

IN THE SUPREME COURT OF FLORIDA

**JEFFREY G. HUTCHINSON,**

Appellant,

CASE NO. SC01-500

v.

STATE OF FLORIDA,

Appellee.

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/

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JEFFERY G. HUTCHINSON, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Hutchinson was indicted by a grand jury for first-degree murder of Renee Flaherty and her three children: four-year old Logan, seven year old Amanda and nine year old Geoffrey. (I 24-27)<sup>1</sup>. The murders were committed on September 11, 1998. The defendant filed a motion to suppress statements he made to the investigating officer hours after the murder during a taped interview. (VII 1346-1366). The trial court held a motion to suppress hearing on December 15, 2000. (XVII 3286-3400 - XVIII 3401-3585). The trial court ruled that the taped statements made to Investigator Ashley and Adams were freely and voluntarily given because they had informed him of his *Miranda*

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<sup>1</sup> The indictment gives Amanda age as six, however, it was established at trial that Amanda had just turned seven. (XXIV 1052)

rights. (XVIII 3516). However, the trial court ruled that there was an invocation of the right to remain silent at one point in the interview and therefore, suppressed the remainder of the interview. (XVIII 3517-3518,3537).

At trial, the evidence showed:

A 911 call from 410 John King Road, the victim's home, was received at 8:41 p.m. (XXII 728,750). The 911 caller stated: "I just shot my family". (XXII 701). Hutchinson had be living with Renee and three her children at 410 John King Road. Two close friends of Hutchinson identified the voice on the 911 tape as Hutchinson's voice. (XXII 673-674; XXIV 1148). The deputies arrived at the residence within 10 minutes of the 911 call and found Hutchinson on the ground in the garage with the cordless phone receiver eight inches from Hutchinson's hand. (XXII 768-769). The phone was still on. (XXII 769). There were four dead victims inside the house. Renee was found on the bed in the master bedroom; Amanda was on the floor near the bed in the master bedroom and Logan was on the foot of the bed in the master bedroom. (XXII 1040-1045). Each was shot once in the head with a shotgun. Geoffrey was in the living room between the couch and the coffee table. (XXII 770). He had been shot twice - once in the chest and once in the head. The murder weapon was a Mossberg 12-gauge pistol-grip shotgun located on counter of the victim's home. (XXII 621; XXVI 1547, 1552, 1557; XXVII 1710). All eight shells, the five involved in the murders and the three located in the closet of the house, were from this shotgun. (XXVI 1557). Hutchinson had gun shot residue on his

hands according the test performed at 10:20 p.m. that night. (XXV 1250). Hutchinson also had Geoffrey's tissue on his leg. (XXIV 1174; XXVII 1616). Hutchinson was examined both by a EMT at the scene and a jail nurse. He had no injuries on his head or elsewhere. (XXIII 818; XXIV 1041; XXV 1211). The bartender at the AmVets Post 35, Miss Twisdale, who know both Hutchinson and Renee, testified that Hutchinson was in the bar on the night of the murders at approximately 8:00 p.m. and said to a fellow patron: "Renee is pissed off at me". (XXIII 846).

The Defense presented the testimony of five witnesses, mainly to support its alternative defense of intoxication,<sup>2</sup> including: (1) Clara Kuklo, a nurse at the county jail, who drew the defendant's blood the night of the murder; (2) Laura Rousseau, the evidence technician who collected the blood and who was present when it was drawn at 11:55 p.m. and who identified defense exhibits E F G H and I as photographs of the murder scene at 410 John King Road in Crestview; which included a photograph of nine beer bottles on a counter and a trash can with two cartons of Icehouse beer; (3) Betty Smith, who was working at the jail on September 12, who drew the defendant's blood at around 4:00 a.m. according to her testimony; (4) Officer Travis Robinson, who was present at the second blood draw performed by Betty Smith at exactly 8:34 a.m. according to his report, and who transported the blood to the evidence room

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<sup>2</sup> Defense counsel's main defense was a reasonable doubt based argument based on the officer's "jumping" to conclusions. Defense counsel stated in opening argument that his client did not commit this crime. Intoxication was an alternative defense which the jury was instructed on.

at the Okaloosa County Sheriff's Office; (4) Victoria Moore, who is the Okaloosa County Sheriff's Office custodian of evidence, who had the actual vials of bloods, one set of which was drawn by Clara Kuklo at 12:20 a.m. and the other set which was drawn at 8:40 a.m. and (5) Laura Barfield, who is a crime analyst with FDLE, who performed the blood alcohol analysis on the defendant's blood and determined that his BAC was .17 and .03 and who, using retrograde extrapolation, determined that the defendant's BAC was between .21 and .26 at the time of the murders at 8:40 p.m. and (6) Deanna Adams, the friend of the defendant that previously testified for the State, who lived in the victim's home after the murders and observed a small part of a slug in the master bedroom and reported it to the defense investigator representing Hutchinson, not the Sheriff or the prosecutor. (XXVIII 1933; 1947; 1957; 1964; 1971; 1976; 1989; XXIX 2047). The defendant did not testify but was advised by the trial court of his right to do so. (XXIX 2057,2059). After the defense rested, defense counsel renewed his motion for judgment of acquittal, which the trial court denied. (XXIX 2060).

The prosecutor then presented five witnesses in rebuttal. (XXIX 2061). Mr. Adams, who is a friend of the defendant, testified that the defendant "held his liquor a lot better than the rest of us." (XXIX 2066). Investigator Adams, who testified that he observed the defendant from 11:00 p.m. on the night of the murders until 6:00 a.m., and that while there was an odor of alcoholic beverages on the defendant, he responded appropriately

to questions, he was able to walk normally, and his speech was not slurred. (XXIX 2078,2082-2083). Agent Adams testified that he observed the defendant for approximately seven hours on the night of the murders, and that, while the defendant smelled of alcohol, he was not intoxicated and that the defendant did not need any assistance walking or changing his clothes. (XXIX 2088, 2089,2090). Dr. Berkland, testified that he observed the defendant at approximately 11:00 p.m. on the night of the murders and that while he smelled of alcohol and had bloodshot eyes, he walked in a straight line without any help; had no trouble changing his clothes and answering questions appropriately. (XXIX 2093-2094, 2095). He also testified regarding the concept of tolerance. (XXIX 2096). Michael Hall whose previous testimony was that he weighed all the lead fragments and their total weight was consistent with five slugs, testified that the total was greater than for four slugs. (XXIX 2097). He also testified that a lead fragment the size of an eraser would weigh approximately 40 grains. (XXIX 2105).

The trial court conducted a charge conference. (XXIX 2110-2167) After closing arguments, the trial court instructed the jury. (XXX 2271). The jury instructions included an instruction on intoxication. (XII 2377). The jury deliberated for two hours and twenty minutes. (XXX 2292,2296). On January 18, 2001, the jury convicted the defendant of four counts of first degree murder with a firearm. (XII 2383-2385, XXX 2297-2299). After the jury's verdict, the trial court required both the State and defense to submit a written list of aggravators and mitigators

that they intended to prove during the penalty phase. (XXX 2306). Both the State and defense submitted these lists. (XII 2392-2394; XIII 2405).

The penalty phase started on January 21, 2001. At the start of the penalty phase, counsel filed a motion to waive the jury's recommendation regarding sentencing. (XXX 2308). The motion was accompanied by an affidavit signed by the defendant. (XIII 2408-2409). The trial court conducted a waiver colloquy, during which the defendant stated that he had discussed the waiver with his attorney and family and he personally agreed that a jury recommendation should be waived. (XXX 2311). The trial court found him competent to waive and found the waiver voluntary. (XXX 2316). The trial court then excused the jury. (XXX 2321).

The prosecutor presented the testimony of two witnesses and introduced three letters relating to victim impact. The prosecutor then presented the testimony of Dr. Berkland, who is a forensic pathologist. (XXX 2337). Dr. Berkland gave his expert opinion of the sequence of events regarding the murders. The front door had been locked with a dead bolt. The front door was "busted" down. (XXX 2340). Geoffrey's blood was on the top of the door which was now on the ground. (XXX 2340). The shooting started in the master bedroom. (XXX 2340). First, Renee was shot once in her head. (XXX 2340). He reached this conclusion because Renee was still lying on the bed at the time she was shot. (XXX 2341). Amanda was shot second with one shot to her head. (XXX 2340). He reached this conclusion because not much of Logan's blood was on her and there would have been more

if Logan was shot second. (XXX 2342). Logan was shot last. (XXX 2340). He was shot once through his left hand and left side of his face. (XXX 2340). Hutchinson was standing inside the master bedroom in front of the closet when he shot these three victims because this is where the three shell casing were found. (XXX 2340). Hutchinson then went after Geoffrey moving from his first shooting position. (XXX 2359). Geoffrey was near the doorway of the master bedroom when he was first shot. His blood was found on the carpet there. (XXX 2359). Geoffrey could see his mother, sister and brother's bodies from this location. (XXX 2357). Hutchinson then left the master bedroom to chase down Geoffrey. (XXX 2360). Geoffrey was kneeling at the time of the final fatal shot. (XXX 2341). Geoffrey "absolutely" was conscious at the time of the last fatal shot. (XXX 2345). None of Geoffrey's blood was found inside the master bedroom but all of the other three victims' blood was found inside the master bedroom. (XXX 2343). Geoffrey would have been in pain from the first shot. (XXX 2363). The prosecutor then presented the testimony of Agent Adams, the lead investigator, who testified that during the interview, Hutchinson admitted that Renee and the two children were in the bedroom and Geoffrey was in the living room. (XXX 2372).

The defendant presented the testimony of seven witnesses. Dr. Vincence F. Dillon testified. Dr. Dillon's diagnosis was that the defendant suffered from Bipolar 1 and should have been treated by medication for it. (XXX 2374-2375, 2379). Dr. Dillon

testified that the two mental mitigators applied. (XXX 2398)<sup>3</sup>. However, on cross, Dr. Dillon clarified that the defendant was under the influence of extreme mental or emotional disturbance solely because Hutchinson was under the influence of alcohol. Dr. Dillon testified that "alcohol intoxication is a psychiatric disorder". (XXX 2387). The Defense also presented the testimony of six family members, including defendant's father, mother, sister, older brother and two younger brothers. (XXX 2401 - XXXI 2463).<sup>4</sup> The prosecutor and defense counsel stipulated to the admission of a certificate of honorable discharge in lieu of court martial and motorcycle trophies. (XXXI 2414,2417,2421). Hutchinson's medical records from Dr. Plastino were introduced.

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<sup>3</sup> At first, Dr. Dillon testified that he had "questions" about the defendant's capacity to appreciate the criminality or conform his conduct to the requirements of the law was substantially impaired, it was only when the trial court asked questions to clarify this answer, that Dr. Dillon testified that this statutory mitigator applied. (XXX 2391-2392)

<sup>4</sup> Hutchinson's father testified that Hutchinson supported his fifteen year old son financially and emotionally; Hutchinson was security officer of the year; Hutchinson had Attention Deficit Disorder and was on Ritalin for several years which had a beneficial effect. (XXX 2402, 2404, 2405). The defendant's mother testified that the Ritalin calmed him down; that his participation in Desert Storm made him physically ill and he had been diagnosed by Dr. Baumzweiger with Gulf War Syndrome.(XXXI 2421, 2423). Hutchinson's sister testified that his behavior was different after the Gulf War; he was active in distributing information about Gulf War Syndrome and that while he was depressed, he did not suffer from psychosis or delusions. (XXXI 2436,2438, 2440-2441). His older brother testified as to his mechanical abilities; his never having been arrested previously, that his behavior changed after the Gulf War but he was not psychotic or delusional. (XXXI 2444-2449). One younger brother testified that he was physically ill after the Gulf War and the other younger brother testified about his hyperactivity as a child. (XXXI 2454,2457, 2459).

(XXXI 2465). Dr. Baumzweiger's report dated May 24, 1999, diagnosing Hutchinson with Gulf War Illness was introduced by the prosecutor. (XXXI 2467).

The State presented three rebuttal witnesses. Dr. Harry McClaren, a forensic psychologist testified that he examined the defendant on January 22, 2001 (XXXI 2481). Dr. McClaren performed a Wechsler Adult Intelligence Scale; Revised Bender-Gestalt and the Rotter Incomplete Sentences Blank and reviewed Dr. Larson's MMPI-2 results and Dr. Larson's Wechsler Memory Scale. (XXXI 2481-2482). Dr. McClaren testified that Hutchinson was not suffering from any major mental illness. (XXXI 2490). Dr. McClaren testified that neither statutory mental mitigator applied. (XXXI 2484,2486;2488). Dr. McClaren diagnosed Hutchinson as having alcohol dependence and narcissism with some anti-social features. (XXXI 2503). Dr. McClaren did find some degree of brain dysfunction based on the results of the digit symbol sub test. (XXXI 2497). Hutchinson has an IQ of 97 which is in the normal range. (XXXI 2491). Dr. James Larson also testified that Hutchinson has no major mental disorder. (XXXI 2516). Dr. Larson also testified that neither statutory mental mitigator applied. (XXXI 2518-2519) Dr. Larson also diagnosed Hutchinson as narcissistic with some anti-social features. (XXXI 2517). Dr. Larson's report was dated January 3, 2001. Dr. Larson testified that while he was an expert on the subject, he understood that Gulf War Illness was mainly physical, not psychological. (XXXI 2535). The prosecutor then offered into evidence Dr. Baumzweiger's deposition. (XXXI 2536).

Investigator Ashley testified to rebut the defense mitigation claim that the officer did not believe that the murders were premeditated. He explained that the statements he made to Hutchinson during the taped interview were not a personal opinion that the crime was not premeditated; rather, such statements were an interview technique designed to induce the defendant to speak about the murders. (XXXI 2546-2548).

The State submitted a written sentencing memoranda in support of four death sentences. (XIV 2682-2702). The prosecutor sought five aggravators in the death of the children: (1) previously convicted of another capital felony based on the contemporaneous murders of the other victims; (2) the less than twelve aggravator; (3) HAC for Geoffrey, Amanda and Logan; (4) committed during an aggravated child abuse; and (5) victim was particularly vulnerable because the defendant stood in a position of familial or custodial authority.<sup>5</sup> The prosecutor acknowledged that the statutory mitigating circumstance of no significant history of prior criminal activity applied. Defense counsel submitted a written sentencing memoranda in support of a life sentence. (XIII 2413-2424). Defense counsel acknowledged that the prior violent felony aggravator applied, but argued against the aggravated child abuse because the death resulted from gunshot wounds. He asserted that HAC did not apply because these were shootings. He seemed to admit that the less than

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<sup>5</sup> The trial court rejected the familial or custodial authority aggravator as not proven beyond a reasonable doubt. (2707)

twelve years of aggravator applied just that it could not be used in conjunction with the child abuse aggravator.

The trial court held a *Spencer*<sup>6</sup> hearing on February 1, 2001. The State presented Investigator Don Adams. He also explained that the statements he made to Hutchinson during the taped interview were not a personal opinion that the crime was not premeditated; rather, such statements were an interview technique designed to induce the defendant to speak about the murders. (XXXI 2557). The trial court read the transcripts of the interview and agreed to listen to the audio tapes as well. (XXXI 2563). The prosecutor argued for five aggravators and that there was no improper doubling problem with these aggravators. (XXXI 2572-2582). The prosecutor agreed that the no significant history of criminal activity statutory mitigator applied and that many of the non-mitigators were properly found but that the aggravators outweighed the mitigators and death was the proper sentence. (XXXI 2592). Defense counsel argued that use of the aggravators in conjunction would involved improper doubling and even tripling. (XXXI 2593). Defense counsel also argued that the HAC aggravator did not apply because this was a shooting that lasted only 10 seconds. (XXXI 2594-2595). The trial court invited the defendant to speak but he declined.

The trial court held a sentencing hearing on February 6, 2001. (XXXII 2612-2633). The trial court imposed a life sentence for the murder of Renee Flaherty but the trial court imposed three

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<sup>6</sup> *Spencer v. State*, 615 So.2d 688 (Fla.1993).

death sentences for the murder of each of the three children. (XIV 2703-2715). The trial court found three statutory aggravators in the murder of Geoffrey Flaherty: (1) previously convicted of another capital felony; (2) the victim was less than 12 years of age and (3) that the murder was heinous, atrocious and cruel. The trial court found two statutory aggravators in the murder of Amanda Flaherty: (1) previously convicted of another capital felony and (2) the victim was less than 12 years of age. The trial court found two statutory aggravators in the murder of Logan Flaherty: (1) previously convicted of another capital felony and (2) the victim was less than 12 years of age.<sup>7</sup> The trial court found one statutory mitigator and twenty non-statutory mitigators. The trial court found no significant history of prior criminal activity as a statutory mitigator and accorded it "significant weight". § 921.141(6)(a), Fla. Stat. (1997).<sup>8</sup> The trial court found the following non-statutory mitigators: (1) the defendant was a decorated military veteran of the Gulf War which the trial court accorded "significant weight"; (2) the defendant is the father of

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<sup>7</sup> The trial court merged the "defendant engaged in the commission of an aggravated child abuse" and the "less than 12 years of age" aggravator and therefore, considered only the "less than 12 years of age" aggravator. This is the issue in the State's cross appeal.

