IN THE SUPREME COURT OF FLORIDA

Case No. SC09-1383

WILLIAM MICHAEL KOPSHO,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.
_____/

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE/ INITIAL BRIEF OFCROSS-APPELLANT

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STATEMENT OF THE CASE

William Michael Kopsho was indicted, tried, and convicted of the armed kidnapping and first-degree murder of his wife, Lynne. Kopsho appealed. This Court reversed the convictions and vacated the sentences because the trial court committed reversible error in the denial of a challenge for cause of a potential juror. *Kopsho v. State*, 959 So. 2d 168, 169 (Fla. 2007).

On May 22, 2009 Kopsho was re-tried, and re-convicted of armed kidnapping and first-degree murder. (V23, R3684-85). On June 3, 2009, the jury recommended the death sentence by a vote of ten (10) to two (2). (V23, R3839). The *Spencer* hearing was held June 25, 2009. (V41). Kopsho was sentenced to death on July 2, 2009. (V24, R3962-3977). The trial judge found four aggravating circumstances:

1. Under sentence of imprisonment or placed on felony probation (minimal weight);

2. Prior violent felony (great weight);

3. Committed during armed kidnapping (moderate weight); and

4. Cold, calculated, and premeditated (great weight).

(V24, R3963-3969).

The trial judge found no statutory mitigating circumstances. (V24, R3969). The trial court found the following non-statutory mitigating circumstances:

1. Mental or emotional disturbance (moderate weight);

2. Reared in an unloving home (little weight);

3. Subjected to emotional and physical abuse as a child (little weight);

4. Abandoned by mother at age 16 (little weight);

5. Sent to juvenile detention at age 16 (little weight);

6. Housed with violent criminals for eight (8) months at age eighteen (18) (little weight);

7. Beaten while at juvenile detention (little weight);

8. Good brother (little weight);

9. Good father (little weight);

10. Society protected by life sentence (little weight);

11. Voluntary statement/cooperative (little weight);

12. Did not flee/assisted in arrest (little weight);

13. Murder occurred in context of marital discord (little weight);

14. Knowledgeable and helpful employee; dependable and performed excellent work; attended bible studies (little weight).

(V24, R3969-3975).

STATEMENT OF THE FACTS

Lynne Kopsho, 21, and William Kopsho, 46, were married April 24, 1999. (V22, R3542-State Exhibit #56). They separated on or about September 30, 2000, and Lynne went to live with her father and stepmother. (V33, R692-93, 704-05, R719, 721-22).

Around October 14, Jane Wickstandt (Cameron)[1], Lynne, and two other friends went to the ABC liquor lounge. (V33, R693-94). Kopsho and Robin Cameron unexpectedly showed up. (V33, R694, 722-23). Jane went home around midnight but Lynne stayed behind. (V33, R695). Robin went home, but later spent the night at Jane's house. (V33, R723-24). The next morning, Lynne came over to Jane's house and had bruises on her neck. Lynne told Jane how she got the bruises. (V33, R695, 696). In the meantime, Kopsho had called Robin and said he "needed to talk to me real bad." (V33, R724). Robin went to Kopsho's home where he found both Lynne and William Kopsho. (V33, R724). Kopsho told Robin that the previous night, "he went to where she (Lynne) was staying at that time, and went through a window, and got a knife out of the kitchen, and went over to the couch where she was sleeping and forcibly made her come back to his house." (V33, R725-26). Lynne had "abrasions, red marks" on her neck. (V33, R726).

[1] Jane Wickstandt was dating Robin Cameron in October 2000. They later married and divorced. (V33, R689).

Appellant told Robin he had "grabbed her by the throat." (V33, R726). Appellant agreed to get counseling. (V33, R726).

Dennis Hisey was Lynne's supervisor at the window factory. (V33, R730). Lynne told Jane that she had a "sexual encounter" with Hisey before she moved out of the Kopshos' home. (V33, R705, 711). Lynne said she told Kopsho about her one night with Hisey. (V33, R712). Appellant was angry about it. (V33, R707).

On October 22, Kopsho and Robin discussed Lynne's relationship with Hisey. (V33, R727-28). Robin said that Kopsho "was asking questions, and I was giving answers, unfortunately." (V33, R728, 731). Robin told Kopsho that Lynne and Hisey had a sexual encounter. (V33, R730-31).

On October 24, Robin, Kopsho, and Robin's neighbor were drinking and talking. Kopsho said, "If my old lady ever left me, I would kill the fucking bitch." (V33, R729).

On October 25, Jane invited Kopsho and his friend Vivian to dinner at her home. (V33, R697-98). Kopsho told Jane that he and Vivian had a "sexual relationship." (V33, R698).

The morning of October 27 at 9:45 a.m., Jane and Lynne took their morning break together at work. Jane noticed that Kopsho's truck was not in the parking lot. (V33, R699-700). She called Kopsho to tease him about not being at work. Kopsho said he was at the bank but would stop by her office later. (V33, R700). After Jane

and Lynne finished their morning break, Jane never saw Lynne alive again. (V33, R701, 708-09).

On the morning of October 27, 2000, William Kopsho withdrew $3000.00 from the joint account he had with Lynne. (V33, R844). His bank statement showed a debit card transaction at Wal-Mart on October 27, 2000. (V33, R844-45, 847).

On October, 27, 2000, Catina and Shawn Tufts were traveling east on State Road 40 when they noticed a black pick-up truck swaying back and forth in front of them. (V33, R752-53, 770-71, 778). They could see "some commotion in the back window." (V33, R754, 760, 762). With the pick-up still moving, they saw Lynne exit and start running towards their vehicle. (V33, R754, 772, 778). The Tufts kept driving past the Kopsho's truck as Kopsho pulled off on the side of the road. (V33, R755, 771-72). The Tufts thought Kopsho was going to beat Lynne so they pulled off the side of the road to help her. (V33, R755, 762, 773). They stopped in front of Kopsho's truck and Shawn Tufts started to exit. (V33, R755, 763, 778). Kopsho exited his vehicle, chased after Lynne, "grabbed her by the back of the neck and threw her to the ground." (V33, R755, 773). Kopsho reached behind his back, pulled a gun, and shot Lynne in her chest. (V33, R756, 763, 773, 776, 779). Lynne collapsed back on the ground. (V33, R776).

Sylvia Hall was traveling east on State Road 40 when she observed a truck pulled over and a person on the ground "in a fetal position." (V33, R785-86). There was another person who "reached out, checked – like they were checking on the person with their left hand, and pulled that hand back as he pulled his knee up, and pulled a gun from behind his back with the right hand and fired it." (V33, R787). The person on the ground jerked back. (V33, R787). Hall floored her vehicle until she was about a mile-and-a-half down the road, then she called "911". (V33, R787-88). Hall only saw or heard one shot. (V33, R788).

In the meantime Catina Tufts had yelled to her husband to get back in their car. (V33, R756, 763). They drove to the nearest house and requested the owner call "911." (V33, R756, 763, 774, 779). Shawn Tufts returned to the shooting scene, and Catina Tufts rode with Mr. Friend, the homeowner. (V33, R757, 763-64, 774, 779-80). Mr. Friend had a gun with him. (V33, R764). After the Tufts returned to the scene, Catina Tufts saw Lynne lying on the ground "in the middle of a ditch." (V33, R758).

Kopsho said he "had shot the bitch, that it was over." (V33, R758). He was angry and yelling. He told people to stay away from Lynne. (V33, R765, 766, 775, 783). Shawn Tufts saw Kopsho on his phone. Kopsho was yelling, "I shot the bitch." (V33, R774-75, 781). It appeared that Lynne was dead. (V33, R780). Catina Tufts said no one approached because "we had no idea where the weapon

was at that time." (V33, R758). After the shooting, Catina and Shawn Tufts looked at a photo lineup and identified Kopsho as the driver of the black pick-up who chased Lynne and shot her. (V33, R767-77, 775-76).

Basil Friend was at his house when someone ran up and told him to call "911." (V33, R789-90, 795). He called the Sheriff's Department, then armed himself with his .32 caliber pistol. (V33, R791, 795). When he arrived at the scene, Friend saw a man standing near the victim saying, "Get the f- back. I just shot her three times." (V33, R791, 796). The man acted, "Like a proud person who just won a battle." (V33, R794). Friend pulled his own weapon and told the man, "Just don't move." (V33, R792). At some point, the man crossed the road and used his cell phone. (V33, R792, 796).

Edwin Boone, dispatcher for Marion County Sheriff's Office, received a "911" call from Kopsho the morning of October 27, 2000. (V34, R865). There were other calls coming into dispatch about the incident, and other dispatchers were answering those calls. (V34, R872). The audiotape of the cell phone call was published to the jury. (V34, R873-881). On the audiotape, Kopsho stated he "just shot my wife," that they were people nearby and, that the dispatcher would learn his identity "when you get here." (V34, R874). Kopsho described what he wearing and said he would be laying on the ground when the police arrived. (V34,

R874). Kopsho described the gun as a .9mm located near the victim's right hand. (V34, R875). The conversation proceeded:

> MR. KOPSHO: Her name is Lynn Kopsho, K-o-p-s-h-o. I think we might have the police here, I don't know.
>
> "MR. BOONE: Okay.
>
> "MR. KOPSHO: You people need to stay back. Stay back. Are you the police? Stay back. Stay back. I'm her husband. That's fine. That's good. When the police get here, everything's fine. You people can just stay back.
>
> (Indiscernible.) She's been shot three fucking times, once in the heart. Stay back.
>
> UNIDENTIFIED SPEAKER: (Indiscernible.)
>
> "MR. KOPSHO: Do you see that fucking gun (indiscernible).
>
> "MR. BOONE: Stay away from the gun, okay?
>
> "MR. KOPSHO: Okay.
>
> "MR. BOONE: Just what's going on out there?
>
> "MR. KOPSHO: There's some men around her right now.
>
> "MR. BOONE: Okay. They -- they have people on the way to you.
>
> "MR. KOPSHO: Uh-hmm, I'm just going up the road a little bit. Now I'm going across the road.
>
> "MR. BOONE: You don't have any other guns on you, right?
>
> "MR. KOPSHO: I -- wait -- I'm talking to the police right now, fat boy.
>
> "MR. BOONE: You don't have any other weapons on you, right?

"MR. KOPSHO: You just stay on your side of the road, I'll stay on mine. When the police get here I'll hit the fucking ground.

(V34, R876-877). The conversation continued:

"MR. KOPSHO: I'm fixing to get on this side of the road here, my truck. I'm just getting a cigarette. I'm assuring these people on the phone I'm just getting a cigarette.

"MR. BOONE: Okay. And what kind of truck are you -- do you -- do you have?

"MR. KOPSHO: It's a --

"MR. BOONE: (Indiscernible.)

"MR. KOPSHO: A Mazda B, B2000.

"MR. BOONE: Is it black?

"MR. KOPSHO: Yeah, it's black with some stripes on it and fire flames on the sides.

"MR. BOONE: What happened? Y'all got in an argument?

"MR. KOPSHO: Yes, sir, I caught her in bed with another man.

"MR. BOONE: When did this happen?

"MR. KOPSHO: She -- she was sleeping with, uh -- she was sleeping with her boss who is my good friend.

"MR. BOONE: This just happened this morning?

"MR. KOPSHO: No, this happened -- uh, I just found out about it yesterday. I didn't mean no offense to you, mister. Like I didn't mean no offense to you.

(V34, R878-879). Kopsho then advised the dispatcher that he had stolen the gun from William Steele. (V34, R879).

When Deputy Jeff Peebles arrived at the scene he saw a female victim lying in a ditch on the side of the road and a person walking back and forth talking on his cell phone. (V33, R804, 806). Peebles recognized another bystander who pointed to the man with the cell phone as the suspect. (V33, R806-07). Kopsho put his phone on the ground, laid down, and Peebles handcuffed him. (V33, R807). Peebles removed several items from Kopsho and put them in a paper bag. (V33, R808, 812). Kopsho's wallet contained $3,000.00 dollars. (V33, R809).

Kopsho was transported to the police station, and Deputy Owens conducted an interview. (V35, R1015, 1020). Kopsho waived *Miranda*[2] rights and signed the waiver form. (V35, R1021-22; V22, R3519-State Exhibit #32). The videotaped interview was published to the jury. (V35, R1028-75, State Exhibit #43).

Kopsho said he killed Lynne because she admitted to having an affair with her boss, "Dennis." She told Kopsho about the affair just a few days prior to her murder. (V35, R1034-35). Kopsho denied being under the influence of alcohol or drugs or taking any prescription medication. (V35, R1034). Kopsho first said he found out that Lynne was having an affair with Dennis Hisey:

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

> "MR. KOPSHO: And I just found out about it two days ago, she confided. She finally come out. A friend of mine had said that he found out from his girlfriend. I confronted her and she denied it at first. And yesterday -- it was yesterday, or it was the day before, in the afternoon she asked me to come outside with her and sit in my truck. And she said -- she told me that she sleep with him.
>
> "DETECTIVE OWENS: Okay.
>
> "MR. KOPSHO: Had slept with him. And, uh, that's the reason.

(V34, R1035). Kopsho then told the officer that Lynne had been with Hisey while "things were going good for us" about two to three months prior to Lynne's murder. (V35, R1036, 1038). Kopsho then said:

> "DETECTIVE OWENS: Okay. So you -- you mentioned something earlier about premeditation. What does that mean?
>
> "MR. KOPSHO: That means that I planned all this.
>
> "DETECTIVE OWENS: This, that happened today?
>
> "MR. KOPSHO: Yes, sir.
>
> "DETECTIVE OWENS: Okay. And how did you plan that? Well, when did you begin planning that I guess is a good place to start.
>
> "MR. KOPSHO: Okay. I -- I begin planning it, uh, the night that she told me, which would have been three days ago.

