350. 355 (Fla. 2005)(Crook II) to assert that the mental health mitigation renders his sentence disproportionate just as was found in Woods, Crook I, and Crooks II. Further, he relies on Green v. State, 975 So.2d 1081, 1088 (Fla. 2008) and Tennard v. Dretke, 542 U.S. 274, 288 (2004) for the proposition that mental health

mitigation evidence has been found compelling in other cases. While mental health mitigation has been found in other cases and identified as a basis for a sentence less than death, here the trial court found most of Tumblin's mental health evidence, but gave it little weight since it did not cause him to act as he did, was inconsistent with the facts of the crime, and was contradicted in part by the State's expert. The court's findings are supported by competent, substantial evidence, as noted in the State's answer to Points IV and V and reincorporated here. As such, neither Woods nor Crook further Tumblin's position.

In Woods, the mental health mitigation was found by the trial court and the striking of the CCP aggravator left only the felony murder aggravator based on a contemporaneous felony. While in Crook II, the statutory mental health mitigators were proven along with substantial non-statutory mitigation including organic brain damage. Yet, as noted above, Tumblin's mental mitigation was controverted by the State's expert and the facts of the case as found by the trial court. Also, there was little mitigation and of that only "very little" to "some weight" was assigned. Crook II is distinguishable from Tumblin's case. Tumblin has three aggravators, no statutory mitigators, and little non-statutory mitigation while Crook had three statutory mitigators, two of which were the mental mitigators, and 18 non-statutory mitigators. Tumblin's case is more aggravated and less mitigated that Crook II, and his sentence is proportional.

However, even if non-statutory mental mitigation of brain damage and borderline intellectual functioning should have been found and the CCP aggravator should have been rejected in Tumblin's case, both the prior violent felony (based on prior robbery, battery, and other violent criminal charges) and merged felony murder/pecuniary gain aggravators remain. In the court's analysis, the facts showed that the mental issues did not impact the commission of the crime, thus, even if found, little if any weight would have been assigned. Further, in its weighing, the court concluded that "Not only does this Court find that the totality of the aggravating circumstances in this case far outweigh the totality of the mitigating circumstances; but, the Court expressly finds that each of the three (3) statutory aggravating circumstances, when considered alone, outweighs the totality of the mitigating circumstances established in this case." (R28 4055). Consequently, it is clear that the court would have imposed the death sentence even absent the CCP aggravator. This Court has affirmed death sentences under similar circumstances. See Hunter v. State, 660 So.2d 244 (Fla. 1995) (finding sentence proportional based on two aggravators - prior violent felony conviction (12 prior violent felonies including contemporaneous convictions) and felony murder/robbery along with no statutory mitigators and 10 non-statutory mitigators).

Tumblin also points to Terry v. State, 668 So.2d 954, 965 (Fla. 1996), but it does not further his claim. In Terry, this Court focused on the fact that the impetus for the murder was unclear, thus, causing the Court to discount this when considering the totality of the facts. However, in Tumblin's case, there is direct testimony that it was his intent to kill his robbery victim and that he did this by a single gunshot to the head at nearly contact distance, after the victim had surrendered his cash. Tumblin went so far as to ask his victim, with the gun to his head, what he "thought about this." The facts of this murder are clear and CCP was found. On this fact alone, Terry is distinguishable.

Likewise, Johnson v. State, 720 So2d 232 (Fla, 1998) is of no assistance to Tumblin. There, this Court discounted the prior violent felony aggravator based on the underlying facts of those convictions including that one was based on a brotherly dispute, and the others were based on contemporaneous convictions for actions taken by Mayes against the victim. The facts of Tumblin are more egregious and are all committed in a cold, calculated, and premeditated manner, during the course of a robbery pre-conceived by Tumblin for pecuniary gain. Tumblin's prior violent felonies were committed by him personally. There is strong aggravation here with little mitigation making this sentence proportional, unlike what was determined in Johnson.

Tumblin's reliance upon Thompson v. State, 647 So.2d 824 (Fla. 1994) is also misplaced. In Thompson, the proportionality analysis was conducted upon the totality of the circumstances after three of the four aggravators were stricken, leaving just the felony murder aggravator and eight non-statutory mitigators. Here, however, Tumblin, as discussed in previously, has three valid aggravators, including the very weighty aggravators of CCP and prior violent felony. See Porter v. State 788 So.2d 917, 925 (Fla. 2001) (announcing that the prior violent felony and cold, calculated, and premeditated aggravators are weighty). Further, not much weight was given the non-statutory mitigation offered by Tumblin. As such, Tumblin's sentence is dissimilar to Thompson's, in that there is significant aggravation and one fact of which has been found by the trial court to outweigh all of Tumblin's mitigation. This Court should find the sentence proportional.

In his final challenge to his sentence Tumblin points to Mayes's life sentence and suggests that such makes their treatment disparate as Mayes is equally culpable in the murder. The facts do not support Tumblin's claim. It was Tumblin who conceived of the plan and begged Mayes for assistance as a look-out. Tumblin procured a gun and ammunition with which he announced he would kill all during the robbery. He drove the reluctant Mayes to the victim's business where it was Tumblin who confronted the victim, took his cash, and because of a defect in the gun, held the cylinder closed as he shot Jimmy Johns at near point

blank range. Following the shooting, Mayes ran away, but Tumblin remained and calmly walked to the office and rifled through the desk and took additional property (mail), the evidence of which he later had burned by his female friends. As noted above, this Court has indicated that a plea bargain with a less culpable co-defendant does not violate proportionality principles. See also, Garcia, 492 So.2d at 360. See also, Shere, 830 So.2d at 63, n.9; Diaz, 513 So.2d at 1045; Brown, 473 So.2d at 1260.