<sup>8</sup> The trial court considered but rejected two other statutory mitigators as not proven: (1) the extreme mental or emotional disturbance mitigator and (2) the capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired mitigator. § 921.141(6)(b), Fla. Stat. (1997); § 921.141(6)(f), Fla. Stat. (1997).

a son who he has provided financial and emotional support which the trial court accorded "some weight";(3) the defendant has potential for rehabilitation and productivity while in prison which the trial court accorded "some weight";(4) the defendant's intoxication with a BAC of .21 to .26 on the night of the murders which the trial court accorded "some weight";(5) the defendant was an honorable discharged soldier for eight years which the trial court accorded "slight weight";(6) the defendant provided financial and emotional support to his family which the trial court accorded "slight weight";(7) the defendant has the ability to show compassion which the trial court accorded "slight weight";(8) the defendant's employment history which the trial court accorded "slight weight"; (9) the defendant's family support of him which the trial court accorded "slight weight";(10) the defendant's ability as a mechanic which the trial court accorded "slight weight";(11) the defendant seeking motorcycle patents which the trial court accorded "slight weight";(12) the defendant was diagnosed with Gulf War Illness which the trial court accorded "minimal weight" because there was no connection between the illness and the murders;(13) the defendant was security officer of the year which the trial court accorded "minimal weight";(14) the defendant never abused drugs which the trial court accorded "little weight";(15) the defendant is a high school graduate which the trial court accorded "little weight";(16) the defendant was active in disseminating information about Gulf War Illness which the trial court accorded "little weight";(17) the defendant's religious

faith which the trial court accorded "little weight";(18) the defendant's distress during the 911 call which the trial court accorded "little weight";(19) the defendant's friends which the trial court accorded "very little weight"; and (20) the defendant was diagnosed with Attention Deficit Disorder which the trial court accorded "very little weight".<sup>9</sup> The trial court found that the aggravators outweighed the mitigators.

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<sup>9</sup> The trial court considered but rejected six other non-statutory mitigators either finding them to be not mitigating in nature or not proven or not worthy of any weight. The trial court found that the appropriateness of a life sentence did not qualify as a mitigating factor. The trial court found that mercy did not qualify as a mitigating factor. The trial court reviewed the tape of the defendant's statement to the investigating officers that it had suppressed at the defendant's request and found no mitigating circumstances contained in these statements. The trial court found that the officer's belief that this was a crime of passion was not proven. The trial court accorded no weight to the fact that the defendant is an accomplished athlete and motorcycle racer. The trial court also accorded no weight to the defendant's decision not to testify.

## SUMMARY OF ARGUMENT

**ISSUE I** - Appellant asserts that the special jury instruction regarding premeditation amounted to an improper judicial comment on the evidence. Special jury instructions are jury instructions, not comments on the evidence. Comments on the evidence occur when a judge comments upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. Jury instructions are guidance on the law, not comments on the facts or testimony. Thus, the trial court properly instructed the jury.

**ISSUE II** - Appellant asserts that the trial court improperly admitted testimony of the victim's friend regarding a telephone conversation where the victim stated that she and the defendant had a fight on the night of the murders because it was inadmissible hearsay. Appellant argues that the fight was not a sufficiently startling event to qualify as an excited utterance. The State respectfully disagrees. The statement is admissible as a spontaneous statement and/or excited utterance. A break up is a startling event. Moreover, both the fight and the telephone call occurred within 30 minutes. Additionally, the error, if any, was harmless. Hutchinson told a person at the bar he went to just prior to the murders that Renee was mad at him. So, the jury already knew that the defendant and the victim had had a fight regardless of this testimony. Thus, the trial court properly admitted this testimony.

**ISSUE III** - Appellant contends that the trial court abused its discretion in refusing to grant a mistrial. None of the

prosecutor's comments was error; all were perfectly proper. They were fair comments on the evidence. Thus, the trial court properly overruled the objections and properly denied the motion for mistrial

**ISSUE IV** - Appellant asserts that the trial court abused its discretion in refusing to grant a mistrial. Appellant argues that the mention of the appellant's statements on the night of the murder violated his right to remain silent. The testimony did not violate the right to remain silent because appellant waived his right to remain silent and talked with the investigator. There is no possible violation of the right to remain silent under these facts. Moreover, the error, if any, was harmless. Thus, the trial court properly denied the motion for mistrial.

**ISSUE V** - Appellant asserts that the trial court should have granted his motion for judgment of acquittal because there was insufficient evidence of premeditation to send the case to the jury. Appellant's assertion is meritless. Appellant drove back to his house, retrieved his pistol-grip, pump shotgun from his truck and broke down the front door of the house. He went into the master bedroom. He aimed and pulled the trigger killing Renee. He then pumped the shot gun, aimed at Amanda and pulled the trigger, killing Amanda. He then pumped the shot gun, aimed at Logan and pulled the trigger, killing Logan. He then turned and went after Geoffrey. He pumped the shot gun, aimed at Geoffrey and pulled the trigger. Geoffrey, while mortally wounded, attempted to escape. He pumped the shotgun, yet again,

aimed again at Geoffrey and shot again finally killing Geoffrey. This establishes premeditated murder. Thus, the trial court properly denied the judgment of acquittal.

**ISSUE VI** - Appellant asserts that the trial court abused its discretion in denying his motion for mistrial made when an elderly lady at the restaurant during a lunch recess made a remark about the case to three of the jurors. The trial court properly handled the incident. The trial court individually inquired of three jurors and each assured the trial court that the incident would not affect their verdict. Thus, the trial court properly denied the motion.

**ISSUE VII** - Appellant asserts that "victim less than 12 years of age" aggravating circumstance, § 921.141(5)(1), Florida Statutes (1998), fails to genuinely narrow the class of persons eligible for the death penalty and therefore, violates the prohibition against cruel and unusual punishment. The State respectfully disagrees. Florida's "victim less than twelve years of age" aggravating circumstance genuinely narrows the class of persons eligible for the death penalty. Murderers of children less than twelve are a subclass of murderers. This Court has recently rejected a similar attack on the "victim vulnerable due to advanced age or disability" aggravator. Thus, the "victim less than 12 years of age" aggravating circumstance does not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

**ISSUE VIII** -

Appellant contends that the merger doctrine prohibits aggravated child abuse from serving as the underlying felony for a felony murder conviction where the aggravated child abuse is based on a single gunshot. This argument is contrary to the explicit language of the felony murder statute that lists aggravated child abuse as an enumerated felony. There can be no argument that the legislature did not intend the crime of aggravated child abuse to serve as an underlying felony for a felony murder when it specifically amended the felony murder statute to so provide. Thus, aggravated child abuse may properly served as the underlying felony for a felony murder conviction.

**ISSUE IX** - Appellant asserts that the trial court erred in finding the murder of Geoffrey to be heinous, atrocious or cruel. The State disagrees. Geoffrey was acutely aware of his impending death. After shooting Geoffrey's entire family, Hutchinson shot Geoffrey in the chest. Geoffrey, although mortally wounded, attempted to flea. Hutchinson then pumped the shotgun again, aimed directly at the child's head with the child watching and then shot the child again. Geoffrey knew he was about to die. Thus, there is competent, substantial evidence to support this finding and the trial court properly found the murder to be heinous, atrocious or cruel.

**ISSUE X** - Appellant asserts that the death penalty in this case is disproportionate. The defendant killed four persons, three of whom were young children. Death is proportionate where there are multiple victims especially three child victims. The trial

court sentenced Hutchinson to death for the murders of the three children - all of whom were under 10 years of age. This Court has found death appropriate where there were less than the three aggravators present here. Moreover, this Court has also found the death penalty the appropriate punishment where facts of the murder were similar to this murder. Thus, the death penalty is proportionate.

**CROSS-APPEAL ISSUE** - The aggravated child abuse aggravator is properly considered separately from the less than 12 years of age aggravator. These two aggravators are not referring to the same aspect of the crime. One aggravator concerns the defendant's conduct and the other concerns the victim's status as a child. Hence, the trial court improperly merged the two aggravating circumstances.

#### ARGUMENT

#### ISSUE I

DID THE TRIAL COURT ABUSE ITS DISCRETION BY  
GIVING A SPECIAL JURY INSTRUCTION ON  
PREMEDITATION? (Restated)

Appellant asserts that the special jury instruction regarding premeditation amounted to an improper judicial comment on the evidence. First, this issue is not preserved. Appellant objected to the special jury instruction but did not state any basis for the objection. The special jury instruction was a correct statement of the law. Furthermore, special jury instructions are jury instructions, not comments on the evidence. Comments on the evidence occur when a judge comments upon the weight of the evidence, the credibility of the

witnesses, or the guilt of the accused. Jury instructions are guidance on the law, not comments on the facts or testimony. The special jury instruction merely informed the jury of permissible factors, such as the nature of the weapon and the wounds, to consider in determining whether premeditation exists. Thus, the special jury instruction was not a judicial comment on the evidence.

#### The trial court's ruling

Prior to defense resting its case, the prosecutor mentioned to the trial court that he was going to request a special jury instruction on premeditation that the trial court had given in the past. (XXIX 2020-2021). The trial court held a jury instruction conference. (XXIX 2111). During the conference, the prosecutor referred to a special jury instruction on premeditation. (XXIX 2121,2129). The prosecutor submitted a separate written request for the special jury instruction as requested by the trial court. (XII 2382). Defense counsel objected but did not state any basis. (XXIX 2130,2163). The trial court granted the state's request for the special jury instruction because it was an "appropriate instruction in accordance with Florida law." (XXIX 2131). The trial court instructed the jury.(XXX 2271). The trial court gave the standard jury instruction on premeditation. (XXX 2274-2275). The trial court then gave the following special jury instruction:

You may consider the nature of the weapon used, the manner in which the homicide was committed, and the nature and

manner of the wounds inflicted upon the victim in determining whether the crime was premeditated.

(XXX 2275).

#### Preservation

This issue is not preserved. While defense counsel objected to the giving of the special instruction on premeditation he did not object to the instruction on the basis that the instruction amounted to a comment on the evidence. Indeed, counsel stated no basis for his objection. Fla.R.Crim.Pro. 3.390(d)(providing that a "party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection). A general objection without any basis is not sufficient to preserve an issue for appeal.<sup>10</sup> Thus, this issue is not preserved.

#### The standard of review

There are two standards of review involved with special jury instructions. First, the question of whether the special jury instruction is a correct statement of the law is a pure question of law reviewed *de novo*. However, once it is determined that the jury instruction is an accurate statement of the law, it is

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<sup>10</sup> *Jennings v. State*, 782 So.2d 853, 862 (Fla. 2001)(noting that the objection to the CCP jury instruction was not preserved because the defendant failed to specifically argue that the instruction was unconstitutionally vague in the trial court); *Geralds v. State*, 674 So.2d 96, 98-99 (Fla. 1996)(holding constitutional vague challenge to jury instructions on aggravators procedurally barred because counsel failed to object with specificity).

within the trial court's discretion whether or not to give a special instruction.<sup>11</sup>

### Merits

The summing up and comment by judge statute, § 90.106, Florida Statutes, (1998), provides:

A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.<sup>12</sup>

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<sup>11</sup> *United States v. Nolan*, 223 F.3d 1311, 1313 (11<sup>th</sup> Cir. 2000)(reviewing *de novo* whether the jury instructions misstated the law but reviewing for abuse of discretion a refusal to give a requested jury instruction); *United States v. Beers*, 189 F.3d 1297, 1300 (10<sup>th</sup> Cir. 1999)(reviewing a district court's decision whether or not to give a particular instruction for an abuse of discretion but conducting *de novo* review to determine whether the instruction correctly stated the law); *Darling v. State*, 808 So.2d 145, 160 (Fla. 2002)(concluding that the trial court did not abuse its discretion by refusing to give a requested special jury instruction regarding circumstantial evidence); *Card v. State*, 803 So.2d 613, 624 (Fla. 2001)(stating that the decision on whether to give a particular jury instruction is within the trial court's discretion).

<sup>12</sup> While the law revision council notes in the statutes annotated aver that this statute is a codification of the holding in *Seward v. State*, 59 So.2d 529 (Fla.1952), is this not accurate. A version of this statute existed prior to 1952. Indeed, Florida has had statutes prohibiting judges from commenting on the facts of a case since March 2, 1877. Chapter 2096, § 1, Acts 1877, providing: "[u]pon the trial of all common law and criminal cases . . . , it shall be the duty of the Judge presiding on such trial to charge the jury only upon the law of the case); Revised Statutes of 1892 § 1088, charge to the jury in civil case section, the duty of judge to charge jury statute, providing: "the judge presiding on such trial shall charge the jury only upon the law of the case"; Revised Statutes of 1892 § 2920 charge of the court statute, providing: "the rules of law relative to instruction and the charge of the court in civil cases shall obtain in all criminal case. . ."; Compiled General Laws of Florida of 1927 § 4363 (2696) Charge to jury in civil and criminal cases section, the judge to charge jury on law of case statute, providing "the judge presiding on such trial shall charge the jury only upon the law of the case . . ." See also

*Garner v. State*, 9 So. 835, 843 (Fla. 1891)(noting the statutory basis for the rule in Florida prohibiting comments by the judge); *Keigans v. State*, 41 So. 886 (Fla. 1906)(reversing a murder conviction where the judge commented on the defendant's testimony regarding the interest the defendant "necessarily must have in the result of the trial" and noting that while other states permit such comments they do not have a statute limiting the presiding judge to charges "only upon the law of the case" as Florida does); see also CHARLES W. EHRHARDT, *FLORIDA EVIDENCE*, § 106.1 at 38 (2000 ed.)(noting that the federal rules of evidence do not prohibit such comments and that, at common law, a judge was permitted to comment on the evidence). Some states allow judicial comments on the evidence. Cal. Const. art. VI, § 10 (providing that the court may make such comment on the evidence and the testimony and credibility of any witness as, in its opinion, is necessary for the proper determination of the cause); *People v. Rodriguez*, 726 P.2d 113, 134-139 (1986)(holding judge's comment on a witness' testimony to a deadlocked jury was within court's constitutional power and while a trial court's comment should be accurate, temperate, and fair, they need not be neutral, bland, or colorless summaries).

While Florida has a statute forbidding judicial comments, it is not a constitutional issue. *Quercia v. United States*, 289

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*Keigans v. State*, 41 So. 886, 890 (Fla. 1906)(Shackleford, C.J., dissenting)(giving legislative history of statute prohibiting judges from commenting on the evidence and limiting comments to the law.). The basis of this statute is a prior statute, not caselaw.

U.S. 466, 77 L.Ed. 1321, 53 S.Ct. 698 (1933)(noting that, in a jury trial, a federal judge, as trial judges did at common law, may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are for their determination). Comments by the judge do not violate the right to a jury trial or due process. Indeed, in a criminal case, while "ill advised", it is not even *per se* reversible error for a trial judge to express his personal opinion of the defendant's guilt. *United States v. Fuller*, 162 F.3d 256 (4<sup>th</sup> Cir. 1998)(holding that the trial judge's statement that: "from my own personal view I do not credit and accept the defendant's testimony . . . that he had no intent to violate the federal drug laws"; rather, "I believe he was acting illegally as a drug dealer" but emphasizing that jury was not required to accept the judge's view; rather, it was "entirely up to you and you alone to make your determination of what the evidence establishes" was not *per se* error because the undisputed facts amounted to the commission of the crime but disapproving the practice *citing United States v. Murdock*, 290 U.S. 389, 394, 54 S.Ct. 223, 78 L.Ed. 381 (1933)). But even a judge commenting on a defendant's guilt is not a constitutional issue. *Davis v. Craven*, 485 F.2d 1138, 1140 (9th Cir.1973)(en banc)(declining to constitutionalize *Murdock*).

At common law, and to this day in federal courts, judges were permitted to sum up evidence and comment on weight of the evidence and the credibility of the witnesses. Renee Lettow Lerner, *The Transformation of the American Civil Trial: The*

*Silent Judge*, 42 WM. & MARY L. REV 195 (2000)(giving as an example of a true comment on the evidence a comment; explaining that the practice of judicial comments on the evidence has deep roots in our legal traditions and was widely employed in early America where a jury often would discuss with the judge their doubts about the facts and the weight of different pieces of evidence; and noting that many commentators have expressed great concern over the curtailment of the judge's power to give such advice).

Here, however, the judge did not comment on the evidence. The trial court did not state his opinion regarding premeditation or express any thoughts about how the weapon demonstrated appellant's premeditation; rather, the trial court merely instructed the jury. Special instructions are jury instructions, not comments on the evidence. A jury instruction is a statement of the law, not a comment on the facts of the case. A comment on the evidence, as the statute explains, involves summing up the evidence like a prosecutor does or commenting to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. Courts sometimes confuse erroneous jury instructions with the

concept of comments on the evidence.<sup>13</sup> A permissive jury instruction is never a comment on the evidence.

In *Kearse v. State*, 662 So.2d 677 (Fla. 1995), this Court held that a special jury instruction defining premeditation was proper. The trial court gave a special instruction on premeditation which provided:

Among the ways that premeditation may be inferred is from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted.

Kearse contended that this instruction constituted an improper comment on the evidence. *Kearse*, 662 So.2d at 681. This Court rejected that contention, reasoning that although the added language is not part of the standard jury instruction, it is an accurate statement of the law regarding premeditation. *Id.*

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<sup>13</sup> *Baldwin v. State*, 46 Fla. 115, 35 So. 220, 222 (1903)(finding that two requested instructions invade the province of the jury, single out and emphasize specific parts of the testimony to be considered without reference to the other parts, and are arguments to be addressed to the jury by counsel, rather than the law of the case to be given by the court); *Whitfield v. State*, 452 So.2d 548 (Fla.1984)(holding that a jury instruction stating that the jury could infer guilt from the defendant's refusal to submit to fingerprinting constitutes an impermissible comment on the evidence); *Fenelon v. State*, 594 So.2d 292, 294 (Fla. 1992)(stating that there is no valid policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial; *Weddell v. State*, 780 So.2d 324 (Fla. 1<sup>st</sup> DCA 2001)(certifying as a matter of great public importance whether the standard jury instruction on possession of property recently stolen is an impermissible comment on the evidence); *Fecske v. State*, 757 So.2d 548 (Fla. 4<sup>th</sup> DCA), *rev. denied*, 776 So.2d 275 (Fla. 2000)(holding a special jury instruction that lack of affirmative medical treatment did not relieve defendant of criminal responsibility for victim's death was an improper comment on the evidence).