(V35, R1041). Kopsho then said Lynne had told him about the affair on Sunday because they were supposed to carve pumpkins with Jane and Robin for a

retirement home as they did every year. (V35, R1042).[3] Kopsho said "it was that instant, at that instant, when I planned to kill her. I know it was." (V35, R1044). Kopsho "couldn't let her see me angry. I didn't have a gun." "I didn't want her to notice that, so I -- I stayed cool. I stayed calm." (V35, R1044).

Kopsho stole a gun from William Steele the same day he murdered Lynne. (V35, R1044-45). After clarifying that it was Friday, Kopsho stated that he had been at Steele's house on Wednesday to do some work for Steele. Kopsho saw the .9mm at the house, "so I was going to find out where it was and so I could get to it." (V35, R1045). Kopsho asked Steele where he kept the gun, and saw Steele put the gun in the side of the chair where he sat. (V35, R1045-46).

On the morning of the murder, Kopsho told his supervisor he had to go to the bank. He withdrew $3000.00 so he could take the money to prison with him. (V35, R1046). He then went to Wal-Mart and bought a Crossman BB gun which resembled the 9mm gun that Steele owned. Kopsho went to Steele's home, and, while Steele was distracted, replaced the 9mm with the BB gun. (V35, R1047-48). Kopsho went to Lynne's work and asked if she could go to the bank with him. He told Lynne's supervisor he was making a substantial withdrawal. He told Lynne he was planning a trip to Ohio and needed her to go to the bank with him to make a large withdrawal. (V35, R1048-49). He purposely parked behind Lynne's vehicle

[3] State Exhibit #1 is a calendar of October 2000. (V22, R3540). October 27 was a Friday, and the Sunday before was October 22.

so she would ride with him, and not offer to follow him. (V35, R1049). Kopsho told Lynne the bank had opened up a new branch on "40 East."[4] Kopsho continued east on State Road 40 out of Ocala, and Lynne realized they were going the wrong way. (V35, R1051). She mentioned that they had driven too far, and Kopsho responded that he thought they might have passed the bank. Kopsho "planned on going out to the forest and, uh, killing her." (V35, 1052). Kopsho had a plan, and "knew he was going to be sitting here talking to you [law enforcement] today." (V35, R1061).

Kopsho had hidden the gun in the door panel so Lynne could not see it. (V35, R1054). He noticed the butt sticking up a little bit, so he put an envelope in front of it so Lynne couldn't see it. (V35, R1054). The clip was in the gun, but it had not yet been racked so that a bullet would be in the chamber. (V35, R1054). Lynne was talking about someone getting ready to have a baby and was "so deeply in conversation" she did not realize they were still driving into the forest. (V35, R1055). Kopsho was looking for a place to turn off into the forest. His truck had four-wheel drive. (V35, R1055).

Kopsho and Lynne discussed having closure in their relationship. He told her, "I'm tired of this. I'm hurting too much inside." (V35, R1057). He reached down and pulled out the gun. (V35, R1057-58). Kopsho could see the surprised

[4] The road on which Lynne was killed was State Road 40 which connects Daytona Beach to Ocala and passes through the Ocala National Forest.

look on Lynne's face. She kept asking him, "Why?" He told her: "I said why, because I want closure. I got to get you out of my life." (V35, R1058). Kopsho then asked the detective whether Lynne was dead. When the detective said she was, Kopsho replied: "I wanted her to be." (V35, R1062). The truck was travelling about 60 mph when Lynne tried to jump out. Kopsho started applying the brake and grabbing Lynne at the same time. "I had her by the hair (indicating), pulled her back like this (indicating)." Lynne grabbed the steering wheel and started to pull on the steering wheel to get it over to the side of the road. (V35, R1062). She broke free and opened the passenger side door. Kopsho came out behind her and loaded a bullet into the chamber of the gun. (V35, R1062). Kopsho explained that he shot Lynne three times:

> (1) "while she was running," which hit her in the side or back (V35, R1062, 1064);
>
> (2) Lynne fell and was face down. Kopsho "shot for her heart." He pulled the hair from Lynne's face and told her he loved her.
>
> "When that bullet went in her body jerked and jumped. And I saw it, like she was even in more pain, so the next one I don't even know where it went, I just closed my eyes and shot again." (V35, R1065);
>
> (3) Kopsho did not know where the third bullet entered.

Kopsho told bystanders to stay away because, "I wanted her to die, didn't want anybody to help her." (V35, R1066-67). When the first lady pulled up, Kopsho told her to call the police but to stay away from Lynne. (V35, R1067).

When he was sure Lynne was dead, he "laid the gun right next to her." (V35, R1067-68). There was a bullet stuck in the chamber. (V35, R1068). He crossed the road and called police. (V35, R1069).

Kopsho said he was in his "right and proper mind. Not been drinking. I haven't done any drugs." He had no psychiatric problems and had not done any drugs, "not in years." (V35, R1071).

Deputy Thompson searched the area to determine the boundaries of the crime scene. (V34, R895, 899). Thompson made a video recording of the crime scene and took still photographs. (V34, R901, 902). Thompson collected evidence, including live rounds, spent shell casings, and a Glock model 22, 40-caliber handgun. (V34, R903, 909). Thompson searched and processed Kopsho's vehicle after the shooting. (V34, R906, 913). Thompson recovered a plastic package from the truck bed that had previously contained a Crossman air gun pistol. (V34, R917). He also recovered an Old Timer's knife, and a Wal-Mart bag containing a blanket, duct tape, and a roll of anchor line (rope).[5] (V34, R917, 921, 922). In addition, he recovered a sleeping bag, camping pad, and a tent. (V34, R918). These items appeared to be in their original packaging. (V34, R922-24).

The State introduced a firearms transaction record which stated that William Steele owned a Glock model 22. (V34, R937-38). A Crossman air gun BB pistol

[5] There was no anchor in the vehicle. (V34, R926).

was found between the armrest and cushion in a chair at William Steele's residence. (V34, R934). Ammunition was recovered from Mr. Steele's home. Law enforcement believed "that's where he (Kopsho) got the gun from." The .40 caliber Smith and Wesson ammunition (State Exh. 30) matched the ammunition found at the crime scene. (V34, R942).

Peter Lardizabal, senior crime lab analyst at Florida Department of Law Enforcement "FDLE," examined the Glock gun,[6] cartridges collected at the crime scene and an ammunition carton that contained 40 caliber cartridges. (V35, R952, 956, 968-69). After test-firing one of the cartridges, Lardizabal determined that the submitted cartridges were fired from the Glock. (V35, R961-62). One of the live rounds found in the Glock contained markings consistent with having malfunctioned or jammed in the firearm. (V35, R963-64). Three live rounds in the Glock matched the cartridges from the box of ammunition collected from Mr. Steele's home. (V35, R963). After examining the clothing worn by the victim, Lardizabal determined the gun was fired at a distance less than six feet. (V35, R972-73). There were eight holes in the victim's shirt, consistent with damage done by bullets. (V45, R970).

Dr. Susan Ignacio, associate medical examiner, conducted the autopsy on Lynne. (V35, R988, 990). There were eight gunshot wounds; however, Lynne was

[6] The Glock 22 (State Exh. 18) is a semiautomatic weapon that requires a separate pull of the trigger for each separate shot. (V35, R958, 961).

shot a total of three times. (V35, R992). Dr. Ignacio could not determine in what order the shots were fired. (V35, R1004). She lettered the wounds "A, B, C, and D." Wound A was an entry would at the left inner portion of the left breast and exit wound at the outer portion of the breast. V35, R992). Wound B was an entry would to the left arm, which broke the humerus then exited the back of the left arm. (V35, R992-93). In Dr. Ignacio's opinion, those four wounds depicted by Wound A and Wound B were caused by a single bullet. (V35, R993). Entrance and exit wounds can be distinguished by the shape, abrasion color, and tearing at the exit. (V35, R999). Wound C was an entrance wound on the right side of the chest which hit the right upper lobe of the lung and pulmonary artery then exited the left side of the back. (V35, R1000). The bullet went from right to left, front to back, and downward. This bullet hit a vital organ and was potentially fatal. (V35, R1002). Would D was to the left side of the abdomen. (V35, R1005). The bullet hit the left lobe of the liver, the stomach, the pancreas, went through the fat around the colon, then exited the back. Wound D was potentially life-threatening. (V35, R1005). Wound C to the pulmonary artery would bleed faster than Wound D to the abdomen. (V35, R1006). The gun was between 2 inches and 2 feet from Lynne's abdomen when Wound D was made. (V35, R1008). There was stippling around the wound. (V35, R1008).

Although Wound C would have been a fatal wound, it would not cause a person to go into shock immediately. (V35, R1010). Wounds A and B would not cause loss of consciousness and would have been painful. (V35, R1011-12). Wound D would not cause immediate unconsciousness. (V35, R1012-13).

PENALTY PHASE

The State called six witnesses in the penalty phase: Eileen Smith, Robert Cox, Wayne White, Rena Greenway, Helen Little, and Emily Preuss. The defense presented eight witnesses: Antoinette Harton, David Kopsho, Sean Kopsho, Donella Bullard, Ida May Scott, William Seibold, Thomas DiGrazia, and Dr. Elizabeth McMahon. The State called two rebuttal witnesses: Ted Shaw and Sandra Hyer.

Eileen Smith, Investigator with Department of Children and Families, was driving east on SR40 on the morning of October 27, 2000. (V37, R1281-82). Smith saw Lynne lying on the side of the road with Kopsho standing over her. She pulled her van in front of Kopsho's truck, exited, and walked past the truck, which had the passenger door open. (V37, R1282). Lynne and Kopsho were "quite a distance" from the truck. (V37, R1283). Smith asked Kopsho "if they needed help." Kopsho responded, "very loudly and very angry, I shot her, I killed her, and I've already called 911." (V37, R1283). Lynne "appeared to move in response to our dialogue, and he yelled at me to get back." Smith tried to move toward

Lynne, who "moved." (V37, R1283). Lynne was trying to turn her head towards me" but wasn't able to turn. (V37, R1284).

After Kopsho crossed to the other side of SR40, Smith and other bystanders attempted to move toward Lynne. Kopsho yelled at them "to get back." After about five minutes, Lynne was no longer moving. "It seemed like an eternity, but it was five minutes, I believe." (V37, R1284). Smith did not see a weapon in Kopsho's hand. She later saw police retrieve it from the ground. (V37, R1285-86).

Helen Little and Kopsho worked together in Georgia in 1991. (V37, R1328, 1335). They started dating and Kopsho moved in with her. (V37, R1307-08, 1309). Little eventually told Kopsho to move out. Afterwards, he called her several times. (V37, R1312). Although Kopsho asked her to let him come back, Little was "afraid of him and ... wanted to keep (her) distance." (V37, R1313). Kopsho was possessive, jealous, and controlling. (V37, R1337).

One night Little awoke to a noise and saw Kopsho standing in her bedroom doorway. Before she could move, Kopsho was sitting on top of her, pinning her legs. (V37, R1314). He held her arms and repeatedly slapped her in the face. He called her names and told her he had seen her go out to lunch with people from work. (V37, R1315). Little attempted to reach for a high-powered BB gun she kept under her bed. Kopsho continued to wrestle with her and she fell off the bed. He sat on her and wrapped a phone cord around her neck. Little fought Kopsho off of

her and tried to get away. As she attempted to break out her bedroom window, Kopsho hit her in the shoulder, arm, and head, with the butt of a shotgun. Little tried to get underneath the bed to get away. (V37, R1316). She was bleeding profusely from the head as she told Kopsho "to stop, I'm hurt, I'm hurt, stop." (V37, R1317). Kopsho pushed Little into a chair in the living room. He paced through the house and was throwing things. He told Little to rinse the blood off herself. (V37, R1317-18, 1321).

Kopsho put the gun in Little's face and told her to write a letter to her father, to tell him "bye." Little wrote a note in the dust on her coffee table which said, "Bill did this." (V37, R1322). Little was exhausted and terrified. She lay on her bed and was "in and out of consciousness." Kopsho got on top of her and sexually assaulted her. (V37, R1323). Afterward, Kopsho gave her clothes to put on. He led her out of her home and they ended up in his truck. (V37, R1323).

Little knew the shotgun was behind the seat as they drove toward Ocala. Kopsho gave Little a blanket and some water. (V37, R1324). Kopsho checked them into a motel when they reached Ocala. Little recalled Kopsho pacing back and forth, "I guess figuring out what to do." Little went into the bathroom and tried to figure out "how to get out." (V37, R1325). Kopsho sexually assaulted her again. (V37, R1325). Little begged Kopsho to take her to a hospital. He said, "I could take you and we could tell them that you were in a fight." Little convinced Kopsho

that she would make medical personnel believe that story. (V37, R1325-26). Hospital personnel called the police. Little told police what had happened. Police found the shotgun with Little's blood on it. Kopsho's pants had Little's blood on them, as well. (V37, R1326). Kopsho was arrested. (V27, R1327). The State admitted the 1992 Marion County judgment and sentence for false imprisonment while armed with a dangerous weapon and sexual battery. (V22, R3532-38 State Exhibit #45; V37, R1298, 1307).