Tumblin's case is proportional and the State relies upon the following faces for support. See, Diaz v. State, 860 So.2d 960, 971 (Fla. 2003) (finding sentence proportionate where two aggravators (CCP and previous violent felony) were balanced against four statutory mitigators (no significant prior criminal history, extreme mental or emotional disturbance, impaired capacity, and age), and remorse and history of family violence); Miller v. State, 770 So.2d 1144 (Fla. 2000) (affirming sentence with aggravation of felony murder/robbery-merged pecuniary gain and prior violent felony balanced against 10 non-statutory mitigator (victim did not suffer, alternative sentence was life without parole, Miller turned himself in, remorse/apologized, cooperated with police, suffered emotional distress over death of sister and close cousin, had frontal lobe defect that affected inhibition and ability to control impulses, would do well in prison, loved by family, performed good deeds, and adjusted well to prison); Mendoza v. State, 700 So.2d 670, 679

(Fla. 1997) (concluding death sentence was proportionate for 25 year old defendant who killed robbery victim with a single gunshot and had aggravation of prior violent felony and pecuniary gain outweighing mitigation of defendant's alleged history of drug use and mental health problems); Pope v. State, 679 So.2d 710, 716 (Fla. 1996) (finding sentence proportional for robbery/murder robbery of girlfriend where two aggravators (pecuniary gain and prior violent felony) were balanced against two statutory mitigator (extreme mental/emotional disturbance and impaired capacity to appreciate criminality of conduct) and several non-statutory mitigator); Heath v. State, 648 So.2d 660 (Fla.1994) (affirming death sentence based on two aggravators (prior violent felony and felony murder/robbery, despite existence of statutory mitigator of extreme mental/emotional disturbance). Tumblin's death sentence is proportionate and should be affirmed.

POINT VII

THERE IS NO ERROR IN ACCEPTING DEFENDANT'S DECISION TO PRECLUDE HIS MOTHER AND SISTER FROM TESTIFYING DURING THE PENALTY PHASE (restated)

Here, Tumblin maintains it was trial court error to allow him to preclude his mother and sister from testifying during the penalty phase. He asserts that such a decision rests with counsel and that even if he could waive the testimony of these witnesses there was an insufficient colloquy conducted under Boyd v. State, 910 So.2d 167 (Fla. 2005) to ensure that the decision was knowing and voluntary.

To the extent Tumblin is asserting the court erred in its acknowledgment of his decision not to call certain witnesses for mitigation, the standard of review is abuse of discretion. Boyd, 910 So.2d at 189 (reviewing "decisions of the trial court in its handling of mitigation issues for abuse of discretion"); Spann v. State, 857 So.2d 845, 854 (Fla. 2003) (same). However, to the extent Tumblin is asking this Court to reassess decisions permitting clients to direct what mitigation/witnesses should be presented, the question is one of law. Questions of law are reviewed *de novo*. Execu-Tech Bus. Sys. v. New Oji Paper Co., 752 So.2d 582 (Fla. 2000).

This issue was not preserved for appeal. The defense neither made an objection below nor asked the trial court to decide whether Tumblin could be the "captain of his ship" and select defense witnesses to be offered. Counsel offered no argument on what should be included in the colloquy nor whether specific

findings on the voluntary and knowing nature of the waiver were required. In fact, counsel was satisfied with the questions asked by the trial court and was merely interested in putting on the record that Tumblin was waiving the presentation of his mother and sister during the penalty phase. This Court should reject the matter as unpreserved. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (holding in order for issue to be cognizable on appeal it must be specific contention asserted below as ground for objection); Archer v. State, 613 So.2d 446 (Fla. 1993) (same). However, if the merits are reached the following is offered.

Boyd and Mora v. State, 814 So.2d 322 (Fla. 2002) govern the instant matter. This Court should reject Tumblin's suggestions that as a represented defendant he was not permitted to decide which witnesses to call or, in the alternative, if he could decide the matter then a more thorough colloquy should have been conducted. In Mora, 814 So.2d at 332, this Court reasoned that a full hearing pursuant to Koon v. Dugger, 619 So.2d 246 (Fla. 1993) only was necessary when a defendant, against the advice of counsel, desired to waive the entire mitigation presentation. Similarly, this Court rejected the argument that selected portions of a mitigation case could not be waived absent a Koon hearing or that a counseled defendant could not direct his attorney to exclude certain mitigation witnesses. In Boyd, 910 So.2d at 189-90, this Court announced:

> ... Boyd argues that the defendant's waiver of mitigation was invalid because it is the attorney's obligation to decide what evidence is to be

presented in the penalty phase of trial. ... Boyd attempts to distinguish a long line of cases holding that a *pro se* defendant may waive the presentation of mitigating evidence because Boyd was represented by counsel and his counsel should have controlled the presentation of mitigating evidence. This argument is without merit.

As stated above, we have long recognized that a competent defendant may waive the right to present all mitigating evidence. *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). This right is not altered when the defendant has counsel. Again, Boyd did not waive his right to present mitigating evidence. Instead, he limited the presentation of such evidence to his testimony and that of his pastor. Boyd argues that the trial court erred in failing to comply with *Koon* (discussed above under Issue 8) and *Mora v. State*, 814 So.2d 322 (Fla. 2002), in accepting Boyd's presentation of mitigating evidence.

In *Mora*, the defendant objected to penalty phase counsel contacting his relatives that lived overseas as part of counsel's investigation of mitigating evidence. The trial court relied on *Koon* in refusing to allow the defendant to waive any mitigating evidence before counsel had investigated all such evidence. *Id.* at 331. The defendant refused to allow counsel to contact his family and proceeded *pro se* during the penalty phase, where he presented no mitigating evidence. *Id.* at 332. We reversed the death sentence because the trial court misapplied *Koon* in holding that it barred a defendant from waiving mitigation before counsel first investigates all possible mitigation. *Id.* Instead, *Koon* simply developed a procedure so that the record clearly reflects "a defendant's knowing waiver of his or her right to present mitigating evidence." *Id.* at 332-33. The defendant received a new penalty phase, because the record reflected that he had only wished to waive a portion of the mitigating evidence and had done so knowingly, intelligently, and voluntarily.