*citing Sireci v. State*, 399 So.2d 964, 967 (Fla.1981). Accordingly, this Court held that the special jury instruction on premeditation was not error.

The complained of special instruction in this case is the same as the special instruction in *Kearse*. Here, as in *Kearse*, the special jury instruction is an accurate statement of the law. This Court has repeatedly said premeditation may be inferred from the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. *Perry v. State*, 801 So.2d 78, 84 (Fla. 2001); *Holton v. State*, 573 So.2d 284, 289 (Fla.1990)(quoting *Larry v. State*, 104 So.2d 352, 354 (Fla.1958); *Sochor v. State*, 619 So.2d 285, 288 (Fla.1993)(quoting *Larry v. State*, 104 So.2d 352, 354 (Fla.1958)). How can it be error for the trial court to instruct the jury to consider the exact same factors that this Court considers when it determines whether premeditation exists? Thus, the special jury instruction on premeditation is an accurate statement of the law and the trial court did not abuse its discretion in giving the special jury instruction. If a permissive jury instruction is commenting on the evidence, then all jury instructions are improper comments on the evidence. CHARLES W. EHRHARDT, FLORIDA EVIDENCE, § 106.1 at 37 n.1 (2000)(noting the contradiction in Florida caselaw where sometimes a jury instruction is viewed as a comment on the evidence but at other

times, "seemingly similar instructions are determined not to be a comment on the evidence").

#### Harmless Error

Regardless of the special jury instruction, the jury would have concluded that these murders were premeditated. *Quintana v. State*, 452 So.2d 98, 101 n.2 (Fla. 1<sup>st</sup> DCA 1984)(stating that judicial comments, which either directly or indirectly, convey to the jury the judge's view of the case or the evidence, may simply be harmless). Appellant contends that the harm was the affect of the special jury instruction on his intoxication defense. However, this special jury instruction did not, in any manner, undermine that defense. The special instruction did not say anything about the intoxication defense. The jury was still free to find that appellant was too intoxicated to form the requisite intent for first degree murder. Hence, any error was harmless.

#### ISSUE II

THE TRIAL COURT ABUSE ITS DISCRETION IN  
ADMITTING TESTIMONY RELATING THE VICTIM'S  
STATEMENT IN A TELEPHONE CALL? (Restated)

Appellant asserts that the trial court improperly admitted testimony of the victim's friend regarding a telephone conversation where the victim stated that she and the defendant had a fight on the night of the murders because it was inadmissible hearsay. Appellant argues that the fight was not a sufficiently startling event to qualify as an excited utterance. The State respectfully disagrees. The statement is admissible as a spontaneous statement and/or excited utterance.

A break up is a startling event. Moreover, both the fight and the telephone call occurred within 30 minutes. Additionally, the error, if any, was harmless. Hutchinson told a person at the bar he went to just prior to the murders that Renee was mad at him. So, the jury already knew that the defendant and the victim had had a fight regardless of this testimony. Thus, the trial court properly admitted this testimony.

#### The trial court's ruling

The prosecutor sought to admit part of a telephone conversation Renee had with her best friend the night of the murder. At trial, the prosecutor, citing *Ferrell v. State*, 686 So.2d 1324, 1329 (Fla. 1996) and *Rivera v. State*, 718 So.2d 856 (Fla. 4<sup>th</sup> DCA 1998), argued that the statements were excited utterances. (XXIV 1011-1012). Defense counsel objected. (XXIV 1007). The trial court directed the prosecutor to proffer the testimony. (XXIV 1012). The prosecutor proffered the testimony of Francesca Pruitt, who testified that she and Renee were best friends; she received a telephone call on September 11, 1998 at 7:30 central time from Renee; Renee was crying and Renee said "I just had a fight with Jeff"; "he has left" and "he took stuff out of the closet and put it in the truck" (XXIV 1013-1017). The trial court ruled this limited part of the conversation was admissible as an excited utterance. (XXIV 1020). Defense counsel objected to the statement as hearsay citing *Harmon v. Anderson*, 495 F.Supp. 341, (E.D.Mich. 1980).<sup>14</sup> Defense counsel

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<sup>14</sup> *Harmon* held that a rape victim's statement was admissible as an excited utterance because "[t]here is no question but that, at the time of the statement, the victim was

argued that the statements were not covered by the excited utterance because the time frame was unknown and that the characteristics of the fight, such as whether it was a fist fight, were unknown. In the presence of the jury, Francesca Pruitt, testified that Renee was her best friend; she received a telephone call from Renee on September 11, 1998 at 7:30; Renee told her that "I've had a fight with Jeff"; Renee was crying, sobbing and upset; "It was a big fight and he had taken some of his stuff and put it in the truck and left"; "he's gone" and "I want to come home" to Deer Park, Washington. (XXIV 1027-1030).

#### Preservation

This issue is preserved. Defense counsel objected to the statements as hearsay, not covered by the excited utterance exception. He argued that it was not an excited utterance because the time frame and the nature of the fight was unknown. Therefore, the issue is preserved.

#### Standard of Review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion.<sup>15</sup> This, obviously, includes whether a statement is

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still under the strain of the incident." *Harmon*, obviously, does not support any argument that the statement is not admissible.

<sup>15</sup> *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000); *Cole v. State*, 701 So. 2d 845 (Fla. 1997); *Jent v. State*, 408 So. 2d 1024, 1039 (Fla. 1981); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (stating that all evidentiary rulings are reviewed for "abuse of discretion").

covered by the excited utterance exception. *Cotton v. State*, 763 So.2d 437, 441 (Fla. 4<sup>th</sup> DCA 2000)(noting that the standard of review for whether a statement qualifies as an excited utterance is abuse of discretion). The standard of review for whether a statement qualifies as an excited utterance is abuse of discretion.

### Merits

The hearsay statute, § 90.801(1)(c), Florida Statutes (1998), provides:

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Hearsay is generally inadmissible for three reasons: (1) the declarant does not testify under oath; (2) the trier of fact cannot observe the declarant's demeanor; and (3) the declarant is not subject to cross-examination. *Breedlove v. State*, 413 So.2d 1, 6 (Fla. 1982)(citing *State v. Freber*, 366 So.2d 426, 427 (Fla.1978)).

Florida's Evidence Code retained much of old "res gestae" concept and codified the doctrine in three exceptions of (1) spontaneous statements, (2) excited utterances, and (3) then existing mental and emotional conditions of the declarant. *Alexander v. State*, 627 So.2d 35, 43 (Fla. 1st DCA 1993)(explaining that the res gestae rule was codified in sections 90.803(1), (2), and (3)).

### **Spontaneous statements**

The hearsay exception statute, § 90.803(1), provides:

Spontaneous statement.--A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

The federal equivalent of this exception is the present sense impression. CHARLES W. EHRHARDT, *FLORIDA EVIDENCE*, 688 (2000 ed.). It is the contemporaneity of the statement to the event that is the basis for its reliability. Because there is no or only a slight lapse of time, this negates any memory problems - one of the four classic dangers of hearsay. A textbook example of a present sense impression is a radio announcer's play-by-play description of a baseball game. The event or condition need not be startling.

In *Tampa Electric Co. v. Getrost*, 151 Fla. 558, 10 So.2d 83 (Fla. 1942), this Court held that was a victim's statement made during a telephone call was admissible because it was reliable. An assistant testified that the victim, who was a lineman, told him that he called the plant and ordered the power line turned off. This Court, while acknowledging that the testimony was hearsay, reasoned that it was admissible because it did not result "from reflection or premeditation, nor was there motive to make it self-serving." Here, likewise, the victim's call about the fight did not result from reflection or premeditation, nor was there motive for Renee to lie to her best friend about why she was crying.<sup>16</sup>

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<sup>16</sup> Crying is not hearsay. *Layman v. State*, 652 So.2d 373, 375 (Fla. 1995)(holding that the testimony of victim's boyfriend that she was crying is not hearsay; rather, it is an observation). Fran's testimony about hearing Renee crying

While the exception necessarily requires only a short period of time elapse between the event and the statement, several minutes may pass. *United States v. Blakey*, 607 F.2d 779 (7th Cir.1979) (holding a statement made up to 23 minutes after it was observed was admissible as a present sense impression). Here, both the fight and the phone call occurred within the same half hour.

#### **Excited utterance**

The hearsay exception statute, § 90.803(2), provides:

Excited utterance.--A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The excited utterance exception requires: (1) an event startling enough to cause nervous excitement; (2) the statement was made before there was time for reflection; and (3) the statement was made while the person was under the stress of the excitement from the startling event. *Rogers v. State*, 660 So.2d 237, 240 (Fla.1995). It is the excited condition of the declarant that is the basis for its reliability. The stress and excitement of the event negate reflection and therefore, the declarant's ability to lie.

While the length of time between event and statement is a factor to consider in determining whether a statement may be admitted under excited utterance hearsay exception, the immediacy of the statement is not a statutory requirement. *Henyard v. State*, 689 So.2d 239, 251 (Fla. 1996). There is no

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during the telephone call, likewise, is not hearsay.

bright-line rule of hours or minutes. *Rogers*, 660 So.2d at 240. Florida Courts have admitted statements made within an hour of the event. *State v. Wright*, 678 So.2d 493,494 (Fla. 4<sup>th</sup> DCA 1996)(noting both the First and the Fourth District have held that statements separated by over one hour in time were admissible). Some courts have found statements made hours after the event to be admissible. *United States v. Tocco*, 135 F.3d 116, 127-28. (2d Cir. 1998)(holding statement properly admitted as an excited utterance even though it was made some three hours after the startling event which was a fire set by the declarant); *But see Corn v. State*, 796 So.2d 641,644 (Fla. 1<sup>st</sup> DCA 2001)(holding statement was not excited utterance where made two hours after event because two hours is sufficient to permit reflective thought). Here, the statement occurred within the same half hour as the fight.

The fight need not be a physical fight. *United States v. Bailey*, 834 F.2d 218 (1st Cir.1987)(finding an offer of a bribe to be a sufficiently startling event for purpose of the excited utterance exception because "common sense suggests that a juror would be 'startled' by a neighbor's attempted bribe"). Common sense also suggests that romantic break ups are startling events. Moreover, the test of a startling event is subjective. *West Valley City v. Hutto*, 5 P.3d 1, 5, n.5 (Utah App. Ct. 2000)(explaining that the test is subjective, not objective and giving an example of a driver in a minor fender bender accident but who is a sixteen year old who just acquired her license and noting that she likely would be upset for some time). Renee was

clearly upset from the fight as she was still crying when she made the statements and that is all the exception requires. Appellant seems to argue that because she calmed down during the telephone call that fact makes the excited utterances retroactively not excited. All that is required is that the declarant be excited at the time she make the statements. Every person who makes an excited utterance later calms down. *Henryard v. State*, 689 So.2d 239, 251 (Fla. 1996)(holding victim's statements made when she was still experiencing the trauma of the events were properly admitted under the excited utterance).

*Stoll v. State*, 762 So.2d 870, 873 (Fla. 2000) is distinguishable. In *Stoll*, this Court held that the murder victim's statement that defendant had threatened to kill her more than once and she knew he would do it to witness after a fight with defendant was not as an excited utterance. The State never asserted that victim's statements were excited utterances at trial nor did the trial court ever make a factual finding to support this assertion. However, here, the State did assert this position at trial and the trial court found the statements to be excited utterances. The State made a sufficient showing of the time period and that the victim was still under the stress of the fight. Hence, the trial court properly admitted the statements as excited utterances.

#### **Confrontation rights**

First, both the spontaneous statement and excited utterance exceptions are firmly rooted and therefore, evidence admitted

pursuant to either does not violate the confrontation clause.<sup>17</sup>

Moreover, the declarant, Renee, was unavailable because Hutchinson killed her. *United States v. Rouco*, 765 F.2d 983, 995 (11<sup>th</sup> Cir. 1985)(concluding that the defendant waived his right to confront the witness by killing him and quoting the Fifth Circuit: "[t]he law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him."). Hutchinson waived any confrontation rights. Hence, the admission of the statement did not violate his right to cross-examination.

#### Harmless Error

The error, if any, was harmless. In *United States v. Peacock*, 654 F.2d 339, 351 (5<sup>th</sup> Cir.1981), *vacated on other grounds*, 686 F.2d 356 (5<sup>th</sup> Cir. Unit B 1982)(5th Cir.1982), the Fifth Circuit held any error in the admission of the victim's telephone conversation describing a fight with the defendant was harmless. The victim and the defendant were married and having difficulties. The victim telephoned her mother the night before she was murdered. The victim told her mother the defendant "was gone, she had no idea where he was at, they were separated; that

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<sup>17</sup> *White v. Illinois*, 502 U.S. 346, 356 & n.8, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992)(explaining that the Confrontation Clause is not violated when the declaration falls within a firmly rooted hearsay exception); *State v. Frazier*, 753 So.2d 644, 646(Fla. 5<sup>th</sup> DCA 2000)(holding that the admission of statements on 911 tape did not violate right to confrontation because the exception is firmly rooted in the common law and its reliability can be inferred); *Williams v. State*, 714 So.2d 462, 467, n.3 (Fla. 3d DCA 1997)(finding that the excited utterance is uniformly considered a firmly rooted exception to the hearsay rule and collecting cases).

he had taken her keys away from her and that she had no idea when or if she would ever see him again." At trial, the mother's testimony regarding the telephone call was admitted under the residual exception. Fed.R.Evid. 804(b)(5). On appeal, the defendant asserted that this testimony was erroneously admitted. The government argued that the defendant waived his right to confront the victim by killing her. The *Peacock* Court referred to the waiver argument as "highly sensible" but found the error, if any, harmless. The Court noted that the victim's conversation with her mother served the limited purpose of establishing a motive.

The jury would have already been aware that the defendant and Renee had been fighting. The bartender, Teresa Twisdale, at AmVets bar, the bar that Hutchinson visited just prior to the murders, testified that Hutchinson had told another patron that Renee was "pissed off at him". Moreover, Hutchinson is confusing motive with evidence of premeditation. The jury would have concluded that these murders were premeditated based on the nature of the crime which involved multiple victims and multiple gunshots even without knowing the reason for the murders. While prosecutors understandably wish to prove motive, motive is not an element of murder. *Daniels v. State*, 108 So.2d 755, 759 (Fla.1959). Thus, the error was harmless.

### ISSUE III

DID THE TRIAL COURT ABUSE ITS DISCRETION BY OVERRULING DEFENSE COUNSEL OBJECTION TO THE PROSECUTOR COMMENTS IN CLOSING? (Restated)

Appellant contends that the trial court abused its discretion in refusing to grant a mistrial. None of the prosecutor's comments was error; all were perfectly proper. The prosecutor did not shift the burden nor improperly vouch for witnesses. The remaining comment were fair comments on the evidence. Thus, the trial court properly overruled the objections and properly denied the motion for mistrial.

#### The trial court's ruling

During closing argument, defense counsel objected to several comments by the prosecutor. The trial court overruled the objections. (XXIX 2186;XXX 2271; XXIX 2178-2179; XXIX 2184; XXIX 2195).

#### Forfeiture

This issue is preserved except for appellant's claim of error regarding the prosecutor's comment that the evidence points to him and no other. Appellant fails to specifically identify what he thinks is wrong with this comment; he merely quotes the comment and the defense counsel's one word objection. Merely quoting the record is not properly presenting an issue on appeal. *Pagan v. State*, 2002 WL 500315, \*12 (Fla. 2002)(refusing to address issue on appeal where the argument consisted of a simple recitation of instances where a motion for mistrial was made and no substantive argument was made and explaining that the lack of specificity precluded appellate review).

#### The standard of review

The standard of review is abuse of discretion. Wide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So.

2d 1, 8 (Fla. 1982). As this Court has observed, it is within the judge's discretion to control the comments made to a jury and appellate courts will not interfere unless an abuse of discretion is shown. *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997), citing *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990). A trial court's ruling granting or denying a mistrial motion is reviewed under an abuse of discretion standard. *Overton v. State*, 801 So.2d 877, 897 (Fla. 2001).

### Merits

A mistrial is appropriate only where a prosecutor's comment is so prejudicial that it vitiates the entire trial. *Ford v. State*, 26 Fla. L. Weekly S602 (Fla. 2001), citing, *Duest v. State*, 462 So.2d 446, 448 (Fla.1985); *Gonzalez v. State*, 786 So.2d 559, 567 (Fla. 2001)(stating that for a prosecutor's comments to be prejudicial, they must "vitate the trial or so poison the minds of the jurors that Appellant did not receive a fair trial."). Courts should not lightly overturn a criminal conviction on the basis of the prosecutor's remarks alone. *United States v. Virgen-Moreno*, 265 F.3d 276,290 (5<sup>th</sup> Cir. 2001).

Courts consider: (1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any curative instruction, and (3) the strength of the evidence supporting the conviction. Here, while the trial court did not give any curative instruction because none of the comments were error, the prejudicial effect was minimum especially in light of the strength of the state's case. The defendant called 911 and

confessed to these murders. His shotgun was positively identified as the murder weapon. He had gunshot residue on his hands. His version of events, *i.e.* two masked men with a Remington 870 shotgun committed these murders, was completely refuted by the evidence that the murder weapon was not that type of shotgun.<sup>18</sup>

### **Burden shifting**

The prosecutor, referring to the evidence of the gunshot residue found on defendant's hands, stated: "it is valuable evidence of his guilt, evidence that anybody deciding this case would want to know. If there was no gunshot residue on his hands that would be valuable evidence of innocence." (XXIX 2186). Defense counsel objected arguing that this was burden shifting. The trial court overruled the objection.