Wayne White, Department of Corrections probation officer, established that at the time of Lynne's murder Kopsho was on probation for false imprisonment while armed and sexual battery. (V37, R1291-93).

Emily Preuss, Lynne's sister, read letters to the jury written by her mother, sister, and herself. (V37, R1371, 1372, 1373-77).

Kopsho presented the videotaped perpetuated testimony of his older sister, Antoinette Harton. Harton is "a year or two" older than Kopsho. (V37, R1398, 1400, 1405). There were five children in the Kopsho household. (V37, R1401). The children did not see their father often as he worked various shift hours. (V37, R1403). Their parents did not have a loving relationship with each other. (V37, R1413). The children were sent to private Catholic school and always had food to eat. (V37, R1423). There were strict rules enforced in the home. (V37, R1424-25). They were allowed to go places with their cousins. (V37, R1431). Harton and

Kopsho had a typical "brother/sister" relationship. Kopsho was never violent with her and she was not afraid of him. (V37, R1430).

When their mother, Ida Mae Kopsho, disciplined the children, she screamed and yelled, and they were grounded or "hit with a belt" at least a couple of times a week. (V37, R1405, 1406). All of the children were disciplined the same way. (V37, R1407). When the children played with the gas stove, Ida held their hands over the stove so they would "know what it's like to play with the stove, we wouldn't get burned but it would be hot." (V37, R1409, 1425). The children were not allowed in the home unless their mother was in the house. They were not allowed to have a key. (V37, R1409-10).

Harton recalled an instance when Kopsho was disciplined by being tied to a tree in the yard "like a dog." (V37, R1410). Ida Kopsho was not affectionate with the children at all. (V37, R1414). Harton was kicked out of the home before she graduated high school. (V37, R1416). At about the same time, Kopsho started running away from home. (V37, R1418, 1426-27). He argued with his mother, did not come home when he was supposed to, and stole money from her. (V37, R1429). At 15 or 16 years old, he was sent to the Indiana Boys' School. (V37, R1418, 1426-27). Kopsho did not tell Harton about his stay at the Indiana Boy's School. (V37, R1430). Harton said their older sister, Theresa, died in childbirth. (V37, R1420).

Harton knew about Kopsho's conviction involving Helen Little. (V37, R1432-33). After his release from prison, Kopsho lived with his mother for a short time. (V37, R1433).

Harton's cousin called her and told her about Lynne's Kopsho's murder. (V37, R1433-34). By this time, Ida Kopsho had Alzheimer's disease and could not recall what had occurred earlier in Kopsho's life. (V37, R1434).

David Kopsho, Kopsho's younger brother, stated their mother was a disciplinarian that punished the Kopsho children with whippings once or twice a week. (V38, R1445, 1447). The Kopsho sisters were allowed to do things the brothers were not allowed to do. (V38, R1466). Kopsho's punishment was "even worse" than his siblings. He was punished more than the others and for things his sisters did. (V38, R1448, 1449, 1465). There were times when Kopsho was locked out of the house. (V38, R1450). He occasionally ran away from home after he was disciplined by their mother. (V38, R1452). Kopsho did not follow Ida Kopsho's rules. He stole money from her. (V38, R1458, 1459, 1466).

Kopsho was eventually sent to the Indiana Boys home. (V38, R1452). David was not aware that Kopsho was on probation before being sent to the home. (V438, R1458). Kopsho stayed there for seven months. The Kopshos, David, and his younger sister visited Kopsho at the Indiana Boys' Home about once a month.

(V38, R1452, 1459, 1460). David said everyone there "had a terrified look on their face." Kopsho always asked his parents to take him home. (V38, R1453).

After Kopsho was released from the home, he was still under supervision. Kopsho told David it was a "bad place" and that, if boys did not listen to staff or ran away, they got beat. (V38, R1461). Kopsho told David he had been beaten at the school. (V38, R1462).[7]

Sean Kopsho is Kopsho's thirty-two-year-old son. Kopsho was not around much while Sean was growing up. Sean went back and forth living between his mother and his father. (V38, R1471). As Sean spent more time with Kopsho, his father offered advice, took Sean places, and was affectionate. Sean is "best friends" with his father and loves him very much. (V38, R1472). Kopsho knows how to be kind and loving. He never beat or threatened Sean. (V38, R1473).

Sean vaguely recalled his father's previous conviction for the incident involving Helen Little. (V38, R1473-74). Sean wrote a letter to Little and asked her to drop the charges against his father. (V38, R1474).

Donella Bullard worked with Kopsho at Custom Windows. Kopsho was a good worker, "a very respectable young man ... an outstanding, hardworking man." He was close friends with Donella's husband. (V38, R1474-75).

[7] In an October 28, 2008, deposition, David testified that Kopsho had told him a "bigger kid" at the school had beaten him. (V38, R1463-64).

Ida Mae Scott was Kopsho's supervisor at Custom Window Systems. (V38, R1476-77). Kopsho was a good worker and helped others in the workplace. (V38, R1477).

William Seibold was a teacher at the Indiana Boys' School for thirty-nine years. (V38, R1478, 1485). Vocational programs offered at the school included woodworking, lumber work, farm work, dry cleaning and tailoring, auto mechanics and service, and horticulture. There was a band as well as intramural and inter-high school sports. (V38, R1491). Kopsho was a student there from April to December of 1970. (V38, R1479). The average length of stay for a boy in 1970 was eight to fourteen months. (V39, R1484). In 1970, the boy's school was the only juvenile detention facility in Indiana. (V38, R1480). The facility housed rapists, murderers, violent offenders, runaways, and those "uncontrollable by their parents." (V38, R1479).

Of approximately 600 boys at the facility, 60 were placed in each of the cottages located on the property. (V38, R1480). The boys in each cottage were supervised by one untrained male staff person per eight hour shift. (V38, R1481). Their respective offenses had nothing to do with their housing. (V38, R1479-80). Seibold was aware that corporal punishment was used at the school. (V38, R1482). Although a new superintendent ordered the cessation of corporal punishment in 1969, the staff continued to use it for quite a while. (V38, R1482-83, 1489-90). A

Federal lawsuit resulted in certain changes being implemented at the school. (V38, R1482). Seibold was aware a bully system was used where a boy would punish other children. “The big guys ruled the cottage.” (V38, R1484). Seibold did not personally know Kopsho nor did he have personal knowledge any of Kopsho’s experiences at the school. (V38, R1492).

Thomas Digrazia had been practicing law for 39 years at the time of Kopsho’s trial. (V38, R1540). In 1972, Digrazia and an associate became aware of conditions at the Indiana Boys’ school which lead to the filing of a Federal lawsuit. (V38, R1541, 1544).

Digrazia conducted an investigation. The institution was spread over one thousand acres in a rural community. It housed boys from ages twelve through eighteen in twelve cottages. There were several administration buildings and an isolation unit within one of these buildings. (V38, R1541-42). The isolation unit contained “bird cages” in which the boys who committed infractions were sent to these detention cages. The cages ranged in size from 4 feet by 8 feet to 6 feet by 9 feet. The cages were covered with mesh wire so observers could see through the cages. (V38, R1542). Digrazia observed one or two boys handcuffed to the bed in a spread eagle fashion. There were at least thirty cages; most of them were filled with boys. (V38, R1543). After observing these conditions. Digrazia filed a class action lawsuit in which he ultimately prevailed. (V38, R1543, 1544).

Digrazia does not know Kopsho and did not see him at the Indiana Boys' school. (V38, R1545-46). However, conditions in 1970 were the same as they were in 1972, when Digrazia conducted his investigation. (V38, R1547).

Dr. Elizabeth McMahon, clinical neuropsychologist, evaluated Kopsho on six separate occasions. (V38, R1548, 1552). She reviewed a vast amount of material in preparation for her evaluation of Kopsho. (V38, R1552-54). She conducted a full battery of evaluation procedures which included tests and other psychological procedures. (V38, R1554). Dr. McMahon administered the Rorschach test and the Wechsler IQ test. (V38, R1555, 1578). She administered the Minnesota Mutiphasic Personality Inventory (MMPI), a test comprised of 567 true/false questions which indicated how Kopsho "sees himself, his environment, and the interaction between himself and his environment." (V38, R1556, 1579). One score was elevated - - the psychopathic deviance score. (V38, R1579).

After completing interviews and the testing process, Dr. McMahon determined Kopsho has an IQ of average intelligence: 105. (V38, R1577-78). Results of the Wisconsin Card Sort test were normal. (V38, R1578). He has a "maladaptive way of learning" but it would not have impacted his behavior at the time of Lynne's murder. (V38, R1557-58, 1578). At least 50 to 60 percent of the time, Kopsho's perceptions of reality are "right on." Kopsho's perceptions get distorted "at a time of increasing anxiety and stress, emotional turmoil, emotional

upheaval." Kopsho has paranoid ideations, and is suspicious and distrustful of others. Kopsho's "affectional anxiety" gives him "the most trouble." His needs for security and affection were never met as a child. (V38, R1559). As a result, his emotional development was stunted. (V38, R1560). Most times Kopsho handled provocation in an appropriate manner. "But there are times when he sort of loses it in terms of aggressiveness." (V38, R1562).

Dr. McMahon asked Kopsho about family history, home life, school experiences, marriages and children, prior criminal history, and his current situation. (V38, R1556). She conducted collateral interviews. (V38, R1557). She spoke with all of Kopsho's siblings as well as his mother. His mother has dementia and, although "speaking with her was interesting, (it was) not very helpful." (V38, R1563).

Kopsho experienced a lot of rejection in his childhood home. (V38, R1562). His mother ruled the home and his father was a mild-mannered, secondary parent. (V38, R1564). Kopsho's father occasionally beat him with a belt. (V38, R1570). Kopsho's mother beat the children at least twice a week. Kopsho always got beat more than the others. (V38, R1571). At 15 years old, Kopsho was working, made passing grades in school, and lived with a friend so he did not have to pay rent to his mother. His mother came to his friend's house and asked if he was ready to come home. Kopsho said "no." Ida Kopsho told Kopsho, "then I'll have you put

someplace else." The next day, Kopsho found out "he was on probation." (V38, R1565).

At his probation officer's urging, Kopsho agreed to go home to work things out with his mother. However, Ida Kopsho said no, and Kopsho was sent to the Indiana Boys' school. (V38, R1566). Kopsho spent eight to ten months in the Boys' school and eventually joined the Navy. He went AWOL several times and was discharged. (V38, R1566-67). He married several times but the marriages did not last long and all ended in divorce. The wives were all considerably younger than him. Kopsho believed the wives "were running around on him." (V38, R1567). In the early 1980's, Kopsho was hospitalized in a mental hospital three times. (V38, R1594-95).

Dr. McMahon was aware that Kopsho had twice threatened Lynne that he would kill her before he actually did. (V38, R1589-90, 1593). He had agreed to get counseling. (V38, R1596). After Lynne told Kopsho about her affair, "he shot and killed her." (V38, R1568).

Dr. McMahon concluded Kopsho has a severe psychological condition that "most certainly is in the presence of an intimate other." (V38, R1576). His upbringing led to an abusive personality which then led to a dependent personality with borderline features. (V38, R1576). When women leave Kopsho, "it is being left that triggers that rage and the violence." (V38, R1576). His childhood home

life is “greatly responsible” for Kopsho’s current psychological condition. (V38, R1598).

The State called Dr. Ted Shaw, a psychologist, in rebuttal. (V38, R1604). Dr. Shaw counseled Kopsho between 1995 and 1999. (V38, R1606-07). Part of Kopsho’s treatment included anger and stress management. Kopsho was taught a technique called Rational and Motive Behavior Therapy (RABT), where he learned to take responsibility for his behavior and feelings and adjust his thinking and beliefs accordingly. (V38, R1608, 1609-10). There were a number of different interventions taught on anger and stress management. (V38, R1608). Kopsho successfully completed his treatment program. (V38, R1617, 1618).

Dr. Shaw did not conduct a psychological examination on Kopsho. He did not interview family members or investigate Kopsho’s background. (V38, R1618-19).

The State presented the perpetuated testimony of Sandra Hyer, Kopsho’s younger sister by eight years. (V38, R1623, 1625, 1628). Hyer was made aware of Kopsho’s arrest by her sister, Tony. Ida Kopsho, their mother, was already in the stages of Alzheimer’s disease. (V38, R1626).

Hyer did not feel deprived as a child. Her father worked all the time, she had food on the table and clothes to wear. Her mother was very strict and was the disciplinarian. She never felt that she was not loved. (V38, R1628, 1641, 1644).

They family took vacations “all over the place.” When her father retired, she, along with her parents, moved to Florida. They eventually moved back to Indiana. (V38, R1629-30, 1643). At 16 years old, Hyer’s mother kicked her out of the house. She later asked Hyer to come back, but Hyer refused. (V38, R1630-31, 1642). Hyer felt “she was free” and wanted to do what she wanted. It was not her upbringing that made her chose not to return to her parents’ home. She regularly visited her parents. (V38, R1631).

Hyer was aware her parents took care of Kopsho’s two sons, Carl and Sean. She did not recall where Kopsho was at the time. The boys’ mother, Debbie, asked the Kopshos to put their sons through school for an entire year. (V38, R1632). Hyer’s mother never treated her or her siblings as if they were unwanted. Kopsho regularly visited his parents’ home while Hyer was growing up. The family celebrated birthdays and holidays together. (V38, R1633).