Thus, **a defendant possesses great control over the objectives and content of his mitigation**. *See Farr v. State*, 656 So.2d 448, 449 (Fla. 1995) (no error when defendant takes stand to refute and disclaim any possible mitigation because defendant is entitled to control overall objectives of counsel's argument). **Whether a defendant is represented by counsel or is proceeding *pro se*, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase**. *See Grim v. State*, 841 So.2d 455, 461 (Fla.), *cert. denied*, 540 U.S. 892, 124 S.Ct. 230, 157 L.Ed.2d 166 (2003).

> The record provides extensive support to substantiate that Boyd understood his rights and understood the consequences of his choice to present only the testimony of his pastor and himself. Boyd was exercising his right to be the "captain of the ship" in determining what would be presented during the penalty phase. *See Nixon v. Singletary*, 758 So.2d 618, 625 (Fla. 2000). Therefore, we hold that the trial court correctly allowed Boyd to make a knowing and voluntary decision as to what testimony was to be presented in mitigation.
> ...
> **Therefore, a lawyer is fully within the confines of his professional duties in honoring a knowing, intelligent, and voluntary waiver to present mitigation during the penalty phase**.

Boyd, 910 So.2d at 189-90 (Fla. 2005) (emphasis supplied).

Tumblin has not pointed to a case which precludes the defendant from having the final say on these issues; he only cites cases which have recognized that defense counsel is the party who usually makes the decision on which witnesses/evidence to present. Further, he has not shown where this Court's analysis in Boyd was erroneous. In fact, Tumblin's citation of the ABA Standards for Criminal Justice 4-5.2 commentary at 201-02 (3d ed. 1993) proves the point that counsel is to consult with his client, which implies that the defendant has the authority to override his counsel's decisions regarding witnesses and evidence. Nothing in the cases cited by Tumblin undermines the statement in Nixon v. Singletary, 758 So.2d 618, 625 (Fla.), cert. denied, 531 U.S. 980 (2000), reversed on other grounds, Florida v. Nixon, 540 U.S. 1217 (2004) that "the defendant, not the attorney, is the captain of the ship." See also Grim v. State, 841 So.2d 455, 461 (Fla. 2003).

Moreover, a close reading of Boyd reveals that a colloquy by the trial court is not necessary before a defendant waives mitigation evidence so long as counsel does not suggest that the waiver is unknowing or involuntary. A colloquy may become necessary only where defense counsel informs the court of a disagreement with his client's decision and has a suspicion that the defendant is not making a proper waiver. This is based on the recognition that the defendant is captain of his ship and may waive the presentation of evidence. Boyd, 910 So.2d at 189-90. It is not the court's place to interfere and second-guess each evidentiary decision made by the defendant and his counsel. To rule otherwise would be invading impermissibly the attorney-client relationship. Instead, a colloquy may be recommended to ensure a defendant's decision is knowing and voluntary only when the attorney-client relationship is fractured and counsel seeks a court's determination that his client understands his decision. Here, Tumblin was neither waiving mitigation in its entirety nor was defense counsel at complete odds with his client. Instead, counsel made the strategic decision to follow Tumblin's wishes and not present such testimony. [T:5305-08]. Clearly, counsel had discussed the matter with Tumblin and was not dubious that his waiver was knowing and intelligent. Rather, counsel, "pursuant to [Tumblin's] wishes ... elected" not to present family witnesses. [T:5305-06] Hence, counsel merely wanted such waiver put on the record, which was done to counsel's satisfaction. [T:5308].

Even if a colloquy and finding of voluntariness was required under Boyd, the court's discussion with Tumblin was sufficient to establish that the waiver was knowing and voluntary. Not only was it clear that counsel and Tumblin had discussed the matter, but the trial court was informed that Tumblin knew his family members were available to testify and that counsel wished to call them. Further, the court was informed by Tumblin that it was his personal decision not to call his mother and sister. This shows Tumblin was aware of his options but chose to exclude these witnesses after discussions with counsel. Tumblin's appellate suggestion that his mental condition precluded a knowing and voluntary waiver is not well taken as the mental health issues were rejected in part by the court, there was no suggestion that he was incompetent during the trial, and there was a finding that the crime was committed in a cold, calculated, and premeditated manner which further supports the rejection of mental health issues. The dictates of Boyd and Mora have been met and this Court should affirm.

POINT VIII

THE TRIAL COURT PROPERLY CONSIDERED THE HEARSAY EVIDENCE OFFERED BY THE DEFENSE IN MITIGATION (restated)

Tumblin concedes that the trial court admitted and announced it would consider the hearsay evidence offered through the defense mental health expert, Dr. Riordan, but argues that the evidence was not evaluated properly. The pith of Tumblin's complaint is that he disagrees with the court's credibility findings and related weighing of the evidence.

This Court in Campbell v. State, 571 So.2d 415 (Fla. 1990), established relevant standards of review for mitigating circumstances: 1) whether a circumstance is truly mitigating in nature is a question of law and subject to *de novo* review; 2) whether a mitigator has been established is a question of fact and subject to the competent, substantial evidence test; and 3) the weight assigned to a mitigator is within the judge's discretion. See Kearse v. State, 770 So.2d 1119, 1134 (Fla. 2000); Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000) (receding in part from Campbell and holding an established mitigator may be assigned "little or no" weight); Mansfield v. State, 758 So.2d 636 (Fla. 2000); Alston v. State, 723 So.2d 148, 162 (Fla. 1998); Bonifay v. State, 680 So.2d 413, 416 (Fla. 1996); Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990)(finding judge may reject claimed mitigator if record contains competent substantial evidence to support decision).

A weight assignment is reviewed under the abuse of discretion standard. Cole v. State, 701 So.2d 845, 852 (Fla. 1997); Globe v. State, 877 So. 2d 663, 676 (Fla. 2004); Francis v. State, 808 So.2d 110, 141(Fla. 2001) (noting that the weight to be assigned to a mitigating factor lies within the sound discretion of the trial court); Mansfield v. State, 758 So.2d 636 (Fla. 2000); Campbell, 571 So.2d at 420 (noting the relevant weight assigned a mitigator is within the sentencing court's province). Appellate courts give substantial deference to the court's ruling, finding abuse only if it is unreasonable. Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980); Trease v. State, 768 So.2d 1050, 1053, n. 2 (Fla. 2000).