This is not burden shifting. The prosecutor is making a corollary argument. The prosecutor is saying that if there was no residue on the defendant's hands then that would be evidence of innocence, but here, by contrast, there was evidence of gunshot residue on the defendant's hands, so that is valuable evidence of guilt. The prosecutor was not asserting that the defendant had to prove or produce anything. The prosecutor was merely commenting on the expert's testimony that there was gunshot residue on Hutchinson's hands. Moreover, it was a

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<sup>18</sup> It is not actually proper to conduct harmless error analysis on motions for mistrial based on prosecutorial comments. Rather, the typical harmless analysis of balancing the prejudice with the strength of the State's case is part of the test for whether a mistrial should be granted.

hypothetical because, in fact, the test showed the presence, not the absence, of residue. *Morrison v. State*, 2002 WL 432561, \*8 (Fla. March 21, 2002)(holding that prosecutor's remarks that the defendant, would have us believe that ... the elderly, disabled man attacked him and the victim cut his own throat, were not an impermissible suggestion that the burden was on the defendant to prove his innocence, but rather only a direction for the jury to consider the evidence presented where this was the actual story the defendant gave the police about the murder).

Hutchinson next complains about the prosecutor's comment that the "evidence points to him and no other." (XXX 2271). Identity of the perpetrator is an implied element of every crime and is an explicit element of murder. The prosecutor was required to prove identity. The prosecutor was merely arguing that the evidence proved that the murder was committed by Hutchinson as he was required. (XXIX 2171). If a prosecutor arguing in closing that the evidence points to one man and only one man is improper, then closing argument should be abolished entirely.

#### **Vouching**

The prosecutor, referring to the testimony of two close friends of the defendant, who identified the voice on the 911 tape as Hutchinson's, stated: "they came in here and told the truth even though they were so closely in companionship with Jeff Hutchinson" (XXIX 2184). The prosecutor continued arguing: "they were his best friends . . .the only thing that they've ever done to Jeff Hutchinson that hurt him in any way was come in here and tell the truth." (XXIX 2195).

This is not vouching. Improper vouching occurs when a prosecutor indicates a personal belief in a witness' credibility. Here, by contrast, the prosecutor was commenting on the lack of bias of these witnesses, not vouching for their credibility. *State v. Campbell*, 997 P.2d 726, 735-736 (Kan. 2000)(holding that prosecutor's closing argument that the witness was the defendant's friend but he came in here and he told you the truth was not vouching).

Hutchinson also claims that the prosecutor improperly vouched for the deputies by arguing that "they didn't testify to anything that sounded prejudiced to me. They just testified to the facts" (XXX 2271). However, this was a fair reply to defense closing argument where he accused the deputies of becoming prejudiced by hearing of the confession of the defendant on the 911 tape and immediately decided Hutchinson was a suspect. (XXIX 2202). Defense counsel argued that a presumption of guilt colored the government's view of Jeff Hutchinson before the first law enforcement officer even arrived at 410 John King Road due to the report of dispatch that the 911 caller had said that he shot his family. (XXIX 2203-2204). Where the work of law enforcement is attacked by defense counsel, the prosecutor is entitled to make a fair reply. *United States v. Franklin*, 250 F.3d 653, 661 (8<sup>th</sup> Cir. 2001). The prosecutor's point was that counsel had not shown how the information about the 911 call had affected the officer's conduct. The prosecutor meant that the officer's conclusion that the person with the phone was the caller and therefore, the

murder was a natural one based on reason, "not prejudice" and indeed, the prosecutor was arguing that the jury should come to the same conclusion. The jury would have understood this remark as that type of argument and would not have misunderstood it to be the prosecutor's expression of his personal belief in the credibility of these officers.

#### **"Imaginary" scenario**

In closing, the prosecutor described the murders and explained that Geoffrey saw the murders of his mother, sister and brother and then explained that the reasonable inference was that Geoffrey was not in the master bedroom. (XXIX 2178). Appellant asserts that the prosecutor's comment was arguing facts not in evidence and was a hypothetical scenario that was not a reasonable inference from the evidence. *Rose v. State*, 787 So.2d 786, 797 (Fla. 2001)(cautioning against arguments "imagining" what may have happened to a victim). Improper imaginary script arguments involve what the victim is feeling or thinking, not descriptions of the crime. Such descriptions are proper. Here, the prosecutor was not imagining that Geoffrey was not in the bedroom. Geoffrey's blood was found in other parts of the house, not in the master bedroom. His body was found in the living room, not the master bedroom. That Geoffrey was not in the bedroom was a reasonable inference from the evidence, not an improper imaginary script.

#### ISSUE IV

DID THE TRIAL COURT PROPERLY DENY THE MOTION FOR MISTRIAL MADE WHEN THE INVESTIGATOR TESTIFIED THAT HE TALKED WITH THE DEFENDANT? (Restated)

Appellant asserts that the trial court abused its discretion in refusing to grant a mistrial. Appellant argues that the mention of the appellant's statements on the night of the murder violated his right to remain silent. The testimony did not violate the right to remain silent because appellant waived his right to remain silent and talked with the investigators. There is no possible violation of the right to remain silent under these facts. Moreover, the error, if any, was harmless. Thus, the trial court properly denied the motion for mistrial.

The trial court's ruling

After twice being given *Miranda*<sup>19</sup> warnings, Hutchinson waived his right to remain silent and agreed to talk to investigator Ashley and Adams. A transcript of this interview is included in the record on appeal but was not introduced at trial. (XI 1995-2209). Defendant did not confess during the interview. (XVIII 3529). Defendant filed a motion to suppress claiming that the statements were obtained in violation of *Miranda* and the statements were involuntary. (VII 1346-1366). In the motion, Hutchinson asserted that the investigators' repeated reference to religion rendered his statements involuntary. (VII 1349-

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<sup>19</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)(reaffirming and constitutionalizing *Miranda*).

1354).<sup>20</sup> Hutchinson also asserted that he invoked his right to remain silent at various points during the interview which rendered any subsequent statements in violation of that right. (VII 1355). In the motion, Hutchinson additionally asserted that his use of alcohol rendered his statements involuntary.

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<sup>20</sup> The trial court expressed his "personal disapproval" of the religious method of interrogation but denied the motion to suppress because there was no Florida case holding that such a method renders the resulting statements coerced. (XVIII 3517). There is nothing wrong with appealing to a suspect's Christian beliefs during questioning. IB at n.4. There is no police coercion in such situations because what coercion exists is sacred, not profane. *Welch v. Butler*, 835 F.2d 92, 95 (5<sup>th</sup> Cir.1988)(holding born-again Christian officer's prayer session with defendant in which he confessed did not constitute police coercion because what coercion existed "was sacred, not profane."); *United States v. Miller*, 984 F.2d 1028, 1031-32 (9<sup>th</sup> Cir. 1993)(holding that defendant's confession was not coerced by appeals for the "need to repent" and give a "candid account" from a Mormon bishop who was also FBI agent to defendant's religious beliefs); *Monteon v. Gomez*, 45 F.3d 436 (9<sup>th</sup> Cir. 1994)(unpublished opinion)(holding confession was voluntary, where a licensed chaplain was also a police sergeant encouraged the defendant to turn himself in and to cooperate, because it was the product of defendant's own pre-existing religious beliefs, not of police coercion); *But see Morrison v. State*, 2002 WL 432561, 27 Fla. L. Weekly S253 (Fla. March 21, 2002)(Quince, J., concurring) (stating that there is a thin line separating police coercion and a defendant's voluntary statements after a religious discussion and the police should proceed with extreme caution where a police officer interrogates a suspect under the guise of offering spiritual counseling); *Roman v. State*, 475 So.2d 1228, 1232(Fla.1985)(stating that "the use of the 'Christian burial technique' by law enforcement personnel is unquestionably a blatantly coercive and deceptive ploy"). The United States Supreme Court has never held that 'Christian burial technique' is improper; rather, they have held that such statements amount to interrogation and requires *Miranda* warnings. *Brewer v. Williams*, 430 U.S. 387, 399-400, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)(holding "Christian burial speech" was interrogation despite absence of direct questioning). God may well "coerce" defendants into confessing but that is not police coercion.

(VII 1359-1360).<sup>21</sup> The trial court held a motion to suppress hearing on December 15, 2000. (XVII 3286-3400 - XVIII 3401-3585). The trial court ruled that the pre-*Miranda* statement made to Deputy Woodward was spontaneous. (XVIII 3505,3508). The trial court ruled that the statements made to Deputy Stewart were freely and voluntarily given because Deputy Stewart had informed him of his *Miranda* rights and while the deputy had not obtained a written waiver, a written waiver is preferable but not required. (XVIII 3508-3509,3510). The trial court ruled that the taped statements made to Investigator Ashley and Adams were freely and voluntarily given because they had informed him of his *Miranda* rights and obtained a written waiver. (XVIII 3516). However, at one point in the interview, the investigator said: [a]ll you've got to say is stop. I've told you that from the get-go" and the defendant responds "then stop". (XI 2093, IX 1662). The trial court ruled that this was an invocation of the right to remain silent and therefore, suppressed the remainder of the interview.(XVIII 3517-3518,3537).<sup>22</sup> The trial court

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<sup>21</sup> The trial court ruled that the statement was admissible regardless of the drinking. (XVIII 3521).

<sup>22</sup> In a footnote, appellant implies that he invoked his right to remain silent earlier than the trial court's ruling indicated, when he stated "I have sat here long enough, either you arrest me or charge me or kick my ass out" was some sort of invocation of the right to remain silent. It was not. Any invocation of the right to remain silent must be clear and unambiguous. *Ford v. State*, 801 So.2d 318 (Fla. 1<sup>st</sup> DCA 2001)(holding that defendant's statement during interrogation, "Just take me to jail," was not unambiguous invocation of right to remain silent and thus interrogating officer was under no obligation to cease questioning or to clarify whether defendant wanted the interrogation to cease); *State v. Owen*, 696 So.2d

specifically ruled that all statements prior to that point were admissible. (XVIII 3543).

At trial, the prosecutor called Investigator Adams of the Okaloosa Sheriff's Office to identify Hutchinson's voice as the voice on the 911 tape. (XXVIII 1878, 1882). Investigator Adams was in the presence of the defendant at the Sheriff's Office from midnight until six or seven in the morning following the murders. (XXVIII 1880). He heard the defendant make statements and became familiar with his voice. (XXVIII 1879-1880). Defense counsel objected because this was "an impermissible comment on his right to remain silent" and was "an indirect comment" "on his right to an attorney, his right to silence".(XXVIII 1880-1881). Defense counsel moved for mistrial. The trial court overruled the objection and denied the mistrial. The prosecutor proceeded to ask the investigator if he and someone else were talking to the defendant from midnight until six in the morning, to which the Investigator responded: "yes". (XXVIII 1881). The prosecutor asked the investigator based on his familiarity with

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715, 717 & n. 4 (Fla.1997)(holding that the defendant's statements, "I'd rather not talk about it" and "I don't want to talk about it", were equivocal and ambiguous and therefore, not invocations of the right to remain silent and such ambiguous statements did not require that the interrogator cease questioning or resolve the ambiguity); *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *Coleman v. Singletary*, 30 F.3d 1420 (11th Cir.1994). IB at 40 n.3

At another point in the interview, investigator Adams asks the defendant, "Why don't you tell us again what happened this evening" and the defendant responds, "I have nothing more to say". (IX 1624). In context, this is not an assertion of the right to remain silent; rather, it is an assertion that there is no point repeating the story again because he would not change his version.

the defendant's voice, his opinion as to whether the voice on the 911 tape was the defendant's. (XXVIII 1882). The trial court removed the jury. The trial court expressed doubt that a witness with only five hours familiarity with a person's voice was qualified to identify a voice. (XXVIII 1883). The prosecutor, citing cases where the victim whose only knowledge of the voice was from the few minutes during crime was allowed to identify the defendant's voice, such as *Weinshenker v. State*, 223 So.2d 561 (Fla.3d DCA 1969) and *Mack v. State*, 54 Fla. 55, 44 So. 706 (1907), argued that the investigator who spent hours with the defendant was familiar enough with the defendant's voice and that any objection based on familiarity went to the weight not the admissibility. (XXVIII 1884-1887). The trial court, relying on cases that held that the voice identification by an officer was admissible provided that his occupation as a law enforcement officer was not disclosed to the jury, such as *Edwards v. State*, 583 So.2d 740, 741 (Fla. 1<sup>st</sup> DCA 1991) and *State v. Price*, 701 So.2d 1204(Fla. 3d DCA 1997), ruled that the officer should not be allowed to testify as to his identification of the voice on the 911 tape. (XXVIII 1895, 1898, 1900).<sup>23</sup> The trial court sustained the objection. (XXVIII

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<sup>23</sup> The trial court's ruling excluding the officer's voice identification was incorrect. The prosecutor was correct. Both *Edwards* and *Price* rely on *Hardie v. State*, 513 So.2d 791 (Fla. 4th DCA 1987). The prejudice, the Fourth District identified in *Hardie*, was identifying the witnesses as police officers "created the impression that he had been involved in other criminal activities or had a prior record." Because the jury was told the basis of the investigator's familiarity with the defendant's voice was the interview following the murders, no such impression was created here. Here, the jury would not

1899,1902). Defense counsel stated that the "prior contact" had Fifth Amendment and right to remain silent implications. (XXVIII 1900,1902). Defense counsel renewed his motion for mistrial regarding this incident at the close of the State's case. (XXVIII 1931-1932). The trial court again denied the motion.

#### Preservation

This issue is partially preserved. The right to remain silent claim is preserved. However, the impact on his right not to testify at trial is not preserved. Defense counsel objected at trial on the basis that the investigator's testimony violated his right to remain silent to the police, not on the basis that the testimony burdened his right to testify or not testify at trial.

#### The standard of review

A trial court's ruling on a motion for mistrial is reviewed for abuse of discretion.<sup>24</sup> An appellate court's review is

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infer that the defendant had a prior record. The prejudice that defense counsel identifies as the "prior contact" was the interview which was admissible evidence. The evidence of the interview was only prejudicial to the defendant in the normal sense that all adverse evidence is prejudicial. Moreover, the prior contact, where the defendant waived his *Miranda* rights and spoken during the interview, has no right to remain silent implications. Thus, the trial court should have allowed this testimony and allowed the officer to relate the substance of the conversation prior to the invocation as well.

<sup>24</sup> *Goodwin v. State*, 751 So. 2d 537, 546 (Fla. 1999); *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999)(explaining that a ruling on a motion for mistrial is within the trial court's discretion and should not be reversed absent an abuse of that discretion); *Hamilton v. State*, 703 So. 2d 1038, 1041 (Fla. 1997) (noting that a ruling on a motion for mistrial is within

deferential because a trial judge is in the best position to determine whether an incident is serious enough to warrant the drastic step of declaring a mistrial.

### Merits

Where a defendant does not invoke his right to remain silent but instead chooses to speak with the police, he may not raise a violation of his right to remain silent. *United States v. Pino-Noriega*, 189 F.3d 1089, 1098 (9<sup>th</sup> Cir. 1999) (explaining that a defendant who voluntarily waives his right to remain silent after being informed of his rights cannot prevent the introduction at trial of statements he makes after he waives that right citing *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980)). Similarly, where a defendant first waives his right to remain silent and talks with the officers but then later invokes his right to remain silent, introducing the statements he made before he invoked his rights is proper.<sup>25</sup> Appellant has no right to remain silent regarding

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the trial court's discretion); *United States v. Diaz*, 248 F.3d 1065, 1101 (11<sup>th</sup> Cir. 2001) (reviewing the district court's refusal to grant a mistrial for abuse of discretion).

<sup>25</sup> *Valle v. State*, 474 So.2d 796, 801 (Fla.1985) (holding that where a defendant never invoked his Fifth Amendment right against self-incrimination but instead, after *Miranda* warnings, he freely and voluntarily converses with the police, the interrogating officer's testimony that the defendant refused to answer one question is not a violation of the right to remain silent because that constitutional right was not invoked); *Thomas v. State*, 726 So.2d 357, 358 (Fla. 1<sup>st</sup> DCA 1999) (holding that testimony that defendant failed to respond to one question after waiving his *Miranda* rights was not comment on right to remain silent); *United States v. Burns*, 276 F.3d 439, 441 (8<sup>th</sup> Cir. 2002) (holding, where defendant waives his right to remain silent after *Miranda* admitting to some conduct but declining to answer

statements made after *Miranda* warnings. He was not silent - he talked. Moreover, while the statements made prior to the invocation are properly introduced at trial, here, the actual contents of the statements were not introduced; rather, the mere fact that such a conversation occurred was introduced.<sup>26</sup>

Appellant's argument is premised on the assumption that the jury would somehow jump to the conclusion that the defendant had invoked his right to remain silent at some point in the conversation. The jury was never told this and it is not a

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one question, testimony including the refusal is not a violation of *Doyle v. Ohio*, 426 U.S. 610, 611, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); *United States v. Goldman*, 563 F.2d 501, 503 (1st Cir.1977)(where a defendant waives his right to silence the prosecutor may comment on the defendant's statement including the refusal to respond to two questions).

<sup>26</sup> To the extent that appellant is claiming that the investigator's testimony regarding the identification of his voice is, itself, a violation of his right to remain silent, voice exemplars are not testimonial. A defendant has no right to remain silent regarding the identification of his voice; he may be compelled to speak for this purpose. *United States v. Wade*, 388 U.S. 218, 221, 87 S.Ct. 1926, 1929, 18 L.Ed.2d 1149 (1967)(holding compelling a defendant to speak within hearing distance of the witnesses was not compulsion of a testimonial nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt); *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973)(holding a suspect could be compelled to give voice exemplars for use by the grand jury); *State v. Trotman*, 701 So.2d 581 (Fla. 5<sup>th</sup> DCA 1997)(reversing a trial court's order granting a motion to suppress where defendant invoked his right to an attorney but the officers taped a general conversation and used that tape to have the victim identified him as the rapist and holding that the Fifth Amendment privilege against self-incrimination does not protect a suspect from disclosure of the sound or tone of his voice and that communication directed at appellant for the purpose of obtaining a voice exemplar was not interrogation).

natural assumption. The natural assumption would be that defendant talked to the investigator which is how he was familiar with the defendant's voice. Moreover, this was exactly what the investigator testified occurred - that he talked with appellant that night. Thus, the jury only knew that the defendant had spoken to the police that night but this fact and indeed, the substance of this part of the conversation, was admissible.