Kopsho and his former wife, Susan, lived with Hyer and her boyfriend on Hyer’s farm in Kentucky for a while. Kopsho worked on the farm. (V38, R1634). She never saw Kopsho argue with Susan. However, he argued frequently with his mother, Ida Kospho. (V38, R1634). Hyer does not believe Kopsho is emotionally disturbed due to his upbringing. He did not kill Lynne because of the way he was raised. (V38, R1635-36). Kopsho has always been a good brother to her. (V39, R1643).

After Kopsho was released from prison for his conviction against Helen Little, he went to live with his mother in Ocala. (V38, R1635).

SUMMARY OF ARGUMENT

POINT I. This point contains two issues: *Williams* Rule testimony in the guilt phase and testimony about a prior violent felony in the penalty phase. The trial judge did not abuse his discretion by allowing guilt phase testimony regarding Kopsho's abduction of the victim two weeks before the murder because it was relevant to plan, premeditation, lack of mistake, and motive. The testimony was not a feature of the trial. The testimony was not more prejudicial than probative. Error, if any, was harmless. Kopsho confessed and there were three eye-witnesses to the murder.

The trial judge did not abuse his discretion by allowing penalty phase testimony about the prior violent felony. This Court has repeatedly held that details of a prior violent felony are relevant because they assist the jury in evaluating the character of the defendant. The fact that the victim testified is a result of this Court's decision in *Rodgers* and the *Crawford* right to confrontation. The testimony was neither inflammatory nor a feature of the penalty phase. Error, if any, was harmless. The trial judge found four strong aggravating circumstances which substantially outweighed the mitigation.

POINT II. The State established the cold, calculated and premeditated aggravating circumstance beyond a reasonable doubt. Competent substantial evidence supports the trial judge findings. Kopsho decided to kill Lynne three days

before the murder. He took steps to execute his plan: purchasing a fake weapon and substituting it for William Steele's gun, obtaining money, devising a way to get Lynne in the car alone with him. He even withdrew $3,000 to take with him to prison. Kopsho shot Lynne three times and confessed that he was shooting for the heart. He kept all bystanders away until he was sure she was dead.

Error, if any, was harmless where there was overwhelming aggravation and underwhelming mitigation.

POINT III. Victim impact testimony is allowed by law and statute. The evidence in this case consisted of three letters read by the victim's sister. The testimony was not unduly prejudicial, and was well within the bounds allowed. Error, if any, was harmless.

POINT IV. The trial court did not abuse its discretion by admitting brief, relevant evidence that Kopsho was having an affair at the time of Lynne's murder. This evidence rebutted the defense theory that the murder was a product of rage because Kopsho was devastated by Lynne having an affair. This evidence supported the State theory that Kopsho coldly murdered Lynne because of a wounded ego, not because he was in a rage. Error, if any, was harmless.

POINT V. The trial court did not err in denying the motion for judgment of acquittal on kidnapping. The arguments raised on appeal were not raised at the trial level. Kopsho was charged with kidnapping under two theories of prosecution,

both of which were proved beyond a reasonable doubt. Lynne thought she was going to the bank, but Kopsho was secretly taking her to the forest to kill her. He pulled a gun on her and she was so terrified she tried to jump from a car traveling at 60 mph. Kopsho forcibly grabbed Lynne by the hair to keep her in the car. Eventually she managed to escape, at which point Kopsho shot her in the back. Kopsho planned the murder for three days and had the intent to inflict bodily harm on Lynne when he picked her up and got her to ride in his car. Error, if any, was harmless to the first-degree murder charge.

POINT VI. The trial court did not abuse its discretion by instructing the jury on the heinous, atrocious aggravating circumstance. The State presented evidence Lynne sustained mental anguish when Kopsho pulled a gun on her, she tried to escape, he grabbed her by the hair, and she eventually managed to exit the car. Kopsho then shot her as she was running. She was lying on the ground in a fetal position, when Kopsho shot her again, then pulled her hair back, spoke to her, and shot her yet again. Lynne was moving for five minutes after the last shot and trying to turn her head in response to a bystander's voice. Kopsho stood over her like a proud hunter and kept bystanders from helping Lynne as she died. Error, if any, was harmless.

POINT VII. Kopsho's death sentence is proportional to other similarly-situated capital defendants. Kopsho committed a prior armed false imprisonment

and sexual battery for which he was still on probation. Lynne's murder was planned and prepared for three days. There were four strong aggravating factors and little mitigation aside from his mental state. This Court has rejected the argument that the fact a murder occurs in a domestic situation justifies a life sentence.

POINT VIII. This Court has repeatedly rejected the unanimous-jury-recommendation argument.

POINT I on cross-appeal. The State proved beyond a reasonable doubt that the murder was heinous, atrocious and cruel, and the trial judge erred in failing to find this aggravating circumstance. The trial judge was mistaken in his finding that a shooting death cannot be heinous, atrocious and cruel. The trial judge was also mistaken in his finding that it is the intent of the victim, not the actual anguish and suffering of the victim, that establishes this aggravating circumstance.

POINT II. The trial judge erred in holding that the State was not entitled to depose the defense mental health expert regarding statements made by the defendant or to review her notes of the interview. The State should be afforded a fair opportunity to rebut hearsay testimony, including hearsay statements of the defendant.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING *WILLIAMS* RULE EVIDENCE IN THE GUILT PHASE AND DETAILS OF A PRIOR VIOLENT FELONY IN THE PENALTY PHASE.

Kopsho raises two separate issues in this point:

(1) that the trial judge abused his discretion by allowing testimony in the guilt phase that Kopsho kidnapped Lynne two weeks before he murdered her; and

(2) that the trial judge abused his discretion by allowing testimony about a prior violent felony in the penalty phase.[8]

(1) Guilt Phase.

The State filed a notice of intent to introduce other evidence of crimes or wrong acts (V17, R2652-53). The defense then filed a motion *in limine* to preclude the evidence. (V18, R2828-19). On October 3, 2008, the trial judge held a hearing on the motions (V21, R3264-3323)[9] and reserved ruling (V21, R3311-18). At the pretrial motions hearing on April 20, 2009, the State advised that details regarding the prior violent felony involving Helen Little would be presented only in the

[8] Kopsho also makes a two-sentence argument regarding photographs; however, this issue is not briefed and is abandoned. (Initial Brief at 30).

[9] The transcript of this hearing is included in the record on appeal twice. The second inclusion is Volume 26.

penalty phase. (V28, R9-10). The trial court granted in part and denied in part Kopsho's motion *in limine*. (V28, R9-21). The trial judge ruled that the "prior bad acts go to the issue of premeditation." (V28, R13). Moreover, any mention that Lynne was raped during the kidnapping two weeks before the murder was precluded. (V28, R20).

The testimony concerning the incident comprised 3 pages of testimony in a trial with more than 400 pages of witness testimony. Jane testified that one night she had been at ABC liquor lounge with Lynne when Kopsho and Robin Cameron unexpectantly showed up. (V33, R694).[10] Jane went home around midnight, but Lynne stayed. (V33, R695). The next morning, Jane saw bruises on Lynne's neck, and Lynne told Jane how she got the bruises. (V33, R695, 696).

Robin Cameron testified that after they were at the ABC liquor lounge, he spent the night with Jane. (V33, R723-24). Early the next morning, Appellant called him and said he "needed to talk to me real bad." (V33, R724). Robin went to Kopsho's home. Lynne was there. (V33, R724).[11] Kopsho told Robin that the previous night, "he went to where she (Lynne) was staying at that time, and went through a window, and got a knife out of the kitchen, and went over to the couch where she was sleeping and forcibly made her come back to his house." (V33,

[10] Robin and Jane were not yet married at this point.

[11] Lynne had moved out of Kopsho's home and was living with her dad and step mother. (V33, R693).

R725-26). Lynne had "abrasions, red marks" on her neck. (V33, R726). Kopsho told Robin he had "grabbed her by the throat." (V33, R726). Kopsho agreed to seek counseling. (V33, R726).

At the conclusion of Robin Cameron's testimony, Kopsho moved for a mistrial asserting the jury was presented with prior bad acts testimony (that Kopsho had abducted his wife at knifepoint a few weeks prior to her murder) without the benefit of a prior *Williams* Rule instruction. (V33, R736-37). *Williams v. State*, 110 So. 2d 654 (Fla. 1959). Kopsho then renewed his prior objection to the presentation of *Williams* Rule evidence. The court denied the motion for mistrial finding the *Williams* rule evidence was previously ruled to be admissible. (V33, R737). The court asked if counsel wanted the instruction given at this point. Defense counsel agreed. (V33, R737). The court suggested a modified instruction. (V33, R738). Kopsho objected as "it is not sufficient to cure the error." (V33, R738). The court then inquired if Kopsho wanted the modified instruction given at this time. Kopsho agreed, stating, "I think that's the only choice we have." (V33, R738). The modified instruction was then given to the jury. (V33, R739).

Kopsho argues that premeditation was not in dispute. (Initial Brief at 32). However, Kopsho's defense was that the murder occurred during a rage and was not premeditated. During the first trial, Kopsho twice moved for judgment of acquittal on premeditated murder. (V13, R1996). Kopsho's entire closing argument

at the first trial was the murder was not premeditated, but was second-degree murder. (V13, R2048-2055). As expected, during the second trial, defense counsel argued that the crime was second-degree murder. (V36, R1162). The defense argued that Kopsho was resigned to the separation and helped Lynne move out: that the murder was not premeditated but was the result of learning Lynne "had this tryst with Mr. Hisey" which caused Kopsho to fly into a rage. (V36, R1164). Defense counsel asked for a verdict of second-degree murder because the murder was committed in a rage and not premeditated. (V36, R1165).

In *Williams v. State*, 110 So. 2d 654 (Fla. 1959), this Court held that "[i]f found to be relevant for any purpose save that of showing bad character or propensity," "relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime." 110 So. 2d at 662, 659. The rule has since been codified in section 90.404(2) (a), Florida Statutes (2006), which provides that "[s]imilar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, ... but it is inadmissible when the evidence is relevant solely to prove bad character or propensity."

This Court has held that before admitting collateral crime evidence, the trial court must make four determinations:

(1) whether the defendant committed the collateral crime;

> (2) whether the collateral crime meets the similarity requirements necessary to be relevant;
>
> (3) whether the collateral crime is too remote, so as to diminish its relevance; and
>
> (4) whether pursuant to section 90.403, Florida Statutes, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

Robertson v. State, 829 So. 2d 901, 907-08 (Fla. 2002). A trial court's determination that evidence is relevant and admissible "will not be disturbed absent an abuse of discretion." *Taylor v. State*, 855 So. 2d 1, 21 (Fla. 2003).

In the present case, both Jane and Robin Cameron saw the bruises on Lynne, and Kopsho admitted the offense to Robin. There was no question Kopsho committed the offense. The offenses were similar because they involved the same victim, and the same pattern of abducting the victim. The collateral offense was not remote. The evidence was relevant to plan and premeditation, the salient issue in the case. The defense theory was that Kopsho killed Lynne in a rage. But the fact that Kopsho had imprisoned then released Lynne, only to discover she had an affair, supports the State's theory that Kopsho then planned the ultimate revenge and started taking steps to ensure Lynne was not released the next time.

The collateral evidence is also relevant to motive, lack of mistake and accident. Kopsho allowed Lynne to go free the first time, but when he found out about the affair with Hisey, he resolved to finish the job.

Recently, in the case of *McWatters v. State*, 35 Fla. L. Weekly S169 (Fla. March 18, 2010), the defendant engaged in sex with the victims before killing them. McWatters confessed, then claimed at trial that the confession was false and that, even if the confession was true, it only established that the killings "just happened" when he "lost it" during consensual sex. In other words, his defense was that the sex was consensual and the killings were not premeditated. This Court held that the trial court property admitted evidence of a prior rape and murder because it was relevant to the issues of lack of consent, premeditation, intent, and absence of mistake. *See also Conde v. State*, 860 So. 2d 930, 945 (Fla. 2003) (collateral crimes evidence established that Conde had committed substantially similar crimes on five prior occasions, which in turn was relevant to numerous material issues, such as identity, intent, and premeditation.); *Spencer v. State*, 645 So. 2d 377, 380-381 (Fla. 1994) (previous threats and attacks on victim are proper evidence of premeditation); *King v. State*, 436 So. 2d 50 (Fla. 1983); *Bradley v. State*, 787 So. 2d 732, 741-42 (Fla. 2001) (*Williams* rule evidence of prior crime relevant to proving intent and premeditation); *Townsend v. State*, 420 So. 2d 615 (Fla. 4th DCA 1982) (admission of *Williams* rule evidence upheld where defendant was on trial for strangulation of two prostitutes and State introduced six other murders as relevant to identity and motive). *Wuornos v. State*, 644 So. 2d 1000,

1006 (Fla.1994) (finding evidence of six prior murders relevant to premeditation where accused's testimony portrayed her as the actual victim).

As to the evidence being the feature of the trial, this Court repeatedly has affirmed the admission of extensive collateral crimes evidence where that evidence was probative of material issues. *See Zack v. State*, 753 So. 2d 9, 16-17 (Fla. 2000) (probative value of extensive evidence of thefts, sexual assault, and murder over a two-week period prior to charged crime outweighed prejudicial effect; distinguishing *Steverson v. State*, 695 So. 2d 687 (Fla. 1997), in which evidence was inadmissible because it lacked relevance rather than because it was extensive); *Wuornos*, 644 So. 2d at 1004-06 (introduction of extensive evidence of six prior murders did not amount to "needless overkill"); *Ashley v. State*, 265 So. 2d 685, 692-94 (Fla.1972) (no error in admission of bullet evidence, autopsies, confession, and other witness testimony regarding collateral crimes).