Credibility, resolution of controverted facts, and the weight to be assigned to the trial evidence is within the province of the trier of fact. See Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986); Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981). The trial judge, sitting as the fact finder, has the superior vantage point to see and hear the witnesses and judge their credibility. See, Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998) Cf. Martinez v. State, 761 So.2d 1074, 1080 (Fla. 2000) (recognizing trier of fact has responsibility of determining weight to be given evidence). As stated in Foster v. State, 679 So.2d 747, 755 (Fla. 1996): "[E]xpert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. As long

as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." (citations omitted, emphasis supplied). See Windom v. State, 886 So.2d 915 (Fla.2004) (holding appellate court will not substitute its judgment for that of trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence as long as the trial court's findings are supported by competent substantial evidence).

As a preliminary statement to its review of the offered non-statutory mitigation, the court noted that the defense presented Dr. Riordan as their sole witness. The court noted that the doctor was a "conduit of hearsay statements" made by Tumblin, his mother, and sister; as well as information from records not offered into evidence. [T:4033-34] While the court noted that it was impossible to assess the credibility of the information related to Dr. Riordan which he repeated in court, it would "independently determine the existence of such mitigation under the 'reasonably convinced' standard" for establishing mitigation. [T:4034-35]. Where applicable, the court discussed the accounts of Tumblin's mother and sister along with other hearsay accounts. Tumblin has not identified the mitigating factors rejected based on the use of hearsay testimony;[6] the State, however, has

[6]To the extent Tumblin fails to plead this point fully by identifying the error and any resulting harm, this Court should find the matter insufficiently pled. Failure to fully address an argument necessitates that the matter be deemed waived.

identified those sections where the Court discussed the hearsay evidence. A review of the sentencing order indicates that the Court looked to corroborating factors in determining if the mitigating factors were proven and gave reasons other than hearsay to reject those factors it found not proven. Contrary to Tumblin's suggestion, the court properly evaluated the evidence and gave a factual basis for rejecting the evidence or for assigning a lesser weight.

For example, in discussing the mitigator of Poor Family Life the court concluded in part:

> As previously indicated, all non-statutory mitigation was proven, if at all, through the testimony of the Defendant's forensic expert, Dr. Michael C. Riordan, Ph.D. ... **The Court independently concludes that the accounts of Alwin Tumblin and his mother, Brenda Tumblin, and sister, Keisha Tumblin, of their family life should be considered reliable as they were all consistent when relayed to both Dr. Riordan as well as the State's forensic expert, Dr. Gregory Landrum, Ph.D.** Further, the Court concludes that the Defendant was raised in an environment where he experienced domestic violence between his parents; alcohol and marijuana abuse by his father; that he had no decent father figure; and that his father provided no emotional support or guidance for him after his parents separated when he was five years old.
>
> The evidence also supports ...
>
> **The Court is not reasonably convinced that the Defendant suffered physical abuse from his mother or his father, given the conflicting accounts that he relayed to Dr. Riordan and Dr. Landrum**. In any event, those alleged incidents of physical abuse by either parent were **extremely limited**. Likewise, the one incident of

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Duest, 555 So.2d at 852(opining "purpose of an appellate brief is to present arguments in support of the points on appeal" - notation to issues without elucidation is insufficient and issue will be deemed waived); Cooper, 856 So.2d at 977 n.7; Roberts, 568 So.2d 1255.

> sibling abuse that the Defendant relayed to Dr. Riordan about his brother lighting him on fire and laughing at him was a single isolated event. Also, **the Defendant did not date the incident other than to indicate that it was during his teenage years; nor did he describe the extent of any injuries received**.
>
> **Notwithstanding, the Court is reasonably convinced that the Defendant grew up in a dysfunctional family** characterized by neglect and abuse; and finds this circumstance mitigating in nature and mitigating under the facts of this case. Accordingly, the Court gives this mitigating circumstance some weight.

[R:4039-40] (emphasis supplied).

Similarly, in discussing mitigation of Ability to Overcome His Environment, the Court addressed the hearsay elements of the evidence stating:

> Once again, the only evidence tending to support this non-statutory mitigating factor came through the hearsay testimony of Dr. Riordan. This testimony was based upon statements made to him by either the Defendant or his mother or his sister or a combination of them. **Regardless of the hearsay character of this evidence, it would be expected that the Defendant is a loved member of his family; or at least some of his family members**.
>
> ...
>
> As for non-family relationships, Dr. Riordan testified that the Defendant told him that he helped others .... **These alleged facts are unquantified, undated, and entirely unsubstantiated by any corroborating evidence**.
>
> Similarly, Dr. Riordan's testimony that the Defendant provided emotional and financial support and guidance to his girlfriend's daughters and supported them in their school activities is entirely unsubstantiated. **Dr. Riordan did not meet with or talk to the Defendant's girlfriend, Theresa York, nor was he able to even testify to the ages of Theresa York's children. Dr. Riordan could only testify that he believed that the time period when he would have provided all of this support and guidance was in the "few months" immediately prior to the murder of Jimmy Johns and the Defendant's arrest**.

Additionally, Dr, Riordan testified that the Defendant was brought to church services by a neighbor, which included a bible study and work on a haunted house for Halloween. **None of these were dated, quantified, verified or substantiated in any way other than that the Defendant related these facts to Dr. Riordan**. Dr. Riordan also referred to the fact that the Defendant was involved in kickball, baseball and football.... **Without a single witness testifying; or any elaboration on the duration or extent of these activities; the Court is not reasonably convinced that these factors have been established** in support of this non-statutory mitigating circumstance.

Finally, Dr. Riordan testified that the Defendant maintains contact and gives support to his daughters. ... **Dr. Riordan acknowledged that he [Tumblin] was unable to support his children while he was in prison or in ... Jail. We know that the Defendant has been in custody since May 24, 2004; and that he was living with his girlfriend and her children and his father and his girlfriend for at least several months before that date. There is no evidence that the Defendant ever provided any financial support for his own children**.