Appellant seemingly argues that this somehow affected his decision not to testify at trial. Unidentified pressures to testify do not violate the Fifth Amendment. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 287, 118 S.Ct. 1244, 1253, 140 L.Ed.2d 387 (1998)(finding no violation of the Fifth Amendment privilege in a required interview to apply for clemency and noting there are undoubted pressures pushing the criminal defendant to testify but such pressures do not constitute compulsion for Fifth Amendment purposes and rejecting the court of Appeals' characterization as a "Hobson's choice"); *McGautha v. California*, 402 U.S. 183, 213, 91 S.Ct. 1454, 1471, 28 L.Ed.2d 711 (1971)(rejecting a claim that a unitary trial on guilt and the penalty phase in a capital case violates the right to testify because a defendant's desire to address the jury on punishment unduly encourages waiver of the defendant's privilege to remain silent on the issue of guilt). Even erroneous trial court rulings that influence a defendant's decision not to testify are not a violation of the right to testify. *State v. Raydo*, 713 So.2d 996 (Fla.1998)(holding that the constitutional

right to testify was not violated by the trial court's erroneous ruling that the defendant could be impeached with his prior nolo contendere plea if he took the stand, when Florida law does not, in fact, allow such impeachment and noting that adverse rulings which may influence a defendant's decision whether to testify do not necessarily violate the constitutional right to testify). Here, by contrast, there was no adverse ruling. In the end, the trial court sustained the objection and did not permit the investigator to identify Hutchinson's voice. This testimony and the favorable ruling that followed was not the basis of defendant decision not to testify. *State v. Raydo*, 713 So.2d 996, 1000(Fla. 1998)(noting that a reviewing court cannot assume an adverse ruling was the reason the defendant decided not to testify because the decision to testify seldom turns on one factor).

#### Harmless error

The error, if any, was harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986)(holding that improper comments on a defendant's invocation of his right to remain silent are subject to a harmless error analysis). Appellant speculates that the jury would have expected him to take the stand to give them the details he give the police that night during the interview; however, this expectation would exist from the information regarding the 911 call where defendant referred to other perpetrators and would not arise because of any comment on the invocation of the right to remain silent. Moreover, the trial court's repeated instructions to the jury that the defendant has

the right not to testify would cure this expectation. Given the evidence against Hutchinson, the error, if any, was harmless. *Jones v. State*, 748 So.2d 1012, 1021-1022 (Fla. 1999)(holding detective's testimony that the interrogation ended when Jones invoked his right to remain silent was an improper comment on the defendant's right to silence but because the remark was neither repeated nor emphasized and given the evidence against Jones including his confession ISSUE error was harmless).

DID THE TRIAL COURT PROPERLY DENY THE MOTION FOR JUDGMENT OF ACQUITTAL AND PROPERLY FIND SUFFICIENT EVIDENCE OF PREMEDITATION? (Restated)

Appellant asserts that the trial court should have granted his motion for judgment of acquittal because there was insufficient evidence of premeditation to send the case to the jury. Appellant's assertion is meritless. Appellant drove back to his house, retrieved his pistol-grip, pump shotgun from his truck and broke down the front door of the house. He went into the master bedroom. He aimed and pulled the trigger killing Renee. He then pumped the shot gun, aimed at Amanda and pulled the trigger, killing Amanda. He then pumped the shot gun, aimed at Logan and pulled the trigger, killing Logan. (XXX 2345). He then turned and went after Geoffrey. He pumped the shot gun, aimed at Geoffrey and pulled the trigger. Geoffrey, while mortally wounded, attempted to escape. He pumped the shotgun, yet again, aimed again at Geoffrey and shot again finally killing Geoffrey. This establishes premeditated murder. Thus, the trial court properly denied the judgment of acquittal.

The trial court's ruling

Defense counsel made a motion for judgment of acquittal arguing that the state failed to prove premeditation. (XXVIII 1923-1925). Defense counsel asserted that there was no evidence of premeditation, either direct or circumstantial. The trial court denied the motion. (XXVIII 1929). Defense counsel renewed his judgment of acquittal motion after presenting his defense and the trial court again denied the motion. (XXIX 2060). After the State's rebuttal case and the jury instruction conference, defense counsel again renewed the motion and the trial court again denied the motion. (XXIX 2163).

#### Preservation

This issue is preserved. Defense counsel made a motion for judgment of acquittal on the exact same grounds he raises on appeal. Although not required, he renewed his motion at the close of all the evidence. *Morris v. State*, 721 So.2d 725(Fla. 1998)(holding a defendant was not required to renew a motion for judgment of acquittal at close of all evidence in order to preserve denial of motion on appeal; rather, the issue is preserved if the defendant makes a motion at close of State's case).

#### The standard of review

The standard of review of a motion for a judgment of acquittal is *de novo*. *Pagan v. State*, 27 Fla. L. Weekly S299, 2002 WL 500315, \*5 (Fla. April 4, 2002)(stating that the *de novo* standard of review applies to appellate review for a motion for judgment of acquittal);*Jones v. State*, 790 So.2d 1194 (Fla. 1<sup>st</sup> DCA 2001)(en banc)(holding that the standard of review of a

motion for a judgment of acquittal is *de novo* and receding from prior cases which had held that the standard was abuse of discretion). However, an appellate court does not review the jury's verdict under this standard; it merely reviews the judge's decision to send the case to the jury.<sup>27</sup>

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<sup>27</sup> Both the *Pagan* Court and the First District in *Jones* seems to suggest that appellate courts review the jury's verdict under the competent, substantial standard of review as well as reviewing the trial court's ruling on the motion for judgment of acquittal under the *de novo* standard of review. The *Pagan* Court stated: "[g]enerally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence." The *Jones* Court states: "a jury verdict, like all other findings of fact is subject to review on appeal by the competent, substantial evidence test." *Jones*, 790 So.2d 1196, n.3. However, Florida appellate courts do not review jury's verdict; they review only the trial court's decision on the judgment of acquittal. In *Tibbs I*, the Florida Supreme Court reversed based on the weight of the evidence. *Tibbs v. State*, 337 So.2d 788 (1976)(*Tibbs I*). However, the *Tibbs II* Court later made it clear that Florida appellate courts should not review the jury's verdict. *Tibbs v. State*, 397 So.2d 1120 (1981))(*Tibbs II* ). The *Tibbs II* Court explained that appellate court's only function is to determine sufficiency as a matter of law. *Tibbs II*, 397 So.2d at 1123 n.10. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal. *Tibbs*, 397 So.2d at 1123. Only the trial courts in Florida have the power to sit as an additional juror and grant a new trial based on the weight of evidence. Fla. R.Crim. P. 3.600(a)(2). The difference is not solely a matter of words; it is of constitutional significance. *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)(explaining the difference between a verdict that is against the weight of the evidence and one that is not supported by sufficient evidence and holding that a verdict that is against the weight of the evidence may be retried without violating double jeopardy; whereas, a verdict that is not legally sufficient evidence operates as an acquittal and double jeopardy precludes a retrial). There is no standard of review for the jury's verdict because Florida appellate courts do not review the jury's verdict. The federal constitutional test is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

## Merits

The test is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Pagan v. State*, 2002 WL 500315, \*5 (Fla. April 4, 2002)(stating if a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction); *Bradley v. State*, 787 So.2d 732, 738 (Fla. 2001)(same). An appellate court must consider the evidence and all reasonable inferences from the evidence in a light most favorable to the state. *Jones v. State*, 790 So.2d 1194, 1197 (Fla. 1<sup>st</sup> DCA 2001)(en banc); *Pagan v. State*, 2002 WL 500315, \*5 (Fla. April 4, 2002)(stating appellate court views the evidence in the light most favorable to the State); *Bradley v. State*, 787 So.2d 732, 738 (Fla. 2001)(same). Furthermore, even erroneous admitted evidence is considered. *Lewis v. State*, 754 So.2d 897, 902 (Fla. 1<sup>st</sup> DCA 2000)(explaining that the appellate court considers all the evidence whether or not it was erroneously admitted citing *Lockhart v. Nelson*, 488 U.S. 33, 40-41, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988)); *Barton v. State*, 704 So.2d 569, 573 (Fla. 1st DCA 1997)(expressly relying on evidence found to be improperly admitted in rejecting an insufficiency of the

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*Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Expressing the legal test in this manner, *i.e.*, any rational juror, rather than using the term "competent, substantial" would avoid this confusion. Moreover, it would directly align Florida's test for sufficiency with the constitutionally mandated test.

evidence claim). The Court must consider the evidence as a whole, not as pieces in isolation. *United States v. Rahman*, 189 F.3d 88, 122-123 (2d Cir. 1999). The appellate court cannot reweigh the "pros and cons" of conflicting evidence. *Dusseau v. Metropolitan Dade County*, 794 So.2d 1270, 1276 (Fla. 2001). Even contradictory testimony from the State's own witnesses does not warrant a judgment of acquittal because the witnesses' credibility are questions solely for the jury. *Donaldson v. State*, 722 So.2d 177, 182 (Fla. 1998)(rejecting a claim that the evidence was insufficient because the State's primary witnesses offered contradictory evidence where one testified that the defendant was armed with a firearm and the other state witness testified that the defendant was not armed). An appellate court does not weigh the evidence or assess the credibility of witnesses.

*Looney v. State*, 803 So.2d 656, 673 & n.20 (Fla. 2001)(stating that an appellate court should not retry a case or reweigh conflicting evidence and that "[i]t is not within the province of this Court to pass on the credibility of a witness presented at trial); *Donaldson v. State*, 722 So.2d 177, 182 (Fla. 1998).

#### **Premeditation**

Premeditation may be inferred from the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. *Perry v. State*, 801 So.2d 78, 84 (Fla. 2001); *Holton v. State*, 573 So.2d 284, 289 (Fla.1990)(quoting *Larry v. State*,

104 So.2d 352, 354 (Fla.1958); *Sochor v. State*, 619 So.2d 285, 288 (Fla.1993)(quoting *Larry v. State*, 104 So.2d 352, 354 (Fla.1958)).

Premeditation is a fully formed conscious purpose to kill. This purpose to kill must exist for sufficient time to permit reflection as to the nature of the act and the probable result of that act. However, premeditation may be formed in a moment. *Looney v. State*, 803 So.2d 656, 674 (Fla. 2001)(holding there was "clearly sufficient time" to have formed a premeditated design to kill where defendant followed co-perpetrator in the execution-style killing of the victims).

Here, there were multiple victims. *Walls v. State*, 641 So.2d 381, 388 (Fla. 1994)(finding an obvious "prearranged design" where defendant moves to second victim after killing the first victim). The time between each murder was sufficient to form a purpose to kill the next victim. Moreover, the defendant had to pump the shotgun after each murder. *Cf. Ford v. State*, 802 So.2d 1121,1132 (Fla. 2001)(holding that the evidence of premeditation was sufficient to support CCP jury instruction where defendant had to stop and reload rifle among other factors); *San Martin v. State*, 705 So.2d 1337, 1345 (Fla. 1997)(holding four shots at the scene was sufficient evidence of premeditated first-degree murder). Additionally, after shooting Geoffrey once, Hutchinson tracked him down and shot him again.

Hutchinson argued to the trial court in his motion that the evidence was entirely circumstantial. However, premeditation can be shown by circumstantial evidence. *Perry v. State*, 801

So.2d 78, 84 (Fla. 2001), citing *Woods v. State*, 733 So.2d 980, 985 (Fla. 1999). Additionally, this is not a wholly circumstantial case. Where a defendant first confesses to the crime but later recants portions of his prior confession, this is direct evidence of guilt.

*Perry v. State*, 801 So.2d 78, 84, n.6 (Fla. 2001)(noting that a confession is direct, not circumstantial, evidence of guilt and explaining that where a defendant at first confesses to law enforcement officials but recants at trial, the case is still a direct evidence case).

Appellant argues this is second degree murder because he was in a rage and/or he was intoxicated. Acting on emotions does not foreclose premeditation; anger may explain, rather than eliminate, the fact of premeditation. Provocation means more than simple anger. For the defense of heat of passion there must be "adequate" provocation as would obscure the reason or dominate the volition of an ordinary reasonable man. *Rivers v. State*, 75 Fla. 401, 78 So. 343, 345 (1918). As the *Rivers* Court explained:

A man is not permitted to act upon any provocation which he may think sufficient to excuse him from murder in the first degree in taking human life, merely because it is sufficient to excite his anger and impulse to kill and thereby reduce his crime to manslaughter. It is a well-known fact that a person who has never been accustomed to restrain his passions, and who has a depraved mind regardless of the rights of others and of human life, of a cruel, vindictive, and aggressive disposition, will seize upon the slightest provocation to satisfy his uncontrolled passions by forming a design to kill and executing the design immediately after its formation; therefore the law lays it down as a rule that an adequate provocation is one that would be calculated to excite such anger as might obscure the reason or dominate the volition of an ordinary reasonable man.

*Rivers v. State*, 78 So. at 345. Fighting, even splitting up with your girlfriend, is not adequate. An ordinary, reasonable man does not kill his girlfriend after a "spat". *Douglas v. State*, 652 So.2d 887, 891 (Fla. 4th DCA 1995)(holding marital breakup occurring on day of killing does not constitute reasonable provocation). Furthermore, even if this defense were available, it would apply only to the murder of Renee, not murders of Amanda, Logan or Geoffrey.

As to intoxication, this is a jury argument and the jury rejected it. To establish the intoxication defense, the defendant must be rendered temporarily insane due to his drinking. *Cirack v. State*, 201 So.2d 706 (Fla.1967)(stating the law recognizes "insanity super-induced by the long and continued use of intoxicants so as to produce fixed and settled frenzy or insanity either permanent or intermittent); *Cochran v. State*, 65 Fla. 91, 61 So. 187 (Fla. 1913)(requiring a jury instruction when the intoxication defense is asserted);<sup>28</sup> *Garner v. State*, 28 Fla. 113, 9 So. 835 (Fla. 1891)(establishing voluntary intoxication as a defense in Florida). While the testimony established that defendant's blood alcohol content was between .21 and .26 at the time of the murder, this is not enough to establish the intoxication defense as a matter of law. (XXVIII 1997). The officer who interviewed Hutchinson within hours of the murders, Agent Adams, testified that Hutchinson was not intoxicated. (XXIX 2088,2089,2090). The State's expert, Dr.

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<sup>28</sup> The trial court instructed the jury on intoxication. (XII 2377).

Berkland, who observed the defendant hours after the murders, also testified that appellant was functioning normally. (XXIX 2093-2095). Moreover, a close friend and drinking buddy of the defendant, Mr. Adams, testified that Hutchinson "held his liquor a lot better than the rest of us." (XXIX 2066). The State's expert, Dr. Berkland, explained the concept of tolerance to the jury. (XXIX 2096). Mr. Adams' testimony that the defendant and Mr. Adams often drank together established that the defendant was a frequent drinker whose tolerance would be higher than a non-drinker. Thus, the State rebutted his intoxication defense.

#### Remedy

When the State charges first degree murder by either premeditation or by a felony murder theory and there is insufficient evidence of one theory, if the evidence is sufficient to support the other theory, then the conviction is sustained.<sup>29</sup> Here, there is sufficient evidence of the

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<sup>29</sup> *Looney v. State*, 803 So.2d 656, 673 (Fla. 2001)(explaining that the State sought first-degree murder convictions on alternative theories of premeditated murder and felony-murder, if there was evidence supporting either premeditated or felony murder, conviction would be affirmed); *Mungin v. State*, 689 So.2d 1026 (Fla. 1997)(noting that where general verdict could have rested upon one theory of liability without adequate evidentiary support when there was alternative theory of guilt for which the evidence was sufficient, reversal is not warranted and affirming the first degree murder conviction based on felony murder theory where there was insufficient evidence of premeditation); *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)(distinguishing legal error in jury instruction from insufficiency of the evidence cases and explaining that when a case is submitted to a jury on two theories and the jury returns a general verdict of guilty, affirmance is appropriate so long

alternative theory of first degree murder - the felony murder based on aggravated child abuse. Appellant challenges his felony murder conviction in ISSUE VIII. To grant relief from the first degree murder conviction, this Court would have to find both this issue and the merger doctrine challenge valid. Thus, the conviction for first degree murder should be affirmed.

#### ISSUE VI

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL WHEN ANOTHER RESTAURANT PATRON TOLD THREE JURORS HER OPINION OF THE CASE DURING A LUNCH RECESS? (Restated)

Appellant asserts that the trial court abused its discretion in denying his motion for mistrial made when an elderly lady at the restaurant during a lunch recess made a remark about the case to three of the jurors. The trial court properly handled the incident. The trial court individually inquired of three jurors and each assured the trial court that the incident would not affect their verdict. Thus, the trial court properly denied the motion.

#### The trial court's ruling

During the State's case-in-chief, on January 12, 2001, the trial court had the jury take a lunch recess. (XXV 1216). The trial court instructed the jury that they should not allow anyone to discuss the case in your presence. The jury then went to lunch at the Black Angus. (XXV 1216). When the jury returned, one of the jurors informed the judge that an inappropriate remark was made in his presence at the restaurant.

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as the evidence is sufficient to support a conviction on either theory).

(XXV 1217). The trial court individually questioned juror Inman. (XXV 1218). Juror Inman explained that as the jury was walking upstairs to the second floor of the restaurant, an elderly lady said, "I hope you're on the jury of the Hutchinson trial and if you are I hope you hang him" (XXV 1218). He did not respond but he reported it to the bailiff. Juror Inman was only a foot or two away from the elderly lady when she made the remark, so he could hear her clearly but he did not know if the other jurors heard her and did not ask them. (XXV 1221). The trial court asked Juror Inman if he felt that the remark would have any affect on your ability to sit impartially and he responded: "no, sir" (XXV 1219). The trial court asked if it had any impact whatsoever on his decision-making capabilities or if he would place any evidentiary weight on the remark and he responded no. (XXV 1219). The trial court advised Juror Inman not to inform the other jurors of the incident. (XXV 1222).