Regarding Kopsho's argument on page 33 that collateral evidence should not be permitted where the issue is not in dispute, the State notes that lack-of-premeditation was the entire defense theory, and that this Court has upheld the admission of *Williams* rule evidence where that evidence corroborated independently strong evidence, including witness testimony and confessions. *See Randolph v. State*, 463 So. 2d 186, 189 (Fla. 1984) (corroboration through modus operandi evidence was necessary to support State's chief witness to crime, a self-

declared prostitute); *Ashley v. State*, 265 So. 2d 685, 692-94 (Fla.1972) (affirming admission of collateral crime evidence to prove identity, among other material facts, even though eyewitness testimony, the defendant's confession, and ballistics evidence linked accused to crime for which he was on trial).

Regarding the motion for mistrial, the motion was not timely. The allegedly objectionable testimony regarding Lynne's assault testimony occurred at pages 724-726. The motion for mistrial was after further testimony on other issues and appears at pages 736-37. (V33, R736-37).

Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). There was overwhelming evidence Kopsho committed premeditated murder. He confessed that he planned to kill Lynne three day earlier, he purchased a BB gun so he could steal a 9mm gun from Mr. Steele, contrived a story to get Lynne to go with him, and withdrew $3,000 from the bank to take to prison. The judge limited the evidence to just that which was relevant and not overly prejudicial by excluding testimony Lynne was raped. Additionally, when the State filed the *Williams* rule notice, the incident with Helen Little was included as similar fact. The State did not admit that testimony in the guilt phase. Further, the judge instructed the jury on *Williams* rule evidence after the testimony. (V33, R739).[12]

Penalty Phase.

[12] Defense counsel did not request the instruction before the testimony.

Kopsho claims the trial judge violated *Old Chief v. United States*, 519 U.S. 172 (1997), by allowing the State to present details of the prior violent felony after Appellant offered to stipulate to the conviction. Kopsho recognizes adverse authority. (Initial Brief at 34-35).

This Court has repeatedly held that details of a prior violent felony are relevant in the penalty phase because:

> Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.

Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989). Prior to *Rodgers v. State*, 948 So.2d 655 (Fla. 2006), evidence of the details of a prior conviction could be presented at the penalty phase through a "neutral law enforcement official rather than from prior witnesses or victims." *Rodriguez v. State*, 753 So. 2d 29, 44 (Fla. 2000). However, in *Rodgers*, this Court held that such testimony violated *Crawford v. Washington*, 541 U.S. 36 (2004). Thus, victims are now required to testify at the penalty phase so they may be confronted. The trial judge did not err in allowing Helen Little to testify, since that is what is now required by law.[13]

[13] Given the impact on victims to be required to testify and the issues now raised by Kopsho, the State respectfully invites this Court to reconsider the decision in *Rodgers* that *Crawford* applies to the penalty phase of a capital trial.

Ms. Little's testimony was not, as Kopsho alleges at pages 39-40, inflammatory. It is what he did. Kopsho's cite to a newspaper article is hardly precedent. Further, that article does not say that Juror Nordblum was swayed by Ms. Little's testimony, but by the very fact "Kopsho had previously been convicted of a violent, premeditated felony – namely kidnapping then sexually battering his former girlfriend, Helen Little." (V25, R4046).

Error, if any, was harmless. *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). The prior violent felony conviction was proved by the judgment and sentence. The trial judge found four strong aggravating circumstances which substantially outweighed the mitigating circumstances.

POINT II

THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED WAS ESTABLISHED BEYOND A REASONABLE DOUBT

The State established the cold, calculated aggravating circumstance beyond a reasonable doubt. The trial court found:

> In order to establish this aggravating circumstance, the State must prove beyond a reasonable doubt the existence of four elements: (1) the killing was the product of calm, cool reflection, and not an act prompted by emotional frenzy, panic, or a fit of rage; (2) the defendant had a careful plan or prearranged design to commit the murder; (3) the killing was the result of heightened premeditation; and (4) the defendant had no pretense of moral or legal justification. *See Richardson v. State*, 604 So. 2d 1107 (Fla. 1992); *Rogers v. State*, 511

So. 2d 526 (Fla. 1987); *Jackson v. State*, 648 So. 2d 85 (Fla. 1994); *Banda v. State*, 536 So. 2d 221 (Fla. 1988).

The evidence established that the Defendant's plan to murder his wife began on Tuesday, October 24, 2000, when she confirmed that she had a sexual encounter with Dennis Hisey. Upon his wife's confirmation, the Defendant stated during his confession that it was "at that instant when I planned to kill her." That initial thought would evolve into a careful, deliberate, and elaborate three-day scheme to kill his wife. The Defendant's first step was to remain calm and conceal his anger. During his confession, the Defendant stated, "I couldn't let her see me angry. I didn't have a gun ... I stayed cool. I stayed calm." The Defendant returned to work for the next three days and managed to conceal his intentions without creating any suspicion.

On the day of the murder, the Defendant went to work and then to the bank where he withdrew $3,000.00 from his checking account. During his confession, the Defendant explained his reasoning, "[t]he reason I did that was because I know where I'm going . . . and I'm gonna be ... in ... I don't want my mo . . . that money tied up in the bank. So I planned to take this to prison with me ... Give it out to my sons ... now you see ... where I'm saying this is premeditated?"

The next step involved securing possession of a gun. After the bank, the Defendant traveled to the home of William Steele. The Defendant knew William Steele owned a 9mm handgun. The Defendant asked to examine the gun and made note of its appearance. Armed with this knowledge, the Defendant stopped at Wal Mart and purchased a similar looking Crossman BB gun. The Defendant returned to William Steele's house, distracted Mr. Steele, took the 9mm handgun and replaced the 9mm handgun with the Crossman BB gun.

Upon returning to work, the Defendant intentionally parked his truck behind his wife's car, intending to prevent her from driving. The Defendant then convinced his wife that she needed to accompany him to the bank to make a major withdrawal. The Defendant's true intention, however, was to drive his wife into the Ocala National Forest and murder her. The Defendant confessed, "I had planned on ... going out to the Forest and ah ... killing her." While in the

Defendant's truck he continued to deceive his wife, and told her they were going to the credit union branch on the east side of town.

While travelling to the Ocala National Forest, the Defendant expressed that he needed "closure." At this point, the Defendant drew the handgun. Upon viewing the gun, his wife managed to break free from the Defendant's hold and escaped from the vehicle. After exiting the vehicle, the Defendant loaded the gun and shot his wife three times, ultimately killing her.

The Court is satisfied beyond and to the exclusion of any reasonable doubt as to the existence for the four elements that establish the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. The facts of this case clearly establish that the Defendant, upon cool and calm reflections, concocted a careful and meticulous plan to murder his wife. The Court finds the first element is proven beyond a reasonable doubt.

The second element requires that the murder be the product of a "careful plan or prearranged design to commit murder before the fatal incident." *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994), citing *Roger v. State*, 511 So. 2d 526, 533 (Fla. 1987). Once again, the facts clearly establish this element beyond a reasonable doubt. The Defendant engaged in a three-day prearranged and complex plan to kill his wife, derived from concise and deliberate manipulation and deceit.

The third element requires "heightened premeditation." *Id.* The facts clearly show this element is proved beyond a reasonable doubt. The Defendant's actions not only were calm and careful, but they exhibited a degree of deliberate ruthlessness, as shown by his pre-murder plans of manipulation and deceit and his final intentional and deliberate action of loading the gun before shooting his wife to death.

The fourth element requires that the murder have "no pretense of moral or legal justification." *Jackson v. State*, 648 So. 2d 89, at *citing Banda v. State*, 536 So. 2d 221, 224-226 (Fla. 1988). The Defendant argues the murder was committed under the influence of mental or emotional disturbance. The Court rejects this argument as a legal defense to the murder, though it is addressed below as a mitigating

> circumstance. The evidence fails to establish an excuse, justification, or defense to the murder. Contrarily, the evidence clearly demonstrates that the Defendant, over a three-day period, carefully crafted an elaborate and intelligent plan to kill his wife. Consequently, this aggravating circumstance is proved beyond a reasonable doubt and is afforded great weight.

(V24, R3966-3968).

These fact findings are supported by competent, substantial evidence. Kopsho's argument that "The actual murder of Lynne was a result of her fleeing from him in the truck" (Initial Brief at 45) ignores Kopsho's testimony that he planned to kill Lynne and meticulously planned this murder for three days; taking money from the bank to have with him in prison, stealing a gun from a friend then replacing it with a fake Wal-Mart gun, chasing her down, shooting her repeatedly as she curled into the fetal position, and keeping people away from her so she would die. Kopsho also claims his mental distress was the cause of the murder, thus it cannot be premeditated. The Florida Supreme Court has held that "[a] defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation." *Lynch v. State*, 841 So. 2d 362, 371 -372 (Fla. 2003), *citing Evans v. State*, 800 So. 2d 182, 193 (Fla. 2001). Every aspect of this case was cold, calculated and premeditated without any pretense, or conceivable pretense, of justification.

Error, if any, was harmless. The trial judge found four strong aggravating circumstances and should have found five (see cross-appeal on HAC) which substantially outweighed the mitigation.

POINT III

VICTIM IMPACT EVIDENCE DID NOT TAINT THE JURY RECOMMENDATION.

Kopsho claims the jury recommendation at the penalty phase was tainted by victim impact evidence, *i.e.*, three letters written by relatives of the victims. He particularly objects to the statement that the victim's death would "haunt" her sister forever. (Initial Brief at 46). Additionally, the "dichotomy" between the 21-year-old victim's life and Kopsho's life of crime "unfairly tipped the scales to death." (Initial Brief at 46-47). Kopsho acknowledges that the standard of review is abuse of discretion, and that *Windom v. State*, 656 So. 2d 432 (Fla. 1995), and Section 921.141(7), Florida Statutes, defeat his argument. He urges this Court to recede from *Windom*. Kopsho offers no compelling reason for this Court to overrule *Windom*.

The victim impact evidence presented in this case was not unnecessarily emotional or inflammatory. Emily Preuss, Lynne's sister, read letters to the jury written by her mother, sister and herself. (V37, R1371, 1372, 1373-77). This evidence showed the impact on the family and the uniqueness of Lynne. These letters were neither inflammatory nor prejudicial.

Jill Banning's letter, (Lynne's mother) described Lynne as, "the girl who brought home stray cats ... and nursed fallen baby birds." Lynne was the type of person to say whatever she was thinking and would not allow other people to get picked on. (V37, R1373). Lynne defended her friends and "only saw a person's good qualities." (V37, R1373-74). Lynne was "maybe too naïve, generous, good-hearted, forgiving, and ... a girl who didn't always make the right decisions." (V37, R1374). Ms. Banning described how difficult it was for her family to live without Lynne in their lives, and how much they all loved her. (V37, R1374).

Lynne's sister, Kim Banning, wrote that her life and the lives of everyone who loved Lynne were changed forever on the day Lynne was murdered. Lynne was Kim's best friend, and was strong, beautiful, and caring. (V37, R1375). Kim described Lynne's death, "hoping this nightmare will go away." Further, Kim wrote, "After reading the articles and exactly what happened to her on the day she died, will haunt me forever." (V37, R1376). Ms. Banning said Lynne was very loved and would be missed by all who knew her. (V37, R1376).

Emily Preuss, Lynne's sister, wrote a letter describing Lynne as "someone very special in my life ...young, only 21 ... with a long full life ahead of her." (V37, R1377). Lynne was very involved with Emily's daughter and spent time with her going to the beach, riding horses, and fishing. (V37, R1377). Lynne was "a great human being ... a great sister ... loving daughter and granddaughter and a fabulous

aunt." Lynne was a good friend, outgoing and loving. Lynne and Emily were very close, "She loved life." (V37, R1377-78).

In terms of numbers, this Court has affirmed up to four witnesses for one victim and consistently upheld three. *Wheeler v. State*, 4 So. 3d 599, 607-608 (Fla. 2009) (four witnesses); *Belcher v. State*, 961 So. 2d 239, 257 (Fla.) (four witnesses); *Schoenwetter v. State*, 931 So. 2d 857, 870 (three witnesses); *Huggins v. State*, 889 So. 2d 743, 765 (Fla. 2004) (same). *Deparvine*, 995 So. 2d at 378. In *Deparvine*, the evidence of five victim impact witnesses was found admissible. *Id.* This Court likewise found no error in the admission of victim impact testimony of twelve witnesses in *Farina v. State*, 801 So. 2d 44 (Fla. 2001).

Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING RELEVANT TESTIMONY THAT KOPSHO WAS HAVING AN AFFAIR.

Kopsho next claims the trial court abused its discretion by allowing the State to admit testimony that he had an extramarital affair with "Vivian." He claims the evidence was admitted only to "besmirch" his character. (Initial Brief at 49). Kopsho argues the evidence was not relevant.

The testimony at issue occurred during the testimony of Jane Wickstandt. Jane and Robin Cameron were friends of Lynne and Bill Kopsho (V33, R686-87,

714-15). Approximately four days before Lynne's murder, Kopsho brought a woman named "Vivian" to dinner at Jane's house. (V33, R697). Kopsho told Jane he was having a sexual relationship with Vivian. (V33, R698).

This testimony was relevant not only to the fact that Kopsho had "moved on" after his separation from Lynne and but also to rebut the defense claim that he was so emotionally disturbed he could not function.