Nevertheless, Dr. Riordan tries to establish on the Defendant's behalf that he did have visitation with each of his daughters while incarcerated. ... **He also states that his understanding is that on at least one (1) occasion an adult relative brought the younger daughter to the St. Lucie County Jail to visit the Defendant through the use of video cameras. It is truly sad that anyone would suggest that this form of parental visitation and support should be considered mitigating**. ... **There is no evidence whatsoever of the extent to which the Defendant exercised tights of visitation or owned up to his moral and legal duty to support those children when he was not incarcerated**. The Court is not reasonably convinced that these suggested mitigating facts have been established.

The Court is reasonably convinced that the Defendant loves his mother and sister; and his children; and that they all love him in return. **Solely on the basis of those facts, the Court finds that this non-statutory mitigating circumstance is mitigating** in nature and that it is mitigating under the facts of this case. The Court gives this mitigating factor little weight.

[R:4045-48](emphasis supplied)

In evaluating the mitigator that Execution Would Have A Great Negative Effect Upon [Tumblin's Family], the court reasoned:

> Once again, the only evidence of a brother with a mental illness comes from Dr. Riordan. **That brother was not identified by name, age or nature of mental illness. From there, Dr. Riordan states that "typically individuals who have a mental illness are considered to be more vulnerable to stress so they're likely to take it harder, have more difficulty with an execution of someone from the — from their own nuclear family."** ... Additionally, Dr. Riordan made reference to the fact that Mr. Tumblin's eight-year old daughter is aware of the verdict in the case; and "... is expected to have great difficulty in the event that her father's executed."...
>
> Whether the Defendant has a brother who suffers from mental illness, and whether he would suffer any greater consequences that any other family member has not been established by any competent evidence. **As for the Defendant's children, it should go without saying that it will be difficult to gauge just how much of a relationship the Defendant had with his children or any other member of his family.**
>
> This Court is not reasonably convinced that the anticipated difficulty that the Defendant's children may have if he is executed; or the difficulty that might be experienced by an unknown, unidentified brother can be considered mitigating in nature. ... the Court does not consider these factors, in fairness or in the totality of the Defendant's life and character as extenuating or reducing the degree of Alwin Tumblin's culpability for the murder of Jimmy Johns....

[R:4051-52](emphasis supplied).

The last area where hearsay evidence was discussed involves the mitigator of Defendant Was Experiencing Considerable Stress At The Time of the Offenses. There, the court reasoned:

> There is absolutely no evidence that the Defendant was under any stress; considerable or otherwise, at the time of the offense. Nevertheless, Dr. Riordan testified that he was under considerable stress and based that upon statements allegedly made by the Defendant to him concerning conflicts he was having with his father and his father's girlfriend. He also testified that the **Defendant was applying for social security disability benefits; which is a long process that "...<u>can be very frustrating ans stressful</u> for an individual who is disabled trying to -or hoping to get some benefits**." ... Other than Dr. Riordan's testimony, **there is no evidence to corroborate any of these hearsay statements. Further, <u>this Court finds that these are not unlike the stressors of everyday life of an average person</u>**. Once again, **these are factors that, in fairness, or in the totality of the Defendant's life or character, cannot be considered as extenuating or reducing Alwin Tumblin's degree of culpability for the murders of Jimmy Johns**. Further, **<u>even if these facts could be considered mitigating in nature, they would not be considered mitigating under the facts of this case</u>**. Accordingly, the Court is not reasonably convinced that this suggested mitigating circumstance has been established in this case. There is nothing about the robbery and murder of Jimmy Johns on May 24, 2004 that indicates that it was the product of any form or degree of stress from any source.

[R:4052-53](emphasis supplied).

From the foregoing, it is obvious that the court evaluated the evidence based on the totality of the presentation. The court did not reject any factor merely because it was based on hearsay testimony. Instead, the court looked to the qualitative nature of the evidence such as conflicting accounts given or the lack of supporting factors such as the dates of events, the length of time spent with his children, or the names of those involved. Without question, the court merely assessed the weight/value of the hearsay evidence, not its admissibility, since he

obviously found it admissible as Dr. Riordan testified about what he was told and gleaned from the records provided. The assessment made by the court was well within the province of the finder of fact. See Melendez, 498 So.2d at 1261 (recognizing credibility, resolution of controverted facts and weight assigned to evidence is within the province of the trier of fact). The trial court followed the dictates of Trease, 768 So.2d at 1055 and Campbell, 571 So.2d at 420. This Court should reject this claim and affirm Tumblin's death sentence.

POINT IX

TUMBLIN'S OBJECTION TO THE VICTIM IMPACT STATEMENT WAS OVERRULED PROPERLY (restated)

Tumblin maintains that the trial court erred in overruling his objection to the victim impact statement that Mrs. Johns suffered two strokes following the murder of her husband and now is cared for by her daughter. Contrary to Tumblin's suggestion, the court did not abuse its discretion in ruling on this evidentiary matter as it showed the impact murder had on the lives of the victim's surviving family. However, even if the admission was in error, the trial court properly instructed the jury that the victim impact evidence could not be used in recommending a sentence and then specifically stated that this evidence did not enter into its sentencing decision. Having had no impact on the sentence

recommended or imposed, the disclosure of Mrs. Johns' stroke was harmless beyond a reasonable doubt. This Court should affirm.

"Victim impact evidence is designed to show " each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." Payne v. Tennessee, 501 U.S. 808, 823, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); see also § 921.141(7), Fla. Stat. (2003). The admission of victim impact testimony is reviewed for abuse of discretion. Schoenwetter v. State, 931 So.2d 857, 869 (Fla. 2006) (citing Zack v. State, 911 So.2d 1190 (Fla. 2005))." Deparvine v. State, 2008 WL 4380919, 20 (Fla. 2008).

Here, the court considered the victim impact statements offered and the defense objection to the revelation that Mrs. Johns had had two strokes as a result of her husband's murder, and now she was being cared for by her daughter. [T:5204-06; 5293-94] The court concluded that the connection drawn between the stroke and the murder, i.e., that the stroke was caused by the stress of her husband's murder, was improper and that it had to be stricken. However, it found admissible the fact that Mrs. Johns had had strokes and because of the loss of her husband, she had to be cared for by her daughters. The Court noted that but for the murder Johns would have been there to care for his wife. Given this view of the statement, the trial court did not abuse its discretion in permitting the statements to

be read to the jury.