The trial court then brought the jury in collectively and asked whether any of them heard any inappropriate comment from any person at the restaurant, specifically from a white-haired female as they were entering the restaurant. (XXV 1223). Two other jurors raised their hands, Juror Broxson and Juror Walton. (XXV 1224). The trial court then excused all the jurors other than Juror Broxson. Juror Broxson reported that he heard her say something about the ultimate sentence, but was not paying a whole lot of attention to her. (XXV 1225). Juror Broxson remember that she said "I hope you whatever to him" and that it was something like she hopes he gets the maximum but he could

not recall her exact words. (XXV 1225). Juror Broxson assured the judge that the remark would not have any affect on his ability to serve as a juror and would not affect his deliberations at all. (XXV 1226). Juror Broxson stated he doesn't "pay much attention to other people's thoughts on that line" and that the remark was "very out of place".

The trial court then individually questioned Juror Walton. (XXV 1227). Juror Walton heard a lady say "if you're on the Hutchinson case, I hope you find him guilty" as he was going up the stairs. Juror Walton stated that the remark had no affect whatsoever on him and would not affect his deliberations. (XXV 1229). The trial court then sent Juror Walton back with the rest of the jury and asked if there were any challenges for cause. Defense counsel challenged the three jurors for cause and moved for a mistrial because granting all three strikes would result in a jury of less than twelve. (XXV 1231,1233). The trial court denied the challenges because the jurors who heard the remark indicated that the remark would not affect their impartiality. (XXV 1233,1234). The trial court noted that the remark was non-record information; it conveyed only a personal opinion. (XXV 1234). The trial court reinquired of the entire jury whether they heard any comments concerning this case during lunch without the word inappropriate and no juror responded. (XXV 1236-1237). While Juror Inman and Juror Walton were on the final jury, Broxson was not. (XXX 2298-2230). Alternate Coley,

who did not hear the remark, was excused prior to jury deliberations beginning. (XXX 2290).<sup>30</sup>

#### Preservation

This issue is preserved. Counsel moved to strike the three jurors and for a mistrial.

#### The standard of review

The standard of review is abuse of discretion. *United States v. Sylvester*, 143 F.3d 923, 931 (5<sup>th</sup> Cir.1998)(stating that standard of review for district court's handling of complaints of outside influence on the jury is abuse of discretion); *United States v. Delaney*, 732 F.2d 639,642 (8<sup>th</sup> Cir. 1984)(noting a trial court has substantial discretion in determining whether an improper contact with a juror has caused prejudice to the defendant); *Cf. Knight v. State*, 721 So.2d 287,296 (Fla. 1998)(finding no abuse of discretion in the trial court's removal of the three jurors based on their extrinsic communications with a courthouse employee); *Thomas v. State*, 748 So.2d 970, 980 (Fla. 1999)(holding that the trial court did not abuse its discretion in failing to grant a motion for a mistrial where the State's chief witness suffered an emotional

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<sup>30</sup> Hutchinson had the opportunity of replacing the two non-reporting jurors who heard the remark with the alternates and still having a jury of twelve with only the reporting Juror, Juror Inman, as part of the final jury. *Knight v. State*, 721 So.2d 287, 296 (Fla. 1998)(finding no abuse of discretion in the trial court's replacement of three jurors with alternates at the request of the prosecutor because of extrinsic communications with a courthouse employee where the employee informed jurors that the defendant was a "total psycho" who had faked a suicide attempt).

breakdown). Hence, the standard of review for a claim of improper contact is abuse of discretion.

### Merits

Some courts refer to a presumption of prejudice when an outsider informs the jury of their personal opinion of the guilt of the defendant or the appropriate penalty. This presumption is based on the case of *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954)(vacating the conviction, in a jury tampering situation where a juror was approached by a third party offering a bribe in exchange for a favorable verdict, and labeling such contact "presumptively prejudicial" but noted that the presumption was not conclusive and holding a hearing with all interested parties permitted to participate was necessary to determine prejudice). However, *Remmer's* presumption of prejudice is limited to juror tampering and juror threat situations. *United States v. Dutkel*, 192 F.3d 893, 895 (9th Cir.1999)(limiting *Remmer's* presumption of prejudice to cases of jury tampering and observing that courts presume that jurors will disregard the advice of friends and ignore other *ex parte* contacts but will not indulge any such presumption where jury tampering is involved); *Whitehead v. Cowan*, 263 F.3d 708, 724 (7<sup>th</sup> Cir. 2001)(concluding *Remmer's* presumption does not apply); *Morris v. State*, 2002 WL 242901, \*5 (Fla. Feb. 21, 2002)(affirming where spectator who was a backstruck juror had innocuous conversations with the actual

jurors and stating there is no *per se* prejudice rule regarding contact between a juror and a spectator).<sup>31</sup>

The only difference between this case and the pretrial publicity cases is timing. During the individual inquiry, the three jurors were asked if they could ignore the remark, just as they were asked during voir dire if they could be impartial and ignore anything they had read in the newspapers or heard on television regarding this case. Why should the jurors' assurance of impartiality be believed during voir dire but not during trial. *Bolin v. State*, 736 So.2d 1160, 1164 (Fla. 1999)(noting that a prospective juror exposed to pretrial publicity is

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<sup>31</sup> In *Larzelere v. State*, 676 So.2d 394 (Fla. 1996), this Court held that trial court properly denied a motion for new trial based on allegation that the jury had been contaminated by extrajudicial information. After the guilt phase but prior to the penalty phase, a person approached three jurors in the courthouse parking lot and threatened to blow up a juror's car. The incident was reported to the trial judge who questioned the jurors individually in the presence of counsel. The trial court asked the jurors whether the incident affected their ability to serve as impartial jurors and the jurors responded that they could remain impartial. The trial court denied the motion finding that the incident did not prejudice the jury and that the jurors could remain impartial. Analogizing to pretrial publicity and juror misconduct cases, this Court found that there was no reasonable possibility that the incident affected the jury's verdict and affirmed. *Larzelere*, 676 So.2d at 403-404. The *Remmer* presumption was properly applied in *Larzelere* because it was a juror threat case. Here, there was no threat from the elderly lady when she said I hope. This was obviously only her personal opinion. The *Larzelere* Court mistakenly used juror misconduct case as guidance. Here, there was no juror conduct. Moreover, the *Larzelere* Court seems to reason that any inquiry by the trial court is improper. Inquiry into the jury's deliberations is improper, but the trial court did not inquire into any deliberations. Furthermore, inquiry into the matter is exactly what *Remmer* requires.

presumed impartial if he or she can set aside a preformed opinion or impression and return a verdict based on evidence presented in court citing *Bundy v. State*, 471 So.2d 9, 20 (Fla.1985)). There is no presumption of prejudice just because a prospective juror has read articles about the case prior to trial and, likewise, there should be no presumption if the same thing occurs during trial. In both cases, provided that the juror assures the judge that he or she can be impartial, they are and remain an unbiased juror.

In *Street v. State*, 636 So.2d 1297 (Fla. 1994), this Court held that the trial court properly denied a motion for mistrial. A person passing the jury in a hallway uttered "guilty". Four of the jurors heard the comment. Upon learning of the incident, the trial court individually questioned the four jurors who stated that the comment had not affected their ability to be fair and impartial. The trial court collectively inquired of the remaining jurors who indicated no knowledge of incident. This Court found the trial court's actions were sufficient to determine whether the jurors were improperly influenced by the comments and affirmed the denial of the mistrial. *Street*, 636 So.2d at 1301-1302. See also *Occhicone v. State*, 570 So.2d 902, 904 (Fla.1990)(holding that it was not an abuse of discretion to deny a motion for mistrial on the ground that a spectator told a prospective juror during voir dire that she thought the defendant was guilty where the defendant failed to establish that the jury pool had been tainted).

In *United States v. Sublet*, 644 F.2d 737 (8<sup>th</sup> Cir. 1981), the Eighth Circuit held that the district court did not abuse its discretion in denying the motion for mistrial. A spectator said to an alternate juror: "you better make the right decision". The alternate juror told three other jurors about the comment who in turn told the foreman. The court became aware of the incident and interviewed the five jurors individually in his chambers on the record with counsel and the defendant present. The jurors averred that their impartiality would not be affected. The district court denied the motion for mistrial observing that there is no way to prevent such incidents - any spectator may say something out of line - we have to rely on the jury to disregard such things. The Eighth Circuit agreed with these observations.

Here, the trial court properly inquired collectively of the jury to determine, without revealing the remark to the other jurors, which jurors had heard the remark. The trial court then properly individually inquired of each juror who heard the remark whether the remark would affect their impartiality. *United States v. Sarkisian*, 197 F.3d 966, 982(9<sup>th</sup> Cir. 1999)(stating that the district court adequately dispelled any prejudice by individually questioning to make sure that they could proceed impartially and where all of the jurors answered that the incident would not affect their ability to serve); *Cf. Boggs v. State*, 667 So.2d 765 (Fla.1996)(requiring, during a highly publicized trial, individual and sequestered voir dire where venirepersons were equivocal as to whether they could set

aside preformed opinions regarding the guilt or innocence of the defendant and explaining this procedure would protect the remainder of the venire from any potential contamination resulting from this questioning).

Each of the three jurors who heard the elderly lady's remark stated that they would disregard it and could remain impartial. Courts should believe jurors when they say they will remain impartial. *Craig v. State*, 766 So.2d 257, 259 (Fla. 4<sup>th</sup> DCA 2000)(affirming denial of mistrial, in a DUI case, where one of the jurors stated to another juror at the start of the trial that the defendant looked like an axe murderer where trial court excused the juror who made the remark and where juror to whom remark was made, thought it "ridiculous and unfair", and where another juror who was present at the time the remark was made denied hearing the remark).

The elderly restaurant patron's remark did not give the jury any information regarding guilt or innocence. *Whitehead v. Cowan*, 263 F.3d 708, 724 (7<sup>th</sup> Cir. 2001)(characterizing mother's outburst where she shouted why had he killed her daughter to the defendant outside the presence of the judge and counsel but in front of jury as an "innocuous" comment and holding that no *Remmer* hearing is necessary in these circumstances reasoning that the outburst did not provide any information that could indicate guilt or innocence and holding that while the incident was unfortunate, it did not warrant a new trial); *Cf. Bolin v. State*, 736 So.2d 1160,1164 (Fla. 1999)(requiring individual and sequestered voir dire of prospective jurors whenever they have

been exposed to pretrial publicity that includes inadmissible evidence such as prior convictions and an inadmissible confession); *Cf. Boggs v. State*, 667 So.2d 765 (Fla.1996)(requiring individual and sequestered voir dire where the pre-trial publicity included inadmissible evidence such as his previous conviction for this crime and that both the prosecutor and the presiding judge believed that Boggs was faking mental illness to avoid execution).

Finally, the evidence of defendant's guilt was overwhelming, and this militates against a finding that the incident affected the jury's verdict. *Whitehead v. Cowan*, 263 F.3d 708, 724 (7<sup>th</sup> Cir. 2001)(concluding that where evidence of defendant's guilt is overwhelming, this militates against a finding that the mother's outburst at the defendant outside the presence of the judge and counsel but in front of jury affected the jury's verdict).

Hutchinson, at one point, confessed to the 911 operator that he shot the victims. He was still on the phone when the officers arrived. Hutchinson was soaked in the victims' blood and had their tissue on him. The murder weapon, still at the scene, was his shotgun. His story about the two masked men with a Remington 870 shotgun being the perpetrators was completely refuted by his own statements and the testimony that the murder weapon was not a Remington 870 shotgun. It was this evidence, not the elderly woman's remarks, that the jury relied on to convict Hutchinson.

Appellant's reliance on *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961), is misplaced. *Irvin* is a change of venue due to pre-trial publicity case. *Irvin* was convicted of the murder of one person. The media coverage of the case referred to five other murders. The media accounts revealed his prior convictions and his court-martial during the war. The radio and television reports included interviews with average citizens regarding their views of both his guilt and the proper punishment. The reports also referred to his confession and to a polygraph. Ninety percent of the jurors questioned in voir dire had formed an opinion as to the defendant's guilt. Eight of the twelve actual jurors had stated in voir dire that they thought the defendant was guilty. The *Irvin* Court observed that with such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from jury deliberations.

Here, no jury expressed his belief in Hutchinson's guilt, either before or after the incident at the restaurant. Additionally, the United States Supreme Court has refined the law covering this area since *Irvin. Mu'Min v. Virginia*, 500 U.S. 415, 430, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). Basically, this Court requires individual and sequestered questioning of prospective jurors whenever the jurors have been exposed to improper pretrial publicity, which is exactly what the trial court did in handling the improper remark - he individually inquired of the jurors who heard the remark obtaining their unequivocal assurance that the remark would not affect their

verdict without informing the remaining jurors of the remark. *Bolin v. State*, 736 So.2d 1160,1164 (Fla. 1999); *Boggs v. State*, 667 So.2d 765 (Fla.1996).

Harmless error

This is a claim of a biased juror which is not subject to harmless error analysis. *Hughes v. United States*, 258 F.3d 453, 463 (6<sup>th</sup> Cir. 2001)(noting the presence of a biased juror, like the presence of a biased judge, is a structural defect that defies harmless error analysis); *Dyer v. Calderon*, 151 F.3d 970, 973, n. 2 (9th Cir.1998)(en banc)(Kozinski, J.)(same). However, as noted previously only one of the jurors, the reporting juror, Juror Inman, is actually at issue. Broxson was not on the final jury because he become ill with the flu and was excused. Juror Walton who heard the remark could have been replaced by Alternate Coley who did not.

ISSUE VII

DOES THE "VICTIM LESS THAN 12 YEARS OF AGE" AGGRAVATING CIRCUMSTANCE GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AS REQUIRED BY THE EIGHTH AMENDMENT? (Restated)

Appellant asserts that "victim less than 12 years of age" aggravating circumstance, § 921.141(5)(1), Florida Statutes (1998), fails to genuinely narrow the class of persons eligible for the death penalty and therefore, violates the prohibition against cruel and unusual punishment. The State respectfully disagrees. Florida's "victim less than twelve years of age" aggravating circumstance genuinely narrows the class of persons eligible for the death penalty. Murderers of children less than twelve are a subclass of murderers. This Court has recently

rejected a similar attack on the "victim vulnerable due to advanced age or disability" aggravator, reasoning that the age aggravator meets the two prongs of the constitutional test announced in *Tuilaepa* because not every murder victim will be a person who is of advanced age. The same reasoning applies to the child aggravator. Moreover, many other state's death penalty statutes contain a similar aggravator and their respective courts have rejected similar attacks on their equivalent aggravator. Thus, the "victim less than 12 years of age" aggravating circumstance does not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

#### Preservation

This issue is not preserved. While appellant filed numerous motion to declare several of the aggravators unconstitutional, he did not file one to declare this particular aggravator, § 921.141(5)(1), unconstitutional. Constitutional challenges to aggravators must be preserved.<sup>32</sup>

#### The standard of review

Whether an aggravating circumstance genuinely narrows the class of persons eligible for the death penalty as required by the Eighth Amendment is reviewed *de novo*. *United States v. Allen*, 247 F.3d 741, 786 (8<sup>th</sup> Cir. 2001)(reviewing *de novo* a challenge to the constitutionality of the "grave risk of death"

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<sup>32</sup> *Lukehart v. State*, 776 So.2d 906, 925 (Fla. 2000)(finding a constitutional challenge to the "victim under 12 years of age" aggravator to be procedurally barred); *Morrison v. State*, 2002 WL 432561, \*17 (Fla. March 21, 2002)(finding constitutional challenge "vulnerable victim due to advance age" aggravator not preserved because defense counsel did not object).

statutory aggravating factor, 18 U.S.C. § 3592(c)(5), as unconstitutionally vague and encompassing too large a class of defendants citing *Ross v. Ward*, 165 F.3d 793, 800 (10<sup>th</sup> Cir.), cert. denied, 528 U.S. 887, 120 S.Ct. 208, 145 L.Ed.2d 175 (1999)).

### Merits

The sentence of death or life imprisonment for capital felonies statute, § 921.141(5), provides:

Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

\* \* \* \*

(1) The victim of the capital felony was a person less than 12 years of age.

The Florida Legislature added this aggravating circumstance to the statute in 1995. Ch. 95-159 § 1, Laws of Fla. It became effective on October 1, 1995.

The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

As the United States Supreme Court explained in *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750 (1994), an aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague. Florida's "victim less than twelve years of age" aggravating circumstance meets the two requirements of *Tuilaepa*. Murderers

of children under twelve are a subclass of murderers and no aggravating circumstance could be clearer.

This Court has recently rejected a similar challenge to the "advanced age or disability" aggravating circumstance. *Francis v. State*, 808 So.2d 110, 138 (Fla. 2001)(upholding the "victim vulnerable due to advanced age or disability" aggravator, § 921.141(5)(m), against a facial constitutional attack and reasoning that the age aggravator meets the two prongs of *Tuilaepa* because not every murder victim will be a person who is of advanced age and the words, "particularly" "vulnerable" and "advanced" were clearly comprehensible by the average citizen). Here, as in *Francis*, the "less than twelve" aggravator meets the two prongs of *Tuilaepa* because not every murder victim will be a person who is under twelve.

Appellant claims that because there is no casual link or nexus between the aggravator and the murder, the aggravator is unconstitutional. A casual link or nexus is not constitutionally required. Most aggravators are not casually linked to the murder. However, the age of the victim is never going to be casually linked to the murder. Additionally, there is a connection between this aggravator and the nature of the murder albeit not a casual connection. The victim is part of the crime. Appellant murdered three children.