The theory of defense was that Kopsho committed second-degree murder: that the verdict should be second-degree murder because Kopsho was so anguished and upset about the separation from Lynne. Yet he was having an affair with another woman. The evidence was relevant to rebut the defense theory regarding Kopsho's state of mind. In opening argument, defense counsel argued that Kopsho killed Lynne out of anger. (V33, R685). In closing, defense counsel argued that he wanted to reconcile with Lynne, and the murder was committed out of rage and anger. (V36, R1165). Defense counsel asked for second-degree murder because the murder was the produce of anger. (V36, R1165). The State was entitled to present evidence that Kopsho was having an affair, that he had no interest in reconciling with Lynne, and the murder was the result of his male ego being damaged rather than a fit of rage.

Relevant evidence is admissible unless it is more prejudicial than probative. Sec. 90.402, *Fla. Stat.*; Sec. 90.403, *Fla. Stat.* There was nothing prejudicial about

the fact Kopsho had an affair with another woman. He and Lynne were separated. All evidence prejudices the defendant; however, the question is whether the prejudice is so unfair if should be deemed unlawful. *Wournos v. State*, 644 So. 2d 1000, 1007 (Fla. 1994). The trial judge did not abuse his discretion in allowing this evidence which was relevant and not prejudicial.

Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

POINT V

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL ON THE KIDNAPPING CHARGE.

At the close of the State's case, Kopsho moved for judgment of acquittal on the kidnapping charge because the victim was not "secretly confined." (V35, R1088). The entire argument regarding the kidnapping count included:

> MR. TEDDER: Insofar as the felony murder count, or the theory of first degree murder, I'll submit to the Court that there's not enough evidence to support that Mr. Kopsho committed a kidnapping offense which would then be necessary in order for the jury or the Court to find that he's guilty of first degree murder.
>
> And at best I would submit to the Court the State has only presented evidence of false imprisonment, which I believe is not one of the enumerated crimes that would give rise to a first degree murder charge.
>
> So I would ask the Court to JOA Count I down to second degree murder and Count II down to false imprisonment.
> (V35, R1083-84).
> ……

> MR. TEDDER: Your Honor, I would just respond that as far as the secret nature of it that Mr. King is arguing about, I mean, this -- this -- obviously, the Court is well aware this happened in broad daylight. Uh, they were driving down a heavily travelled road in Marion County with lots and lots of traffic.
>
> The evidence is that people saw some sort of problem inside the truck. She could have rolled her window down and begun screaming and waving her arms about. I mean, she was certainly not secretly confined at that time.
>
> Maybe at a later time, if he -- if nothing happened and if he had been able to drive her all the way out to the forest and then secretly confine her it would be different, but where this all happened it was -- I mean, the evidence was that he said to Sergeant Owens that she first questioned where they were going at Fort King (sic) and 40.
>
> Well , that's a -- a metropolitan area of Ocala, and there's all kinds of people. There's all kind of stoplights between there and where this -- the killing eventually occurred. I would be willing -- well, I don't have any proof of this, but it seems unlikely to me that the truck they were in continued to travel without ever coming to a stop at any stoplight between her first becoming aware there was something -- that he wasn't going where she thought he was going to the point where she decided to jump out of the truck.

(V35, R1087-1089).

The trial court denied the motion. (V35, R1090). The next morning, defense counsel stated that he wished to renew to motion for judgment of acquittal on a ground he forgot to raise the day before. (V36, R1102). Defense counsel argued that the only evidence of kidnap or false imprisonment was Mr. Kopsho's confession, and there was no *corpus delecti* of the kidnap independent of the

confession. (V36, R1102). The motion was denied. (V36, R1103). The motion for judgment of acquittal was not renewed after the defense witnesses testified.

Different arguments are made on appeal from those made at the trial level. "[T]he specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal." *Evans v. State*, 975 So. 2d 1035, 1042 (Fla. 2007), *citing Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003) (*quoting Rodriguez v. State*, 609 So. 2d 493, 499 (Fla.1992)); see also *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla.1982). The focus of the motion for judgment of acquittal at the trial level was that Lynn Kopsho's confinement was not "secret." On appeal, Kopsho argues that Lynne "was not taken against her will anywhere." (Initial Brief at 51). This argument was not made at the trial level and is not preserved. An argument is preserved for appeal only if the same argument was made below. *Johnson v. State*, 969 So.2d 938, 954 (Fla. 2007); *Reynolds v. State*, 934 So.2d 1128, 1140 (Fla. 2006).

Kopsho also argues that the trial judge stated there was no "time frame" required in regards to kidnapping, that this statement was error, and that the error lead to a tainted jury recommendation to impose death. (Initial Brief at 51). The State finds no mention of "time frame" by the trial judge or by trial counsel. This argument was not preserved for appeal.

What Kopsho does outline in the initial brief is that when he brandished his weapon, Lynne "tried to exit the vehicle, so the appellant started applying the brakes and grabbing her at the same time." (Initial Brief at 52). Lynne then was grabbing the steering wheel and pulling the truck over to the side of the road. Despite the fact the arguments now made were not preserved, Kopsho recognizes in his brief that Lynne was confined against her will.

Kopsho's statement details the events as follows:

> Q. Okay.
>
> A. So I -- that's when I reached down and I pulled the gun. And I had -- across the arm rest here -- and ah -- I could see the surprised look on her face and stuff. And ah -- she kept asking me why. And -- I wouldn't even talk to her. I said why? Because I want closure. Got to get you out of my life. If I can't -- I -- I couldn't -- Live with the thought, The fact -- that she was doing this to me.
>
> Q. Take your time. Let me ask you this while -- while we're at ah -- breaking point here. Did you have the truck stopped at this point Bill or was the truck still going?
>
> A. Still going.
>
> Q. Okay. What -- when you say -- she tried to get away is that what you mean when you say the word scramble?
>
> A. Yes.
>
> (V35, R1057-58).
>
> A. Okay. Ah…I just -- well she kept asking me -- You know? Why? I kept saying because I want closure just like you do.
>
> (V35, R1058-59).

> Q. Okay. That was my next question. Had you actually stopped when she jumped out?
>
> A. Alright. She had --
>
> Q. Okay.
>
> A. Try to jump out -- at first I ah -- I was going about 60 so I started applying the break [sic] and grab her at the same time. I had her by the hair. Pulling her back like this.
>
> Q. Okay.
>
> A. And ah -- ah -- she grabbed the steering wheel and started to pull on the steering wheel. To get me -- and that's when we got over to the side of the road. Ah -- she broke free from me. Out the passenger side door. I come out behind her. As I come out behind her I then loaded the gun. Put a bullet in the chamber.

(V35, R1062-63). Both Catina and Shawn Tufts testified that were traveling east on State Road 40 when then noticed a black pick-up truck swaying back and forth in front of them. (V33, R752-53, 770-71, 778). Eventually, the truck slowed and pulled off the side of the road. (V33, R771). By the time Lynne exited the pick-up, it had slowed enough that when Lynne exited, she was able to maintain her footing. (V33, R754). Kopsho exited the pick-up and started chasing Lynne. He grabbed her from behind and threw her to the ground. (V33, R773).

Kopsho now argues that any confinement was incidental to the shooting pursuant to *Faison v. State*, 426 So. 2d 963 (Fla. 1983),[14] and *Mackerley v. State*, 754 So. 2d 132 (Fla. 4th DCA 2000). This argument was not made at the trial level and is not preserved for review.

Even if this issue were preserved, Kopsho meets the requirements for kidnapping. The State charged kidnapping pursuant to Section 787.01(1), which includes forcibly, secretly, or by threat confining, abducting or imprisoning another person against his will and without lawful authority, with intent to (1) commit or facilitate commission of a felony, (2) inflict bodily harm upon or terrorize the victim or another person. (V1, R1-2).

Lynne's kidnapping meets both the facilitate-a-felony and the bodily-harm-or-terrorize sections. There was also a sufficient *corpus delicti* of kidnapping for the confession to be considered. Three people saw Kopsho shoot Lynne and stand over her until she died.

Insofar as the *Faison* issue, Kopsho compares his case to *Mackerly* in which the victim was held in a headlock before he was shot. The present case is less like

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[14] *Faison* held that if a kidnapping is done to facilitate the commission of another crime, the resulting movement or confinement:

(a) Must not be slight, inconsequential and merely incidental to the other crime;
(b) Must not be of the kind inherent in the nature of the other crime; and
(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection. *Id*. at 965.

Mackerley and more like *Boyd v. State*, 910 So. 2d 167, 184 (Fla. 2005). In *Boyd*, this Court found competent, substantial evidence that the movement and confinement of the victim from the Texaco station away from her car made the sexual battery and murder substantially easier to commit and lessened the risk of the crimes being detected while they were being perpetrated. *See also Evans v. State*, 800 So. 2d 182, 195 (Fla. 2001) (victim moved from inside apartment to backyard sufficient movement; asportation to backyard made murder easier to commit and lessened risk of detection); *Walls v. State*, 641 So. 2d 381, 390 (Fla. 1994) (Defendant woke victim and boyfriend, tied her up and took her to another room while he killed boyfriend, then returned and killed victim); *Lovette v. State*, 636 So. 2d 1304 (Fla. 1994) (three employees of Domino's pizza taken to back of store and shot during robbery).

Furthermore, Kopsho, like *Boyd*, was charged with kidnapping with the intent to inflict bodily harm upon or to terrorize the victim or another person. Competent, substantial evidence supports the finding that Kopsho had the intent to harm or terrorize Lynne. Kopsho procured a gun which he held on Lynne. He had a knife, and a Wal-Mart bag containing a blanket, duct tape, and a roll of anchor line (rope) in the truck. (V34, T917, 921, 922). He had a sleeping bag, camping pad, and a tent. (V34, T918). Kopsho admitted that he planned to murder his wife the night she told him about the affair, “three days ago.” (V35, T1041). He went to

Wal-Mart and bought a Crossman BB gun which resembled the 9MM gun that Steele owned. Kopsho went to Steele's home, and, while Steele was distracted, replaced the 9MM with the BB gun. (V35, T1047-48). He planned to murder Lynne in the Ocala National Forest. (V35, T1052). Not only is the intent to commit bodily harm apparent, but also the scenario Kopsho painted of taking Lynne to the forest and killing her. The duct tape, knife, rope and camping gear substantiate the intent to terrorize Lynne before killing her, as does pulling a gun on the victim while traveling 60 mph. *See Bedford v. State*, 589 So. 2d 245, 251 (Fla. 1991).

Insofar as *corpus delicti*, There was substantial evidence, independent of Kopsho's statements, "tending to show" each element of the crime charged. *See Bedford v. State*, 589 So. 2d 245, 251 (Fla. 1991). Catina Tufts saw a struggle in the vehicle and the car weaving down the road going 60 miles per hour. Her husband saw the truck driving erratically, then slow down. Both Mr. and Mrs. Tufts saw Lynne jump from a moving vehicle and run. The fact that Lynne was struggling in the truck, jumped out and ran, shows that she was confined against her will. The fact that Kopsho followed her with a gun shows he had the intent to shoot her and do bodily harm.

The standard of review for Kopsho's motion for judgment of acquittal is the standard used in direct evidence cases. The State presented direct evidence against Kopsho in the form of his confession and three eye witnesses who saw the

shooting. This Court recently outlined the standard of review in direct-evidence cases as follows:

> [C]ourts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." *Woods v. State* 733 So.2d 980, 985 (Fla.1999) (quoting *Lynch v. State*, 293 So.2d 44, 45 (Fla.1974)). "On appeal of a denial of a motion for judgment of acquittal where the State submitted direct evidence, the trial court's determination will be affirmed if the record contains competent and substantial evidence in support of the ruling." *Conde v. State*, 860 So.2d 930, 943 (Fla.2003) (citing *LaMarca v. State*, 785 So.2d 1209, 1215 (Fla.2001)). "In circumstantial evidence cases, 'a judgment of acquittal is appropriate if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt.' " *Woods*, 733 So. 2d at 985 (*quoting Barwick v. State*, 660 So.2d 685, 694 (Fla.1995)). "Therefore, at the outset, 'the trial judge must first determine there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences.' " *Id*. (quoting *Barwick*, 660 So. 2d at 694). "After the judge determines, as a matter of law, whether such competent evidence exists, the 'question of whether the evidence is inconsistent with any other reasonable inference is a question of fact for the jury.' " Id. (*quoting Long v. State*, 689 So.2d 1055, 1058 (Fla. 1997)). "So long as competent, substantial evidence supports the jury's verdict, it will not be overturned on appeal." Id. However, where the State presents direct evidence in the form of the defendant's confession, usually "this Court need not apply the special standard of review applicable to circumstantial evidence cases." *Conde*, 860 So. 2d at 943 (citing *Pagan v. State*, 830 So. 2d 792, 803-04 (Fla.2002)).

Walker v. State, 957 So. 2d 560, 576 -577 (Fla. 2007). As the trial court stated in the findings on CCP, Kopsho planned to kill Lynne and created a "careful, deliberate, and elaborate three-day scheme to kill his wife." (V24, R3966). The intent to do bodily harm is clear. When Kopsho pulled the gun on Lynne and said

he needed "closure" and needed her out of his life, she was confined against her will, grabbed the steering wheel of a truck traveling 60 mph, hit the brake, and jumped from the vehicle.