In Stephens v. State, 975 So.2d 405, 416 (Fla. 2007), this Court reiterated its holding in Bonifay v. State, 680 So.2d 413, 419-20 (Fla. 1996) stating "that victim impact comments were proper because the boundaries of relevance under [section 921.141(7)] include evidence concerning the impact to family members. Family **members are unique to each other by reason of the relationship and the role each has in the family**. A loss to the family is a loss to both the community of the family and to the larger community outside the family." (emphasis supplied) The fact that the victim is not longer there to care for his family falls under the parameters of Payne v. Tennessee, 501 U.S. 808, 827 (1991 and §921.141(7), Fla. Stat. This Court has found admissible other victim impact statements which speak to the fact that the victim is no longer there to care for his family. See Franklin v. State, 965 So.2d 79, 97-98 (Fla. 2007) (finding admissible statement that death of victim left sister without a home or income); Huggins v. State, 889 So.2d 743, 765 (Fla. 2004) (finding victim impact statements of victim's husband, mother, and best friend **regarding their relationship with victim** and loss they suffered due to her murder were appropriate), cert. denied, 545 U.S. 1107 (2005).

Moreover, even if the evidence should not have been offered, there is no impact on the sentence. The jury was given the standard instruction on victim impact evidence and informed that it should be used to assess the victim's

uniqueness and his resulting loss, but it was not to be weighed or considered as aggravation or mitigation. Instead, the sentence had to be based solely upon the aggravating and mitigating factors proven by the parties and the balancing of those. [T:5520-21]. Jurors are presumed to follow the court's instructions. U.S. v. Olano, 507 U.S. 725, 740 (1993) (finding presumption jurors follow instructions); Burnette v. State, 157 So.2d 65, 70 (Fla. 1963)(same). Similarly, it is presumed the court follows the instructions it gave the jury. See Groover v. State,640 So.2d 1077, 1078 (Fla. 1994); Johnson v. Dugger, 520 So.2d 565, 566 (Fla. 1988). The court followed its instruction on victim impact evidence in this case stating: "During the Penalty Phase, Victim Impact statements were presented; but the Court has not considered them in arriving at the sentence imposed." [T:4009](emphasis in the original). Given this, Tumblin's sentence should be affirmed.

POINT X

THE JURY WAS INSTRUCTED PROPERLY REGARDING THE PRIOR VIOLENT FELONY AGGRAVATOR (restated)

Previously, Tumblin was convicted of: (1) throwing or shooting a deadly missile into a dwelling, building, or conveyance in violation of section 790.19, Fla. Stat.; (2) battery on a detention staff; (3) attempted robbery; (4) battery on a law enforcement officer; and (5) aggravated assault. It is his claim that the court erred in its instruction and submission of the prior violent felony aggravator ("PVF") to the jury. Initially, he asserts that the PVF aggravator requires proof that the underlying crime is life-threatening *per se*, and that: (a) battery on a law enforcement officer; (b) aggravated assault; © throwing or shooting a deafly missile into a dwelling, building, or conveyance were not shown to be life-threatening crimes in his case. Likewise he claims that it was error to instruct the jury that: (1) attempted robbery; (2) shooting a deadly missile; (3) aggravated assault; (4) battery on a law enforcement officer; and (5) battery on a detention or commitment facility staff are felonies involving the use of violence to another person. In addition to not being preserved for appeal, this issue is without merit.

Tumblin did not object to the instruction given in this case. In fact, he conceded that the PVF aggravator was proven. [T:5503]. To preserve for review a challenge to a jury instruction, an objection must have been raised below or an

alternate instruction offered. See San Martin v. State, 705 So.2d 1337, 1350 (Fla. 1997); Hodges v. State, 619 So.2d 272 (Fla. 1993). If an issue is not preserved, fundamental error must be shown. Steinhorst.

In Bevel v. State, 983 So.2d 505, 517 (Fla. 2008), this Court announced:

> "In reviewing an aggravating factor challenged on appeal, this Court's task '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.'" *Douglas v. State*, 878 So.2d 1246, 1260-61 (Fla.2004) (quoting *Willacy v. State*, 696 So.2d 693, 695 (Fla. 1997)). Section 921.141(5)(b), Florida Statutes (2005), provides the following as a statutory aggravating circumstance: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

See also Boyd, 910 So.2d at 191 (reviewing whether judge "applied the right rule of law for each aggravating circumstance and, if so, whether competent, substantial evidence supports its finding); Huggins v. State, 889 So.2d 743 (Fla. 2004); Alston v. State, 723 So. 2d 148 (Fla. 1998).

This Court in Lewis v. State, 398 So.2d 432, 438 (Fla. 1981) discussed the meaning of Fla. Stat. sec. 921.141(5)(b) saying: "Only previous conviction of 'another capital felony or of a felony involving the use or threat of violence' will satisfy section 921.141(5)(b). This subsection refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." As such, it is the crime which must be life threatening, not necessarily the behavior of the defendant; his behavior must have some level of violence or threat, but need not be

life threatening. Where the State fails to offer the facts supporting the prior criminal conviction, the reviewing court will look at the elements of the criminal statute and/or charging document. See Hess v. State, 794 So.2d 1249, 1263-64 (Fla. 2001). "[W]hether a previous conviction of burglary constitutes a felony involving violence ... depends on the facts of the previous crime. Those facts may be established by documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both." Johnson v. State, 465 So.2d 499, 505 (Fla. 1985), overruled on other grounds, In re Instructions in Criminal Cases, 652 So.2d 814, 815 (Fla. 1995). See Gore v. State, 706 So.2d 1328 (Fla. 1998) (finding armed trespass sufficient to support prior violent felony); Rhodes v. State, 547 So.2d 1201 (Fla. 1989) (finding facts of prior conviction may be considered to prove aggravator). Likewise, if the substantive felony involves violence *per se*, then an attempt to commit that felony would equally involve the threat of violence. See, Johnson v. State, 442 So.2d 193, 197 (Fla. 1983) (holding "[b]oth robbery and murder involve violence per se; any attempt to commit these crimes must inherently involve the threat of violence.").