Appellant next asserts that this aggravating circumstance is unique in that it is the only Florida aggravator based solely on the victim's status. First, this is not true. Florida has

three other aggravators based on the victim's status.<sup>33</sup> While these other aggravators contain certain qualifying language, the qualifying language does not change the fact that these aggravators are based on the victim's status.

Moreover, even if this aggravator was the only aggravator based on the victim's status, being a unique aggravating circumstance does not render the aggravator unconstitutional. Uniqueness is not constitutionally suspect. Furthermore, it is not unique among death penalty statutes. Many other states and the federal death penalty statute have similar aggravating circumstance that apply when the victim is a child.<sup>34</sup> So, even

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<sup>33</sup> The three other aggravating circumstances based on the victim's status are: (1) law enforcement officer aggravator; (2) the public official aggravator; and (3) the advance age aggravator. § 921.141(5)(j), Fla. Stat. (1998)(providing for the aggravating circumstance that "the victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties."); § 921.141(5)(j), Fla. Stat. (1998)(providing for the aggravating circumstance that "the victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity); § 921.141(5)(m), Fla. Stat. (1998)(providing for the aggravating circumstance that "the victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.").

<sup>34</sup> The federal death penalty covering mitigating and aggravating factors, 18 U.S.C. § 3592 (c)(11)(2001), provides: Vulnerability of victim.--The victim was particularly vulnerable due to old age, youth, or infirmity. Other states with a similar aggravator include: Arizona; Delaware; Illinois; Indiana; Louisiana; Nevada; New Hampshire; New Jersey; Ohio, Pennsylvania, Tennessee, Texas, South Carolina, South Dakota and Wyoming. Ariz. Rev. Stat. Ann. § 13-703(G)(9)(2001)(providing the "defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under

if this aggravator is viewed as unique among Florida aggravators, it is not unique in the United States. State and federal courts have rejected similar challenges to these

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fifteen years of age ..."); Del. Code Ann. tit. 11, § 4209(e)(1)(s)(2001)(providing that the "victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim."); 720 Ill. Comp. Stat. 5/9-1(b)(7)(2001)(providing that the "murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty."); Ind. Code Ann. § 35-50-2-9(b)(12)(2001)(providing that the "victim of the murder was less than twelve (12) years of age."); La. Code Crim. Proc. Ann. art. 905.4(A)(10)(2001)(providing that the "victim was under the age of twelve years . . ."); Nev. Rev. Stat. Ann. § 200.033(10)(2001)(providing that the "murder was committed upon a person less than 14 years of age."); N.H. Rev. Stat. Ann. § 630:5(VII)(g)(2001)(providing that the "victim was particularly vulnerable due to old age, youth, or infirmity."); N.J. Stat. Ann. § 2C:11-3c(4)(k)(2001)(providing that the "victim was less than 14 years old."); Ohio Rev. Code Ann. § 2929.04(A)(9)(2001)(providing that the "offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense . . ."); 42 PA. CONS. STAT. ANN. § 9711(d)(16)(2001)(providing that the "victim was a child under 12 years of age."); S.C. Code Ann. § 16-3-20(C)(a)(10)(2001)(providing that "the murder of a child eleven years of age or under."); S.D. Codified Laws § 23A-27A-1(6)(2001)(providing . . . "Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age."); Tenn. Code Ann. § 39-13-204(i)(1)(2001) ("The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older."); Tex. Penal Code Ann. § 19.03(a)(8)(2001)(providing that the "person murders an individual under six years of age"); Wyo. Stat. Ann. § 6-2-102(h)(ix)(2001)(providing that "the defendant knew or reasonably should have known the victim was less than seventeen (17) years of age . . .").

equivalent aggravating circumstances.<sup>35</sup> Florida's child victim aggravator, likewise, is constitutional.

Furthermore, this aggravating circumstance reflects the reality of what jurors actually think is aggravating. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 COLUM. L. REV. (1998)(conducting a study of South Carolina jurors in capital cases and noting that while other facts about the victim, such as being a prominent member of the community versus a stranger, generally made little difference to jurors, the victim being a child did.)<sup>36</sup>. Jurors do value victims equally but treat children as first among equals. The Legislature merely has enacted as a statutory aggravating circumstances a fact that reflects the community's views regarding what is an aggravated murder.

#### ISSUE VIII

DOES THE MERGER DOCTRINE APPLY TO FLORIDA AND  
PROHIBIT THE LEGISLATURE FROM INCLUDING

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<sup>35</sup>*Styron v. Johnson*, 262 F.3d 438,451 (5<sup>th</sup> Cir. 2001)(rejecting a similar constitutional challenge to Texas' "under six years of age" aggravator, Texas Penal Code § 19.03(a)(8), and finding the aggravator to be constitutionally sufficient because it applies only to a certain subclass of defendants and "is very clear");*Henderson v. State*, 962 S.W.2d 544, 563 (Tex.Crim.App.1997)(holding the aggravator to be constitutional because it meets both tests: murderers of children under six are a subclass of murderers and 'children under six' is "a clear and definite category.");*State v. Steckel*, 708 A.2d 994, 996-999 (Del. App. 1996)(holding that Delaware's "child 14 years old or younger if defendant is at least four years older" aggravating circumstance, § 11 Del.C. 4209(e)(1)(s), is constitutional).

<sup>36</sup> South Carolina's aggravating circumstances include the murder of a child eleven years of age or under. § 16-3-20(C)(a)(10). South Carolina (2001).

AGGRAVATED CHILD ABUSE AS AN ENUMERATED FELONY  
IN THE FELONY MURDER STATUTE? (Restated)

Appellant contends that the merger doctrine prohibits aggravated child abuse from serving as the underlying felony for a felony murder conviction where the aggravated child abuse is based on a single gunshot. This argument is contrary to the explicit language of the felony murder statute that lists aggravated child abuse as an enumerated felony. There can be no argument that the legislature did not intend the crime of aggravated child abuse to serve as an underlying felony for a felony murder when it specifically amended the felony murder statute to so provide. Thus, aggravated child abuse may properly served as the underlying felony for a felony murder conviction.<sup>37</sup>

Preservation

This issue is not preserved. In his sentencing memorandum, appellant argued the child abuse aggravator is precluded because the act of child abuse was gunshots citing *Lukehart v. State*, 776 So.2d 906 (Fla. 2000); *Donaldson v. State*, 722 So.2d 177 (Fla. 1998). However, he does not seem to have made a motion to preclude the felony murder theory of first degree based on merger doctrine during the guilt phase. Thus, only the merger challenge to the aggravator, not the conviction, is preserved.

The standard of review

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<sup>37</sup> The trial court in its sentencing order specifically declined to find the aggravator that the defendant was engaged in the commission of aggravated child abuse. (XIV 2704-2705).

Whether the merger doctrine applies to the first degree felony murder statute is a question of statutory interpretation which is purely a legal question reviewed *de novo*. *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So.2d 376, 377 (Fla. 5<sup>th</sup> DCA 1998)(noting that judicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review).

### Merits

The felony murder statute, § 782.04(1)(a)2, Florida Statutes (1997), provides:

(1)(a) The unlawful killing of a human being:

\* \* \* \* \*

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

- a. Trafficking offense prohibited by Sec. 893.135(1),
- b. Arson,
- c. Sexual battery,
- d. Robbery,
- e. Burglary,
- f. Kidnapping,
- g. Escape,
- h. Aggravated child abuse,<sup>38</sup>
- i. aggravated abuse of an elderly person or disabled adult,<sup>39</sup>

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<sup>38</sup> The aggravated child abuse statute, § 827.03(2), Florida Statutes (1997), provides in part:

"Aggravated child abuse" occurs when a person:

- (a) Commits aggravated battery on a child;
- (b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
- (c) Knowingly or willingly abuses a child and in so doing causes great bodily harm, permanent disability or permanent disfigurement to the child.

The aggravated child abuse charges in this case to were limited to (a) or (c). (XII 2373)

<sup>39</sup> This subsection dealing with aggravated abuse of the elderly is subject to the same type of attack because the

- j. Aircraft piracy,
- k. Unlawful throwing, placing, or discharging of a destructive device or bomb,
- l. Carjacking,
- m. Home-invasion robbery,
- n. Aggravated stalking, or

\* \* \* \* \*

is murder in the first degree and constitutes a capital felony, punishable as provided in Sec. 775.082.

#### **THE MERGER DOCTRINE<sup>40</sup>**

Some states, retaining the old common law definition of felony murder, allow any felony to serve as the underlying felony for felony murder. See *Richardson v. State*, 823 S.W.2d 710, 714 (Tex. App. 1992)(noting that Texas authorizes any felony, except the designated manslaughters, to be the underlying felony in applying the felony murder rule). In the states where any felony could serve as the basis for felony murder, allowing assault or battery to serve as the underlying felony for felony murder meant that all homicides automatically became felony murder.<sup>41</sup>

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definition of aggravated abuse of an elderly person is the same as aggravated child abuse. § 825.102 (2), Fla. Stat. (1997).

<sup>40</sup> Hutchinson also seems to be raising a double jeopardy attack on his first degree murder conviction. Here, however, there can be no valid double jeopardy issue because Hutchinson was not convicted of both the underlying felony of aggravated child abuse and felony murder based on the crime of aggravated child abuse; he was only convicted of felony murder. While dual convictions for both the underlying felony and felony murder would have been proper, no such dual convictions occurred.

<sup>41</sup> New York, which was one of these states at the time, adopted the merger doctrine to limit the application of the felony murder rule. In *People v. Moran*, 158 N.E. 35 (N.Y. 1927), the court held that the assault on a police officer was not

Actually, the merger doctrine is merely an application of the normal rules of statutory construction. *State v. Godsey*, 60 S.W.3d 759, 773-774 (Tenn. 2001)(explaining that the merger doctrine is not a principle of constitutional law; rather, it is a rule of statutory construction which preserves the Legislature's gradation of homicide offenses). The rules of statutory construction, such as the *in para materia* rule, require courts to construe statutes to give effect to all statutes and not to construe one statute in a manner that renders another statute meaningless.<sup>42</sup> In those states that do not limit the felony murder rule to particular enumerated

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independent of the homicide but was the homicide itself. However, once New York's felony murder statute was limited to certain enumerated felonies, New York's courts have refused to extend the merger doctrine because the doctrine was developed to remedy a fundamental defect in the old felony-murder statute. *People v. Miller*, 297 N.E.2d 85 (N.Y. 1973); BARRY BENDETOWIES, FELONY MURDER AND CHILD ABUSE: A PROPOSAL FOR THE NEW YORK LEGISLATURE, 18 FORDHAM URB. L.J. 383 (1991)(noting that the 1967 Penal Law limited the application of the felony murder rule in New York to nine serious and violent felonies and advocating that the New York legislature amend the felony murder statute to include child abuse to the list of enumerated felonies).

<sup>42</sup> See generally, *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)(stating that when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective); *Unruh v. State*, 669 So.2d 242, 245 (Fla.1996)(explaining that courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another and noting the general rule that the legislature does not intend to enact purposeless, and therefore useless, legislation); *Cruller v. State*, 808 So.2d 201, 204 (Fla. 2002)(noting that the legislature does not intend anomalous results and stating that statutes should not be given an interpretation that leads to an unreasonable or ridiculous conclusion).

felonies, any felony may serve as the basis for the felony murder. If the felony murder statute was interpreted to allow a battery or assault to serve as the underlying felony, nearly all killings would become first degree felony murder in those states. Such an interpretation would render those states' second degree and manslaughter statutes meaningless. *Cotton v. Commonwealth*, 546 S.E.2d 241, 243 (Va. App. 2001)(noting merger doctrine developed as a limitation on the felony murder statute necessary to maintain the distinction between murder and manslaughter). Therefore, courts, in those states without enumerated felonies in their felony murder statutes, have interpreted their statutes to exclude battery or assault as a possible underlying felony.

Other state courts, whose felony murder statutes are limited to certain enumerated felonies but whose legislature have also amended to their respective felony murder statutes to include aggravated child abuse as an underlying felony, have rejected similar challenges. These courts have reasoned that their legislatures intended this result.<sup>43</sup> Moreover, as the Arizona

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<sup>43</sup> *State v. Godsey*, 60 S.W.3d 759, 774 (Tenn. 2001)(rejecting, in a capital case where the first degree felony murder conviction was based on aggravated child abuse, a due process argument because due process does not require that the underlying felony be based upon acts separate from those causing death and explaining the General Assembly has expressed an unmistakable intent to have aggravated child abuse as a qualifying offense); *Cotton v. Commonwealth*, 546 S.E.2d 241, 243 (Va. App. 2001)(holding that felony child abuse could be predicate offense for felony murder and rejecting merger doctrine where defendant contended a single act cannot form the basis for both the murder and the predicate felony); *State v. Lopez*, 847 P.2d 1078, 1089 (Ariz. 1992)(rejecting a merger

Supreme Court observed, there is no constitutional prohibition on the legislature choosing to designate aggravated child abuse as an enumerated felony. *State v. Lopez*, 847 P.2d 1078, 1089 (Ariz. 1992).

Florida did not have this problem because its felony murder statute was limited to certain enumerated felonies and did not include battery or assault as one of the underlying felonies. *Robles v. State*, 188 So.2d 789 (Fla.1966)(rejecting the argument that an underlying felony must always be independent of the killing to serve as the underlying felony for a felony murder conviction and explaining that the Florida felony murder statute

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challenge to child abuse as a underlying felony for felony murder and noting that Arizona has enumerated felonies and observing that even in those states that follow the merger doctrine recognize that if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no merger occurs); *Faraga v. State*, 514 So.2d 295, 302-03 (Miss.1987)(rejecting a merger challenge, in a capital murder case where child abuse was the underlying felony and the defendant threw a child to the pavement three times which resulted in skull fractures, because the "intent of the Legislature was that serious child abusers would be guilty of capital murder if the child died" where Mississippi has enumerated felonies).

In factually similar factual case, *Stevens v. State*, 806 So.2d 1031, 1043-1044 (Miss 2001), the Mississippi Supreme Court rejected a merger claim where a defendant killed his ex-wife, her new husband and two boys with a shotgun. Stevens also shot his daughter but she lived. Stevens was convicted of four counts of capital murder and sentenced to death. One of the boys was killed by a single shotgun blast to the head. Stevens argued that the child abuse of killing the two boys merged into their murders. The *Stevens* Court, relying on *Faraga v. State*, 514 So.2d 295, 302-03 (Miss.1987), found that it was the intent of the Mississippi Legislature that the intentional act of murdering a child by any manner or form constitutes child abuse and, therefore, constitutes capital murder. The *Stevens* Court noted that there only needs to be one act alone in order to constitute abuse and/or battery.

was limited to certain specific felonies, and therefore, the problem motivating the adoption of the merger doctrine in other states did not exist in Florida). Florida has is no doctrine requiring the aggravated child abuse be a distinct, separate, and independent offense from the felony murder offense. After *Robles*, the Florida Legislature specifically amended Florida's felony murder statute to include aggravated child abuse. Laws 1984, c. 84-16, § 1. While aggravated child abuse can indeed be a type of battery, it is a unique type of battery limited to children. The Legislature was well aware that often there is one fatal blow to the child during the abuse and that killing a child would become first degree murder if it amended the felony murder statute to include aggravated child abuse. This was a policy choice that the legislature made in an effort to protect children and punish child killers more severely. Furthermore, the legislature has distinguished among the wide variety of child abuse according to degrees of maliciousness and negligence, activeness and passiveness, and violence and non-violence. For example, the neglect of a child resulting in the child's death is not aggravated child abuse, it is covered by a different subsection of the statute. § 827.03(3)(b), Fla. Stat. (2001). So, not every type of child abuse is aggravated child abuse sufficient to trigger the felony murder statute even if the child dies as a result. Moreover, adding one unique type of battery to the felony murder statute does not render any of the other homicide statutes meaningless. The Florida

Legislature clearly intended this one type of battery to serve as an underlying felony for felony murder.

In *Mapps v. State*, 520 So. 2d 92 (Fla. 4th DCA 1988), the Fourth District held that felony murder does not merge with the underlying felony of aggravated child abuse. Mapps threw, shook, or struck a ten-month old child resulting in a skull fracture. Mapps was convicted of first-degree felony murder based on the underlying felony of aggravated child abuse and the conviction was founded entirely on a felony murder theory. Mapps contended that he could not be convicted of felony murder for a death occurring in the course of aggravated child abuse because the act of abuse was not separate and independent of the killing, *i.e.*, it "merged" into the homicide. Noting that aggravated child abuse had been added to the list of specific underlying felonies that support a charge of first degree felony murder, the *Mapps* Court reasoned that: "[i]t is obvious that our legislature did not intend that the felonies specified in the felony-murder statute merge with the homicide to prevent conviction of the more serious charge of first-degree murder."

This Court has twice rejected versions of this same argument. *Lukehart v. State*, 776 So.2d 906 (Fla. 2000); *Donaldson v. State*, 722 So.2d 177 (Fla. 1998). As the *Donaldson* Court noted, legislative intent is the polestar that guides statutory construction and as the *Lukehart* Court noted, in aggravated child abuse cases there is ordinarily overt physical violence which is directed towards a child and that by specifically

including the category of aggravated child abuse within the felony murder statute, the legislature clearly contemplated that both charges can be brought where violence directed at the child results in the child's death. When the legislature amended the felony murder statute to include aggravated child abuse, they were aware of that often a single fatal blow or, as in this case a single gunshot, would be the basis of the felony murder charge and, in a effort to protect child whose deaths had previously been undercharged as third degree felony murder, the legislature made a policy decision to allow aggravated child abuse to serve as the underlying felony for felony murder.