Even if the kidnap conviction were stricken, any error would be harmless as to the murder conviction. Although the murder conviction was a general verdict (V23, R3684), Kopsho was charged with premeditated murder (V1, R1), the parties argued premeditated murder (V24, R1146-1160) and the jury was instructed on premeditated murder (V36, R1214-1215). "A general guilty verdict rendered by a jury instructed on both first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation." *Crain v. State*, 894 So.2d 59, 73 (Fla. 2004); *Jones v. State*, 748 So. 2d 1012, 1024 (Fla.,1999); *San Martin v. State*, 717 So. 2d 462, 470 (Fla.1998) ("While a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground or a legally inadequate theory, reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient."). *See Floyd v. State*, 850 So.2d 383, 409 (Fla. 2002) (underlying felony of burglary stricken; sufficient evidence of premeditation).

In the present case, there was not only overwhelming evidence of premeditation, the trial judge found the murder cold, calculated and premeditated, finding:

> The evidence established that the Defendant's plan to murder his wife began on Tuesday, October 24, 2000, when she confirmed that she had a sexual encounter with Dennis Hisey. Upon his wife's confirmation, the Defendant stated during his confession that it was "at that instant when I planned to kill her." That initial thought would evolve into a careful, deliberate, and elaborate three-day scheme to kill his wife. The Defendant's first step was to remain calm and conceal his anger. During his confession, the Defendant stated, "I couldn't let her see me angry. I didn't have a gun ... I stayed cool. I stayed calm." The Defendant returned to work for the next three days and managed to conceal his intentions without creating any suspicion.
>
> On the day of the murder, the Defendant went to work and then to the bank where he withdrew $3,000.00 from his checking account. During his confession, the Defendant explained his reasoning, "[t]he reason I did that was because I know where I'm going. . . and I'm gonna be...in ... I don't want my mo. . . that money tied up in the bank. So I planned to take this to prison with me ... Give it out to my sons ... now you see ... where I'm saying this is premeditated?"
>
> The next step involved securing possession of a gun. After the bank, the Defendant traveled to the home of William Steele. The Defendant knew William Steele owned a 9mm handgun. The Defendant asked to examine the gun and made note of its appearance. Armed with this knowledge, the Defendant stopped at Wal Mart and purchased a similar looking Crossman BB gun. The Defendant returned to William Steele's house, distracted Mr. Steele, took the 9mm handgun and replaced the 9mm handgun with the Crossman BB gun.
>
> Upon returning to work, the Defendant intentionally parked his truck behind his wife's car, intending to prevent her from driving. The Defendant then convinced his wife that she needed to accompany him to the bank to make a major withdrawal. The Defendant's true intention, however, was to drive his wife into the Ocala National

Forest and murder her. The Defendant confessed, "I had planned on ... going out to the Forest and ah ... killing her." While in the Defendant's truck he continued to deceive his wife, and told her they were going to the credit union branch on the east side of town.

While travelling to the Ocala National Forest, the Defendant expressed that he needed "closure." At this point, the Defendant drew the handgun. Upon viewing the gun, his wife managed to break free from the Defendant's hold and escaped from the vehicle. After exiting the vehicle, the Defendant loaded the gun and shot his wife three times, ultimately killing her.

The Court is satisfied beyond and to the exclusion of any reasonable doubt as to the existence for the four elements that establish the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. The facts of this case clearly establish that the Defendant, upon cool and calm reflections, concocted a careful and meticulous plan to murder his wife. The Court finds the first element is proven beyond a reasonable doubt.

The second element requires that the murder be the product of a "careful plan or prearranged design to commit murder before the fatal incident." *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994), *citing Roger v. State*, 511 So. 2d 526, 533 (Fla. 1987). Once again, the facts clearly establish this element beyond a reasonable doubt. The Defendant engaged in a three-day prearranged and complex plan to kill his wife, derived from concise and deliberate manipulation and deceit.

The third element requires "heightened premeditation." *Id.* The facts clearly show this element is proved beyond a reasonable doubt. The Defendant's actions not only were calm and careful, but they exhibited a degree of deliberate ruthlessness, as shown by his pre-murder plans of manipulation and deceit and his final intentional and deliberate action of loading the gun before shooting his wife to death.

The fourth element requires that the murder have "no pretense of moral or legal justification." *Jackson v. State*, 648 So. 2d 89, *citing Banda v. State*, 536 So. 2d 221, 224-226 (Fla. 1988). The Defendant argues the murder was committed under the influence of mental or

> emotional disturbance. The Court rejects this argument as a legal defense to the murder, though it is addressed below as a mitigating circumstance. The evidence fails to establish an excuse, justification, or defense to the murder. Contrarily, the evidence clearly demonstrates that the Defendant, over a three-day period, carefully crafted an elaborate and intelligent plan to kill his wife. Consequently, this aggravating circumstance is proved beyond a reasonable doubt and is afforded great weight.

(V24, R3966-3968). Thus, even if this Court struck the kidnap conviction and the felony murder, there is sufficient evidence of premeditated murder for the murder conviction to stand. *Floyd v. State*, 850 So. 2d 383, 402, 408 (Fla. 2002) (armed burglary conviction reversed and during - a - burglary aggravating circumstance stricken; sufficient evidence exists of premeditated murder to support conviction).

POINT VI

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, AND CRUEL.

Kopsho argues the trial judge abused his discretion by instructing the jury on the heinous, atrocious, and cruel ("HAC") aggravating circumstance. (Initial Brief at 55-59). The trial judge should have found HAC, and this issue is raised on cross-appeal.

Under the circumstances of this case, the HAC instruction was appropriate. *Floyd v. State*, 850 So. 2d 383, 405 (Fla. 2002). In *Floyd*, the defendant was arguing with the victim, who roused her sleeping grandchildren and sent them to a neighbor's home for safety and help, with instructions to call the police. Floyd

chased the victim to both the front and back of the house, causing her to run outside in only her nightgown. Floyd then pursued her further as he made chase and fired two shots at her, which were off target, before firing the third and fatal shot. The third shot killed Ms. Goss instantaneously. This Court held:

> The victim's fear, emotional strain, and terror during the events leading up to this murder may have been properly considered in determining whether the HAC aggravator existed, despite the nearly instantaneous nature of the victim's death. *See Pooler v. State*, 704 So.2d 1375, 1378 (Fla.1997). Also, "[t]he victim's mental state may be evaluated for purposes of [a determination of the existence of the HAC aggravator] in accordance with a common-sense inference from the circumstances." *Id*. at 1378. Moreover, where competent, substantial evidence supports the trial judge's decision to do so, it is not error to instruct the jury on the HAC aggravator. *See Cave v. State*, 727 So.2d 227, 229 (Fla.1998) (no error where competent, substantial evidence supported both the instruction on the HAC aggravator and the trial judge's ultimate finding of HAC); *Brown v. State*, 721 So.2d at 277 n. 7 (no error in instructing jury on HAC aggravator where competent, substantial evidence also supported finding of HAC). It is not illogical to conclude that Ms. Goss was in a significant state of emotional strain and terror as she ran, barely clad, outside her home in an attempt to elude a killer who not only chased her with a deadly weapon but also fired and missed with multiple shots before mortally wounding her by severing her brain stem with the third shot. Thus, we find no error in the trial judge's decision to instruct on the heinous, atrocious, or cruel aggravating circumstance.

Floyd v. State, 850 So.2d 383, 405 (Fla. 2002)

In the present case, the trial judge ultimately did not find HAC as an aggravating circumstance even though he recognized that "the victim received multiple gun shot wounds and experienced pain and suffering." (V24, R3865). The trial court also noted that Eileen Smith testified that when she got out of the

car and approached the victim, the victim continued to move for five minutes and appeared to move in response to Ms. Smith's voice. (V24, R3865).

When the issue was argued to the judge, he noted that although he did not find HAC after the previous penalty phase, the State had presented additional case law and an additional witness on the issue. (V37, R1382-84).

It was not error for the trial court to instruct the jury on HAC. In *Bowden v. State*, 588 So. 2d 225, 231 (Fla. 1991) this Court stated:

> The fact that the state did not prove this aggravating factor to the trial court's satisfaction does not require a conclusion that there was insufficient evidence of a robbery to allow the jury to consider the factor. Where, as here, evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required.

See also Stewart v. State, 558 So. 2d 416, 420 (1990). As this Court stated in *Suarez v. State*, 481 So. 2d 1201 (Fla. 1985), *cert. denied*, 476 U.S. 1178 (1986):

> The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in making their assessment as to whether death was the proper sentence in light of any mitigating factors presented in the case.

Id. at 1209. *See also Hunter v. State*, 660 So. 2d 244, 252 (Fla. 1995). *See also Floyd v. State*, 850 So. 2d 383, 405 (Fla. 2002) (instructed jury on HAC, not found in sentencing order); *Raleigh v. State*, 706 So. 2d 1324, 1327-28 (Fla. 1997) (pecuniary gain).

Mental anguish and the knowledge of impending death justify finding the heinous, atrocious aggravating circumstance. "[F]ear and emotional strain may be

considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State*, 607 So. 2d 404, 410 (Fla.1992). Simply because Lynne was shot does not automatically remove the possibility of the HAC factor. *See Douglas v. State*, 575 So. 2d 165, 166 (Fla. 1991).

Kopsho compares this case to *Omelus v. State*, 584 So. 2d 563 (Fla. 1991), a contract murder case in which this Court held that the contract-or cannot be held responsible for the heinousness of the contract-ee's method used for the murder, i.e., cannot be "vicariously" liable. *Omelus*, 584 So. 2d at 566. The present case is not a contract murder, and Kopsho is directly responsible for Lynne's terrifying death. Although the trial judge did not find HAC, there was sufficient evidence of heinous, atrocious and cruel to justify a jury instruction. Kopsho pulled a gun on Lynne while they were driving. She was so terrified she tried to jump from a truck moving 60 miles per hour. Kopsho grabbed her by the hair, and they struggled. Lynne managed to make Kopsho pull over, at which time she jumped from the car and ran for her life. Kopsho shot Lynne as she ran. She fell to the ground moaning. He shot her again. She was still moaning, so he shot her again. According to one eye-witness, Lynne was in the fetal position when Kopsho shot her the last two times. (V33, R785-86). The medical examiner testified there were eight gunshot holes, some of which were exit wounds from the three gunshot

wounds. (V35, R991, 992, 1000). The first shot went through Lynn's left breast and arm, breaking her humerus. This was so painful Lynne curled into fetal position. The next shot was described by Kopsho as so extremely painful to Lynne that he could not stand the suffering, so he shot her again. Mrs. Smith arrived on the scene after the terror of the car ride and shootings, and decribed a conscious and responsive victim with Kopsho keeping people away while she died.

Kopsho also argues that the murder was not HAC because he shot Lynne so she wouldn't suffer. (Initial Brief at 57). It is not the killer's intent, but the actual suffering of the victim. In *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003), this Court reiterated that, when analyzing the heinous, atrocious aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina v. State*, 801 So. 2d 44 (Fla. 2001); *see also Hitchcock v. Stat*e, 578 So. 2d 685, 692 (Fla. 1990). Further, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988); *see also Chavez v. State*, 832 So. 2d 730, 765-66 (Fla. 2002). The HAC aggravating factor focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and

motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. *See Barnhill v. State*, 834 So. 2d 836, 849-850 (Fla. 2002); *Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998).

The level of Lynne's mental anguish and distress was such that she tried to jump from a vehicle moving 60 mph. She was chased by Kopsho as he shot her in the back. He then stalked he like an animal and shot her two more times as she lay on the ground moaning. Then Kopsho stood above her like a proud hunter for at least 5 minutes as she slowly and painfully died.

The trial judge did not abuse his discretion in instructing the jury on HAC. Error, if any, was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

POINT VII

KOPSHO'S DEATH SENTENCE IS PROPORTIONATE TO OTHER SIMILARLY-SITUATED DEFENDANTS; THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS.

This Court's function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors; that is the function of the trial judge. *See Bates v. State*, 750 So. 2d 6 (Fla. 1999). Rather, this Court's responsibility is to "consider the totality of circumstances in a case, and to compare it with other capital cases." *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). *See also Reese v. State*, 768 So. 2d 1957, 1060 (Fla. 2000).

In the present case, the trial court found four aggravators: Prior violent felony; Cold, calculated and premeditated; During the course of a kidnapping; Under sentence of imprisonment.

The trial court did not find any statutory mitigators and gave the nonstatutory mitigators little weight except that emotional disturbance was given moderate weight. The circumstances of this case are similar to other cases in which the death penalty has been imposed. For instance, *Larzelere v. State*, 656 So. 2d 394 (Fla. 1996), involved a case in which a wife had her husband killed. The trial judge found two aggravating circumstances: Cold calculated, and premeditated and committed for financial gain. There were no statutory mitigating circumstances, but there was nonstatutory mitigation. In *Evans v. State*, 838 So. 2d 1090 (Fla. 2002), the defendant killed his brother's girlfriend because he believe she was cheating on his brother. There were two aggravating circumstances: prior violent felony and committed while on probation. There were no statutory mitigating factors but several non-statutory mitigating factors.

In *Floyd v. State*, 850 So. 2d 383 (Fla. 2002), the defendant killed his mother-in-law after an argument with his wife during which he said he was going to kill someone she loved. Similar to Kopsho, Floyd claimed the killing was done in the "heat of passion." *Floyd*, 850 So. 2d at 408. There were three aggravating

circumstances: prior violent felony, avoid arrest, and under sentence of felony probation.