In Williams v. State, 967 So.2d 735, 762 (Fla. 2007) this Court upheld this aggravator for an indecent assault conviction as it was a life threatening crime under the case law and the defendant used threats and minimal force on the victim, laying her on the bed, although the force itself was not life threatening. The

requirements for this aggravator were also satisfied when the defendant burglarized an apartment with the intent to rape its occupant and his contact with the victim consisted of clamping his hand over her mouth, verbally threatening her, and then pushing her to the floor on his way out. Rose v. State, 787 So.2d 786, 800 (Fla. 2001). Tumblin's reliance on Mahn v. State, 714 So.2d 391 (Fla. 1998) is misplaced since Tumblin's prior convictions consisted of acts committed by Tumblin himself in contrast to the robbery conviction Mann received for his part as the get-away driver for a robbery committed by a co-defendant. Mahn, 714 So.2d at 394, 399 (noting robbery conviction was based on Mahn being the "driver of the vehicle used after Mahn's friend snatched a woman's purse" and recently, "purse snatching [has been determine] not [to be] a crime of violence sufficient to constitute robbery.").

Here, Tumblin concedes that the attempted robbery conviction was submitted to the jury properly. However, he contends that the instruction for the PVF aggravator was erroneous and that the other convictions should not have been found to involve the use of violence as they were not *per se* "life-threatening." A review of the convictions show they are inherently violent and where additional testimony was offered, the crimes involved the actual use of violence.

The standard instruction for this aggravator[7] was given the jury without objection.[8] [T:5518]. A review of the elements of each conviction and/or the facts adduced at trial support the instruction given and the finding of the PVF aggravator. The crime of shooting deadly missile requires proof in part that" "Whoever ... shoots at, within, or into, or throws a missile ... which would produce death or great bodily harm, at, within, or in any public or private ... vehicle of any kind which is being used or occupied by any person ... shall be guilty of a felony of the second degree...." The very terms of this crime involves the use of deadly force. The crime involves shooting/throwing a missile which would produce death or great bodily harm. Such an act is violent. The conviction was established by the entry of the certified judgment and sentence. [T:5264].

Tumblin was also convicted of battery on a detention commitment staff. The elements of this crime entail a battery on a detention officer. Under Fla. Stat.

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[7]The jury was instructed:

> Number one, the Defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. The crimes of attempted robbery, shooting a deadly missile, aggravated assault, battery on a law enforcement officer, and battery on a detention or commitment staff are felonies involving the use or threat of violence to another person.

[T:5518]

[8]The record indicates that the State and Defense discussed the penalty phase instructions outside the presence of the court and submitted an agreed upon set for the trial court to review. [T:5418-22; 5427-29]. Earlier, there had been record discussions regarding the victim impact statement and the propriety of instructing on both the felony murder and pecuniary gain aggravators. [T:5198-5214], but that seems to be the extent of the discussions on the penalty phase instructions.

§784.03, a battery is defined as an actual and intentional touching or striking another or intentionally causing great bodily harm to another. Again, the elements of the crime require some violence whether it be some sort of touching or striking of a detention officer. Tumblin pled guilty to this crime in 1996 [T:5265].

With respect to the conviction for aggravated assault, the elements of the crime are: (1) an intentional unlawful threat by word or act; (2) coupled with the apparent ability to do so; and (3) doing some act which created a well-founded fear in the other person. Aggravated assault requires the use of a deadly weapon irrespective of any intent to kill. Again, the terms of the statute provide for the use of violence. It is not open for debate that the use of a deadly weapon when confronting another person meets the definition of a violent felony. That act involves putting someone in fear of violence. This satisfies the definition of a PVF aggravator as well as the dictates of Hess,794 So.2d at 1263-64. See, San Martin v. State, 2008 WL 3926580, 17, n.12 (Fla. 2008) (noting prior convictions, including aggravated assault would support a PVF aggravator); Gonzalez v. State, 786 So.2d 559, 563 (Fla. 2001) (noting aggravated assault was used to find PVF aggravator).

Additionally, Tumblin was convicted of two counts of battery on a law enforcement officer. Not only were the certified copies of the convictions introduced, but the officers testified. Wayne Camp spoke of his encounter with

Tumblin in the jail and the fight which ensued when Tumblin became agitated and had to be removed forcibly form his cell. During the struggle, Tumblin struck Camp with such force that the officer's rib was broken. [T:5279-81]. Daniel O'Brien spoke of the same incident and how Tumblin hit him about his face as the deputies were trying to remove him from the jail cell. [T:5282-84]. There can be no debate that these were violent crimes which establish the prior violent felony aggravator. Cf. Remeta v. State, 710 So.2d 543, 548 (Fla. 1998) (noting that an aggravated battery against a law enforcement officer and two counts of aggravated battery establish the PVF aggravator). Consequently, the instruction as read was proper since violence or the threat of violence of those crimes was demonstrated by either the statute itself or the testimony. The sentence should be affirmed.

Furthermore, the facts establish that Tumblin used violence in committing an attempted robbery. During that crime, for which he entered a plea, Tumblin and another man followed Franklin Sloan ("Sloan") home and, as Sloan exited his truck, they approached and tried to take the truck. Tumblin demanded the keys and later money before he pulled a gun on Sloan when he refused. The other assailant entered the truck on the passenger side. When Sloan yelled for the man to get out of his truck, Tumblin hit Sloan in the face with the gun and then stepped back and fired the Taurus 40 gun just inches from Sloan's face. The projectile missed Sloan but went through his house, out his bedroom, and into the back of the

neighbor's house. [T:5244-51] Joanne Sloan confirmed the facts of the attempted robbery and shooting.[T:5253-57]. This testimony alone established the prior violent felony irrespective of the other crimes of shooting a deadly missile, aggravated assault, and battery on law enforcement and detention staff. Any defect in giving the standard instruction is harmless beyond a reasonable doubt. Hess.

POINT XI

THE TRIAL COURT DID NOT ERR IN DENYING TUMBLIN'S REQUEST FOR A SPECIAL PENALTY PHASE VERDICT FORM AND INSTRUCTIONS FOR AGGRAVATORS (restated)

In spite of the fact that Tumblin's jury made a unanimous recommendation for death which, by itself, comports with Ring v. Arizona, 536 U.S.584 (2002), he challenges Florida's capital sentencing. He asserts that it was error to deny his request for special instructions and verdict form which would require the penalty phase jury unanimously to find the aggravating factors beyond a reasonable doubt. (IB 99) Although he acknowledges that in State v. Steele, 921 So.2d 538 (Fla. 2005) this Court rejected these suggestions, he seeks relief and a finding that Ring applies in Florida and renders the capital sentencing statute unconstitutional under the Sixth and Eight Amendments of the federal constitutional as well as under the Florida Constitution. Tumblin has offered nothing to call into question this Court decision in Steele. See Walker v. State, 957 So.2d 560, 570, n.19 (Fla. 2007).

Moreover, given that Ring addressed only the Sixth Amendment, it is of no assistance with his Eighth Amendment challenge. Nonetheless, Florida death penalty statute is constitutional. As in Steele and Walker, this issue should be rejected and Tumblin's death sentence affirmed.

Legal issues are reviewed *de novo*. Connor v. State, 803 So.2d 598, 607 (Fla. 2001); Elder v. Holloway, 510 U.S. 510, 516 (1994).

In Steele and reaffirmed in Walker, this Court determined that it is improper to require a special verdict form and to require unanimity on each aggravator found.[9] This was based on this Court's analysis of the Florida Statute and Ring.

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[9]In State v. Steele, 921 So.2d 538 (Fla. 2005), this Court reasoned in part:

> The requirement of a majority vote on each aggravator is also an unnecessary expansion of *Ring*. The Court in *Ring* concluded that under Arizona's capital sentencing scheme, aggravating factors operate as the "functional equivalent of an element of a greater offense." Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428 (2002) (quoting *Apprendi*, 530 U.S. at 494 n. 19, 120 S.Ct. 2348). Therefore, the Court held, the Sixth Amendment required that they be found by the jury. *Id.* Even if *Ring* did apply in Florida-an issue we have yet to conclusively decide-we read it as requiring only that the jury make the finding of "an element of a greater offense." *Id.* That finding would be that at least one aggravator exists-not that a specific one does. But given the requirements of section 921.141 and the language of the standard jury instructions, such a finding already is implicit in a jury's recommendation of a sentence of death. Our interpretation of *Ring* is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute. In *Jones v. United States*, 526 U.S. 227, 250-51, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the Court noted that in its decision in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), in which it concluded that the Sixth

Nothing new, no changes in the statute, decisional law, or procedural rules, has been shown to challenged those decisions.

Also, this Court had denied challenges to the constitutionality of the capital sentence based upon Ring where the defendant had a unanimous jury recommendation for death. See Taylor v. State, 937 So.2d 590, 601 (Fla. 2006); Crain v. State, 894 So.2d 59, 78 (Fla. 2004), cert. denied, 126 S.Ct. 47 (2005). Tumblin has failed to offer a valid basis to recede from these decisions.

Tumblin has offered nothing to call into question the well settled principles

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> Amendment does not require explicit jury findings on aggravating circumstances, "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." In requiring the jury to consider by majority vote each particular aggravator submitted rather than merely specifying whether one or more aggravators exist, the trial court in this case imposed a greater burden than the one the Supreme Court imposed in reviewing Arizona's judge-only capital sentencing scheme in *Ring*. ...
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> ...
>
> We cannot predict all the consequences of approving the trial court's order, but we are unwilling to approve *ad hoc* innovations to a capital sentencing scheme that both the United States Supreme Court and this Court repeatedly have held constitutional. ... **Therefore, unless and until a material change occurs in section 921.141, the decisional law, the applicable rules of procedure, or the standard instructions and verdict*548 form, a trial court departs from the essential requirements of law in requiring a special verdict form that details the jurors' votes on specific aggravating circumstances**.

Steele, 921 at 546-48 (footnotes omitted - emphasis supplied).

that death is the statutory maximum sentence, death eligibility occurs at time of conviction, Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001), and that the constitutionally required narrowing, for Eighth Amendment purposes, occurs during the penalty phase where the sentencing selection factors are applied to determine the appropriate sentence. Porter v. Crosby, 840 So.2d 981 (Fla. 2003) (noting repeated finding that death is maximum penalty and repeated rejection of arguments aggravators had to be charged in indictment, submitted to jury, and individually found by unanimous jury). See Perez v. State, 919 So.2d 347, 377 (Fla. 2005) (rejecting challenges to capital sentencing under Ring). Florida's capital sentencing is constitutional. See Proffitt v. Florida, 428 U.S. 242, 245-46, 251 (1976) (finding Florida's capital sentencing constitutional); Hildwin v. Florida, 490 U.S. 638 (1989)(noting Sixth Amendment does not require case "jury to specify the aggravating factors that permit the imposition of capital punishment in Florida"); Parker v. State, 904 So.2d 370, 383 (Fla. 2005); Jones v. State, 845 So.2d 55, 74 (Fla. 2003).

Furthermore, the prior violent felony aggravator was found based on Tumblin's five prior violent felony convictions detailed above. Likewise, the felony murder aggravator was proven based on the contemporaneous robbery conviction. This Court has rejected challenges under Ring where the defendant has a prior violent felony conviction. See Robinson v. State, 865 So.2d 1259, 1265

(Fla. 2004) (announcing "prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring"); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) (denying Ring claim and noting "prior violent felony" aggravator justified denying Ring claim). Relief must be denied and the sentence affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm Tumblin's convictions and death sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Paul Petillo, Esq., Office of the Public Defender, 421 Third Street, West Palm Beach, FL 33401 this 19th day of December, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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