Kopsho compares his case to *Douglas v. State*, 575 So. 2d 165 (Fla. 1991), *Songer v. State*, 544 So. 2d 1010 (Fla. 1989), *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988) and *Herzog v. State*, 439 So. 2d 1372 (Fla. 1983). These cases are not similar to the present case. Both *Douglas* and *Herzog* involved jury overrides. In fact, the jury in *Douglas* unanimously recommended life imprisonment. There was only one aggravating circumstance in both *Herzog* and *Songer*. *Songer* and *Fitzpatrick* both had the three statutory mitigating factors of age, extreme emotional disturbance, and inability to appreciate the criminality of their conduct. Mr. Fitzpatrick was, in lay terms, "crazy as a loon." *Fitzpatrick*, 527 So. 2d at 812. The cases cited by Kopsho are easily distinguished. In the present case there were four strong aggravating circumstances weighed against minimally significant mitigating circumstances. Kopsho had previously imprisoned a girlfriend at gunpoint and sexually battered her. He was still on probation for these felonies when he murdered Lynne. He spent three days planning and executing his plan to murder Lynne, then shot her mercilessly after terrorizing her by holding her at gunpoint while driving 60 mph down a two-lane road in the forest.

Sufficiency of the evidence: Kopsho does not raise sufficiency of the evidence; however, this Court automatically conducts such a review. Three

eyewitnesses saw Kopsho shoot Lynne; Kopsho told the dispatcher he shot and killed her; Kopsho told bystanders her shot Lynne; Kopsho confessed.

POINT VIII

THIS COURT HAS REPEATEDLY REJECTED THE UNANIMOUS-JURY RECOMMENDATION ARGUMENT; THIS ISSUE IS RAISED FOR PRESERVATION PURPOSES.

Acknowledging adverse case law, Kopsho raises this issue for preservation purposes. This Court has repeatedly rejected the unanimous-jury-recommendation argument. *See Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007). The State further notes that the trial judge found both the aggravating circumstance of prior-violent-felony and the aggravating circumstance of during-a-felony.

INITIAL BRIEF OF CROSS-APPELLANT

POINT I ON CROSS-APPEAL

THE TRIAL JUDGE ERRED IN FAILING TO FIND THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS AND CRUEL

The State proved beyond a reasonable doubt that the murder was heinous, atrocious and cruel, and the trial judge erred in failing to find this aggravating circumstance. The trial court's reasons for rejecting this factor were:

> "The heinous, atrocious, or cruel aggravating circumstance is intended to include those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." *Dixon v. State*, 283 So. 2d 1, 9 (Fla. 1973). It is the Florida Supreme Court's interpretation that "heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." *Id*. This aggravating circumstance is uniquely applied to shooting murders. **A murder by shooting "when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981). Typically a shooting unaccompanied by any additional acts of torture, will not constitute a heinous, atrocious, or cruel crime. *Ibar v. State*, 938 So. 2d 451, 474 (Fla. 2006).**
>
> The Court is cognizant that the victim received multiple gunshot wounds and experienced pain and suffering. During the penalty phase the Court heard testimony from Eileen Smith, a witness who pulled over when she saw the victim and the Defendant on the side of the road. Eileen Smith testified that when she got out of her car and approached the victim, the victim appeared to move in response to Eileen Smith's voice. The Defendant yelled at Eileen Smith to stay

> back and prevented the witness from assisting the victim in any way. However, failure to get medical attention for a victim is not enough to establish that a killing is especially heinous, atrocious, or cruel. *Cochran v. State*, 547 So. 2d 928, 931 (Fla. 1989), citing *Teffeteller v. State*, 439 So. 2d 840, 846 (Fla. 1983). Furthermore, the Defendant told Eileen Smith that he had already called 911 when she arrived and tried to approach the victim.
>
> Notwithstanding this new evidence presented by the State, the Court feels constrained to its original finding (contained in Sentencing Order dated April 8, 2005) that the murder was not heinous, atrocious, or cruel. The Court does not find sufficient evidence proving beyond a reasonable doubt that this murder was committed in a manner that sets it apart from the norm of capital felonies. **Additionally, the evidence does not establish that the Defendant deliberately and intentionally inflicted mental or physical suffering or consciously chose a method of death intended to cause mental or physical suffering. The evidence fails to show that the Defendant intended to cause his wife additional pain and suffering; rather, the evidence demonstrated he intended to immediately end her life with the first shot.** Consequently, this aggravating circumstance has not been established beyond a reasonable doubt. (Emphasis supplied)

(V24, R3964-65).

These findings ignore settled case law from this Court that not only can a shooting death be heinous, atrocious, but also that the operative question is *not* the intent of the defendant, but rather the actual mental anguish, pain and suffering experienced by the victim. As stated in *Lynch*:

> In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina*, 801 So. 2d at 53; see also *Hitchcock v. State*, 578 So.2d 685, 692 (Fla.1990). Further, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the

> circumstances." *Swafford v. State*, 533 So.2d 270, 277 (Fla.1988); *see also Chavez v. State*, 832 So.2d 730, 765-66 (Fla. 2002).
>
> In *Farina*, the trial court found the victim suffered "real and excruciating" mental anguish and had an "acute awareness" of her impending death. 801 So. 2d at 53. These facts, along with evidence showing the victim was held hostage and witnessed two coworkers being shot prior to her own death, supported the finding of HAC. *See id*. Similarly, this Court upheld the finding of HAC in *Francis v. State*, 808 So.2d 110 (Fla.2001), where elderly twin sisters were found dead in their home, both having been stabbed multiple times. To rebut the defendant's claim that HAC was not applicable because the deaths were instantaneous, the Court relied upon the medical examiner's testimony that both victims could have remained conscious for as little as a few seconds and for as long as a few minutes. *See id*. at 135.
> . . .
>
> Finally, in *Hannon v. State*, 638 So.2d 39 (Fla. 1994), this Court upheld a finding of HAC where a man was shot after witnessing his roommate being brutally stabbed. There, the victim witnessed the roommate's death, pled for his own life, ran and hid, only to be found and shot six times. *Hannon*, 638 So.2d at 43. In *Hannon* this Court wrote: "Under these circumstances, where the victim undoubtedly suffered great fear and terror prior to being murdered, the trial court did not err in finding [the victim's] murder to be heinous, atrocious, or cruel." Id.

Lynch v. State, 841 So.2d 362, 369 -371 (Fla. 2003)(10-year old child shot once after witnesses her mother shot). *See also Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004)(HAC approved where victim suffered substantial mental anguish by witnessing the defendant murder his mother and two siblings and was shot multiple times).

This Court has held that even 30 to 60 seconds of terror supports the HAC aggravating circumstance. *See Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997).

This Court recently explained:

> With respect to the HAC aggravator, this Court has held that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." James v. State, 695 So. 2d1229, 1235 (Fla.1997). This Court has also held that "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." Brown v. State, 721 So. 2d 274, 277 (Fla.1998). Furthermore, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." Swafford v. State, 533 So. 2d 270, 277 (Fla.1988); see also Lynch v. State, 841 So.2 d 362, 369 (Fla. 2003) ("[T]he focus should be upon the victim's perception of the circumstances...."). And, in Buzia v. State, 926 So. 2d 1203, 1214 (Fla. 2006), this Court upheld the finding of the HAC aggravator and stated: "Whether this state of consciousness lasted minutes or seconds, he was 'acutely aware' of his 'impending death.'" We have upheld the HAC aggravator where the victim was conscious for merely seconds."

Aguirre-Jarquin v. State, 9 So. 3d 593, 608-609 (Fla. 2009)(defendant argued that, because he stabbed the victim in the heart and she died instantly, the murder was not HAC).

Kopsho pulled a gun on Lynne while they were driving. She was so terrified she tried to jump from a truck moving 60 miles per hour. Kopsho grabbed her by the hair, and they struggled. Lynne managed to make Kopsho pull over, at which time she jumped from the car and ran for her life. Kopsho shot Lynne in the back as she ran. According to Mrs. Smith, Lynne ran for quite a distance before Kophso

caught up to her and shot her in the chest. This first shot was the one that entered the left breast on one side, exited the other, entered her left arm and broke the humerus, then exited the arm. The medical examiner testified this would be very painful. Lynne then fell to the ground and Kopsho knelt over her, pulled her hair back, looked at her and shot her again. According to Kopsho, he "shot for the heart." This would be the wound that went through the lung and pulmonary artery, and Lynne would have started drowning in her own blood. Yet, the medical examiner testified, she would not necessarily lose consciousness. We know that Lynne was still conscious and alert after the first shot and knew she was going to die because Dr. McMahon testified that Kopsho told her that Lynne told him to leave her alone and let her die. (V38, R1594). We know that Lynne was still conscious after the second shot because Kopsho told Dr. McMahon he could see the pain in her eyes, so he had to shoot her again. (V38, R1595). Kopsho's idea of how to "put someone of their misery" was to shoot Lynne in the abdomen, piercing organs. The medical examiner testified that this shot would not bleed as quickly as the pulmonary artery wound, so what Kopsho accomplished by the third shot was to increase the suffering. Lynne was in the fetal position when Kopsho shot her the last two times. Mrs. Smith testified that Lynne responded to her voice, was moving, and was trying to turn her head toward Mrs Smith for five minutes after the last shot as Kopsho stood over her and kept people from helping the victim.

Although this Court may feel that, because there are four strong aggravating circumstances and a paucity of mitigation, this issue is not important. However, the State is entitled to a proper finding of appropriate aggravating circumstances for all future litigation.

POINT II ON CROSS-APPEAL

THE TRIAL JUDGE ERRED IN LIMITING THE STATE'S ABILITY TO CROSS-EXAMINE DR. McMAHON REGARDING KOPSHO'S HEARSAY STATEMENTS.

The State filed a motion in limine regarding the testimony of Dr. McMahon, the defense mental health expert. The State moved to exclude Dr. McMahon's testimony regarding statements made to her by the defendant because Dr. McMahon refused to allow the State to review her notes of conversations and refused to discuss defendant's statements with the State during depositions. (V21, R3431).

At the May 15, 2009, hearing on the motion, the State argued that the ability to cross-examine and confront Dr. McMahon was impeded because the expert would not cooperate. (V21, R3455). Defense counsel acknowledged that the case law was against him, but asked the trial judge to "see it my way and believe that not to be correctly decided in the past." (V21, R3457). The trial judge asked that Dr. McMahon's deposition be filed so that he could review it before ruling. (V21, R3458).

The first day of trial, the judge ruled:

> First, last Friday I deferred ruling on the State of Florida's Motion in Limine Regarding Testimony of Defendant's Mental Health Expert Recitation of Statements of Defendant.
>
> I have now read the deposition of Dr. McMahon, which was conducted September 15, 2008 by Mr. King, consisting of 84 pages. I am denying the Motion in Limine Regarding Testimony of Defendant's Mental Health Expert Recitation of Statements of the Defendant.
>
> I am leery of ordering a psychiatrist to turn over her notes. And, secondly, based upon my review of the extensive deposition conducted by Mr. King, I simply don't see the necessity of entering such an order. So that motion is denied.

(V29, R4).

Section 921.141(1), Florida Statutes (2008), expressly provides for the admission of hearsay testimony in the penalty phase of a death case under certain circumstances:

> In the [penalty phase] proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in [the statute]. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided *the defendant is accorded a fair opportunity to rebut any hearsay statements.* However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

As defense counsel recognized, the provision regarding "fair opportunity to rebut" applies to both the defendant and the State. *Blackwood v. State*, 777 So.2d 399,

411-12 (Fla.2000) ("[T]he statute clearly states that the defendant must have an opportunity to fairly rebut the hearsay evidence in order for it to be admissible.... This rule applies to the State as well."); *see Hitchcock v. State,* 578 So.2d 685, 690 (Fla.1990) ("While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded. We find no merit to Hitchcock's claim that the state must abide by the rules but that defendants need not do so."). *See also Marek v. State,* 14 So.3d 985, 995 -996 (Fla. 2009)(statements to six witnesses would be admissible in a new penalty phase only if the State would have a fair opportunity to rebut the evidence).

In *Frances v. State*, 970 So.2d 806, 813-814 (Fla. 2007), this Court held that the trial court properly precluded attempts to introduce hearsay statements made by the Frances brothers, neither of whom testified at trial and thus were not subject to the State's cross-examination, citing *Blackwood v. State*, 777 So.2d 399, 411-12 (Fla.2000)(although Sec. 921.141(1) "relaxes the evidentiary rules during the penalty phase of a capital trial, the statute clearly states that the defendant must have an opportunity to fairly rebut the hearsay evidence in order for it to be admissible. This rule applies to the State as well."); see also *Hitchcock v. State*, 578 So.2d 685, 690 (Fla.1990) (finding no merit to claim that state's ability to introduce hearsay in a penalty proceeding is limited while a defendant's ability to introduce hearsay is unlimited).

Despite the State's motion to compel Dr. McMahon to be deposed and cross-examined regarding statements of the Defendant, the trial court denied the motion. Although this Court may believe this evidentiary issue is not important, this is a recurring issue. This Court has repeatedly held that the State should have a fair opportunity to rebut hearsay. This includes statements by the defendant to an expert witness. If the State has no opportunity to discover these statements pre-trial so that it can investigate and rebut the statements, an expert has unfettered discretion in testifying only to statements which favor the defendant or support the expert's opinion.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by Hand Delivery to **George D.E. Burden**, Office of the Public Defender, 444 Seabreeze Blvd., Daytona Beach, Florida 32118, this _____ day of May, 2010.

_____
Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Times New Roman 14 point font, pursuant to Fla. R. App. 9.210.

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Assistant Attorney General