Appellant argues, based on *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), that the jury will not be instructed on any lesser included offenses and therefore, will be faced with an all or nothing option. Hutchinson's jury was instructed on the lesser included offenses of second degree murder, manslaughter and third degree felony murder. (XII 2374-2375). Moreover, the United States Supreme Court has held that states, in capital cases, are not constitutionally required to instruct juries on offenses that are not lesser-included offenses under state law even if this results in no option other than a capital offense. *Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998).

Appellant's reliance on *State v. Jones*, 896 P.2d 1077 (Kan. 1995), is seriously misplaced. The Kansas Supreme Court held that the merger doctrine applied to this situation but noted that "if additional protection for children was desired, the

Kansas Legislature might well consider legislation which would make the death of a child occurring during the commission of the crime of abuse of a child, or aggravated battery against a child, first-or second-degree felony murder." *State v. Lucas*, 759 P.2d 90,99 (Kan. 1988). The Kansas legislature then did just that and amended the first-degree murder statute to make a killing committed in perpetration of abuse of a child first-degree felony murder. K.S.A. 21-3436(a)(7); *State v. Smallwood*, 955 P.2d 1209, 1226-1228 (Kan. 1998)(holding that a defendant may be convicted of first degree murder with child abuse as the underlying felony regardless of the merger doctrine because the legislature intended that anyone who causes the death of a child while committing the act of abuse of a child to be guilty of the crime of first-degree felony murder). The Kansas legislature overruled *Lucas*. Just as the Kansas legislature amended its felony murder statute to include child abuse as a qualifying felony, Florida's legislature also amended our felony murder statute to include child abuse as a qualifying felony.

#### **THE MERGER DOCTRINE & AGGRAVATORS**

Here, the child abuse aggravator was not used as separate aggravator but because the State seeks review of that decision, the State's brief will discuss this aspect of the merger doctrine. The doctrine that limits aggravating circumstances is the rule against improper doubling, not double jeopardy or the merger doctrine. *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976)(explaining that improper doubling occurs when both

aggravators rely on the same essential feature or aspect of the crime). This Court has previously rejected this exact claim. *Lukehart v. State*, 776 So.2d 906,923 (Fla. 2000)(rejecting a claim that merger doctrine applies to aggravators in a child abuse capital case and noting that rationale of *Mills v. State*, 476 So.2d 172, 177 (Fla.1985), is not applicable to this issue, relying on *Blanco v. State*, 706 So.2d 7 (Fla.1997)).

#### ISSUE IX

DID THE TRIAL COURT PROPERLY FIND THE MURDER OF GEOFFREY FLAHERTY TO BE HAC? (Restated)

Appellant asserts that the trial court erred in finding the murder of Geoffrey to be heinous, atrocious or cruel. The State disagrees. The State's expert testified at the penalty phase that Geoffrey could see the bodies of his mother, younger sister and younger brother. Geoffrey was acutely aware of his impending death. After shooting Geoffrey's entire family, Hutchinson shot Geoffrey in the chest. Geoffrey, although mortally wounded, attempted to flea. Hutchinson then pumped the shotgun, aimed directly at the child's head with the child watching and then shot the child again. Geoffrey knew he was about to die. Thus, there is competent, substantial evidence to support this finding and the trial court properly found the murder to be heinous, atrocious or cruel.

#### The trial court's ruling

Dr. Berkland, who is a forensic pathologist, testified at the penalty phase. He testified that Geoffrey was near the doorway of the master bedroom when first shot. His blood was found on the carpet there. (XXX 2359). Geoffrey could see his mother,

sister and brother's bodies from this location. (XXX 2357). Hutchinson then left the master bedroom to chase down Geoffrey. (XXX 2360). Geoffrey was kneeling at the time of the final fatal shot. (XXX 2341). Geoffrey would have been able to see Hutchinson. (XXX 2361). Geoffrey "absolutely" was conscious at the time of the last fatal shot. (XXX 2345). Geoffrey would have been in pain from the first shot. (XXX 2363).

The trial court, in its sentencing order, found the murder of Geoffrey to be heinous, atrocious or cruel based on the events and his awareness of impending death. The trial court found this aggravator solely as to the murder of Geoffrey, not as to the murder of Amanda or Logan.

#### Preservation

This issue is preserved. In his sentencing memoranda, appellant argued that HAC did not apply. (XIII2416). At the *Spencer* hearing, defense counsel argued that the HAC aggravator did not apply because this was only a shooting that lasted 10 seconds. (XXXI 2594-2595).

#### The standard of review

Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. This Court, in *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998), observed it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt - that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of

law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997).

#### Merits

This Court in *Lewis v. State*, 398 So.2d 432, 438 (Fla.1981), held that ordinary murder by shooting is, as a matter of law, not heinous, atrocious or cruel. The fact that the shooting victim begged for his life or received multiple gunshot wounds is insufficient to establish HAC. *Bonifay v. State*, 626 So.2d 1310, 1313 (Fla.1993)(finding no HAC where victim begged for his life prior to being shot twice in the head which resulted in "immediate unconsciousness"). However, the fear, emotional strain, and terror of the victim during the events leading up to the murder may be considered, even where the victim's death was almost instantaneous. *Pooler v. State*, 704 So.2d 1375, 1378 (Fla 1997)(affirming HAC aggravator for shooting death of ex-girlfriend where defendant shot victim's younger brother first and then shot her five times).

In *Henyard v. State*, 689 So.2d 239 (Fla. 1996), this Court affirmed the trial court's finding of the heinous, atrocious, or cruel aggravating circumstance. *Henyard* contended that because each child was killed with a single gunshot, if the victims were adults, heinous, atrocious, or cruel would not be present. *Henyard*, 689 So.2d at 254. The *Henyard* Court disagreed based upon the substantial mental anguish of the victims due to the entire sequence of events. The *Henyard* Court, citing *Preston v. State*, 607 So.2d 404, 410 (Fla.1992), noted that even where the

victim's death was almost instantaneous, the emotional strain prior to the murder may support the HAC aggravator. Here, prior to his murder, Geoffrey heard and saw the murder of his entire family.

Furthermore, Geoffrey did not die instantaneously. He was mortally wounded by the first shot but conscious and in pain, he saw Hutchinson travel five or six feet toward him, pump the shotgun, aim directly at his head, and then shoot him again. Geoffrey was acutely aware of his impending death during this period. Geoffrey raised his arm to protect himself. *Zakrzewski v. State*, 717 So.2d 488, 492 (Fla. 1998)(stating that the children's defensive wounds show that they were aware of their impending deaths and finding sufficient evidence of HAC). Furthermore, Geoffrey was conscious during the entire event. *Francis v. State*, 808 So.2d 110, 135 (Fla. 2001)(noting this Court has repeatedly upheld findings of HAC where the medical examiner has determined that the victim was conscious even though only for seconds). The caselaw requires acute awareness, not prolonged awareness.

In *Farina v. State*, 801 So.2d 44 (Fla. 2001), this Court affirmed a finding of HAC based on the victim's watching her co-workers being shot prior to being shot herself. The defendant and his brother robbed a Taco Bell where the victim worked. Before being shot in the head, the victim watched as the brother shot one of her co-workers in the chest. The brother then shot a second co-worker in the jaw and attempted to shoot the co-worker in the chest but the gun misfired. The other employees

lived. The trial court found that the victim suffered mental anguish and was acutely aware of her impending death. The *Farina* Court noted that fear and emotional strain may be considered even where the victim's death was almost instantaneous and this aggravator pertains to the victim's perception of the crime, not the the perpetrator's. Accordingly, this Court affirmed a finding of HAC. *Farina*, 801 So.2d at 53. Here, as in *Farina*, Geoffrey saw or heard his mother, sister and brother shot prior to being shot himself.

Appellant's reliance on *Santos v. State*, 591 So.2d 160, 163 (Fla. 1991) is misplaced. Santos shot his twenty-two month old daughter once in the head and her mother twice in the head. The *Santos* Court reasoned that happened too quickly and there was no suggestion that of any intention to inflict a high degree of pain or otherwise torture the victims to support the trial court finding of heinous, atrocious, or cruel. However, the child in *Santos* was shot only once, not twice, as Geoffrey was. A child under two may not be aware of her impending death; by contrast a nine-year-old would be.

#### Harmless error

The error, if any, in finding the HAC aggravator was harmless.

<sup>44</sup> Here, two strong aggravators remain including that Hutchinson

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<sup>44</sup> *Jennings v. State*, 782 So.2d 853, 863 n.9 (Fla. 2001)(explaining that where an aggravating factor is stricken on appeal, the harmless error test applies and noting that there would be two remaining aggravators); *Jones v. State*, 748 So.2d 1012, 1027 (Fla. 1999)(holding any error in finding one aggravator harmless in light of three other strong aggravators,

had been convicted of the three prior murders of Renee, Amanda and Logan. The defendant was previously convicted of another capital felony is one of the most serious aggravators. Nor are any statutory mental mitigators involved here. The trial court would still have imposed death for the murder of Geoffrey without the HAC aggravator just as it did for the murders of Amanda and Logan.

#### ISSUE X

WHETHER THE DEATH SENTENCE IS PROPORTIONATE? (Restated)

Appellant asserts that the death penalty in this case is disproportionate because this a domestic killing that was out of character; involved no prior abuse; the defendant had been drinking and suffered from Gulf War Illness and that the murders were a product of rage. The State respectfully disagrees. The defendant killed four persons, three of whom were young children. Death is proportionate where there are multiple victims especially three child victims. The trial court sentenced Hutchinson to death for the murders of - Geoffrey Flaherty, Amanda Flaherty and Logan Flaherty - all of whom were under 10 years of age. This Court has found death appropriate where there were less than the three aggravators present here. Moreover, this Court has also found the death penalty to be the

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including that defendant had previously been convicted of a prior murder); *Reaves v. State*, 639 So.2d 1, 6 (Fla. 1994)(concluding that victim's death from gunshot wounds was not heinous, atrocious, or cruel but finding error to be harmless, in view of the two other strong aggravating factors found and relatively weak mitigation).

appropriate punishment where facts of the murder were similar to this murder. Thus, the death penalty is proportionate.

The trial court's ruling

The trial court imposed three death sentences for the murder of each of the three children. (XIV 2703-2715). The trial court found three statutory aggravators in the murder of Geoffrey Flaherty: (1) previously convicted of another capital felony; (2) the victim was less than 12 years of age and (3) that the murder was heinous, atrocious and cruel. The trial court found two statutory aggravators in the murder of Amanda Flaherty: (1) previously convicted of another capital felony and (2) the victim was less than 12 years of age. The trial court found two statutory aggravators in the murder of Logan Flaherty: (1) previously convicted of another capital felony and (2) the victim was less than 12 years of age. The trial court found no significant history of prior criminal activity as a statutory mitigator and accorded it "significant weight". § 921.141(6)(a), Fla. Stat. (1997).<sup>45</sup> The trial court found twenty non-statutory

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<sup>45</sup> The trial court considered but rejected two other statutory mitigators as not proven: (1) the extreme mental or emotional disturbance mitigator and (2) the capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired mitigator. § 921.141(6)(b), Fla. Stat. (1997); § 921.141(6)(f), Fla. Stat. (1997).

mitigators.<sup>46</sup> The trial court found that the aggravators

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<sup>46</sup> The trial court found the following non-statutory mitigators: (1) the defendant was a decorated military veteran of the Gulf War which the trial court accorded "significant weight";(2) the defendant is the father of a son who he has provided financial and emotional support which the trial court accorded "some weight";(3) the defendant has potential for rehabilitation and productivity while in prison which the trial court accorded "some weight";(4) the defendant's intoxication with a BAC of .21 to .26 on the night of the murders which the trial court accorded "some weight";(5) the defendant was an honorable discharged soldier for eight years which the trial court accorded "slight weight";(6) the defendant provided financial and emotional support to his family which the trial court accorded "slight weight";(7) the defendant has the ability to show compassion which the trial court accorded "slight weight";(8) the defendant's employment history which the trial court accorded "slight weight"; (9) the defendant's family support of him which the trial court accorded "slight weight";(10) the defendant's ability as a mechanic which the trial court accorded "slight weight";(11) the defendant seeking motorcycle patents which the trial court accorded "slight weight";(12) the defendant was diagnosed with Gulf War Illness which the trial court accorded "minimal weight" because there was no connection between the illness and the murders;(13) the defendant was security officer of the year which the trial court accorded "minimal weight";(14) the defendant never abused drugs which the trial court accorded "little weight";(15) the defendant is a high school graduate which the trial court accorded "little weight";(16) the defendant was active in disseminating information about Gulf War Illness which the trial court accorded "little weight";(17) the defendant's religious faith which the trial court accorded "little weight";(18) the defendant's distress during the 911 call which the trial court accorded "little weight";(19) the defendant's friends which the trial court accorded "very little weight"; and (20) the defendant was diagnosed with Attention Deficit Disorder which the trial court accorded "very little weight"

The trial court considered but rejected six other non-statutory mitigators either finding them to be not mitigating in nature or not proven or not worthy of any weight. The trial court found that the appropriateness of a life sentence did not qualify as a mitigating factor. The trial court found that mercy did not qualify as a mitigating factor. The trial court reviewed the tape of the defendant's statement to the investigating officers that it had suppressed at the defendant's request and found no mitigating circumstances contained in these

outweighed the mitigators.

#### The standard of review

The standard of review of whether the death penalty is proportionate is *de novo*.<sup>47</sup> Proportionality review is a task of this Court. However, this Court does not reweigh the mitigating factors against the aggravating factors in a proportionality review, that is the function of the trial court. For purposes of proportionality review, this Court accepts the trial court's weighing of the aggravating and mitigating evidence. *Bates v. State*, 750 So.2d 6, 12 (Fla. 1999).

#### Merits

This Court reviews the propriety of all death sentences. To ensure uniformity, this Court compares the instant case to all other capital cases. *Foster v. State*, 778 So.2d 906, 921 (Fla. 2000). Proportionality review considers the totality of circumstances in a case and compares the case with other capital cases. *Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990).

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statements. The trial court found that the officer's belief that this was a crime of passion was not proven. The trial court accorded no weight to the fact that the defendant is an accomplished athlete and motorcycle racer. The trial court also accorded no weight to the defendant's decision not to testify.

<sup>47</sup>*State v. Middlebrooks*, 995 S.W.2d 550, 561, n.10 (Tenn. 1999)(noting that proportionality review is *de novo*); *State v. Wyrostek*, 873 P.2d 260, 266 (N. Mex. 1994)(observing that the determination of whether a death sentence is disproportionate or excessive is a question of law); *State v. Hoffman*, 851 P.2d 934, 943 (Idaho 1993)(stating that when making a proportionality review, state supreme court makes a *de novo* determination of whether the sentence is proportional after an independent review of the record).

Proportionality review entails a qualitative review of the underlying factual basis for each aggravator and mitigator rather than a quantitative analysis. *Morris v. State*, 2002 WL 242901, \*5 (Fla. Feb. 21, 2002).

The death sentence in this case is proportionate. This case involves a total of four victims - all four of whom died and three of whom were young children. Death is proportionate where there are multiple victims especially multiple child victims. This Court has affirmed the death penalty where a defendant killed multiple children. *Henry v. State*, 689 So.2d 239, 255 (Fla. 1996)(finding the death penalty proportionate for the murder of two young children where each child was killed by a single bullet fired into the head where their mother was also shot but survived); *Durocher v. State*, 604 So.2d 810 (Fla.1992)(concluding that death sentences were appropriate where defendant shot a young girl with a shotgun, stabbed and beat his son and after burying the children, shot their mother); *Zakrzewski v. State*, 717 So.2d 488, 493 (Fla. 1998)(finding death was proportionate where defendant killed his wife and two young children).<sup>48</sup> This court has affirmed the death sentence for murders with a child victim with more statutory mitigating circumstances than the trial court found in this case.<sup>49</sup> This

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<sup>48</sup> Indeed, this Court affirmed an override in *Zakrzewski* for the murder of the five-year-old girl which is the only override affirmed in nearly a decade by this Court.

<sup>49</sup> *Henry v. State*, 649 So.2d 1361 (Fla. 1994)(finding death sentence proportionate where defendant killed his estranged second wife and her 5-year-old son by stabbing him five times where trial court found two aggravating factors: (1) Henry had

court has affirmed the death sentence for murders with multiple child victims with less than the three aggravating circumstances than the trial court found here. *Durocher v. State*, 604 So.2d 810, 812 (Fla. 1992)(finding death sentences proportionate for the murder of two young children and their mother where the trial court found two aggravators: (1) previous conviction of violent felony and (2) committed in a cold, calculated, and premeditated). This Court has repeatedly stated that there is no "domestic dispute" exception to the death penalty. *Blackwood v. State* 777 So.2d 399, 412 (Fla. 2000)(noting that the Court

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previously been convicted of another capital felony in the death of his first wife; and (2) the murder was committed during the course of a kidnapping and the trial court found two statutory mitigating factors of (1) extreme mental or emotional disturbance and (2) capacity to appreciate the criminality of his conduct or conform to the requirements of law was substantially impaired and six nonstatutory mitigating factors: (1) pled guilty and turned himself in for the murder of his first wife; (2) cooperative with law enforcement; (3) good conduct in jail; (4) he was a good Christian and was truly remorseful; (5) he had a history of drug and alcohol abuse; and (6) fell as a child and suffered some brain injury were given some weight); *Henyard v. State*, 689 So.2d 239, 255 (Fla. 1996)(finding the death penalty proportionate for the murder of two young children where trial court found four aggravators: (1) the defendant had been convicted of a prior violent felony; (2) the murder was committed in the course of a felony; (3) the murder was committed for pecuniary gain and, (4) the murder was especially heinous, atrocious or cruel and two statutory mitigators: (1) age of eighteen; (2) the defendant was acting under an extreme emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired and six nonstatutory mitigating circumstances: (1) the defendant functions at the emotional level of a thirteen year old and is of low intelligence; (2) an impoverished upbringing; (3) a dysfunctional family; (4) the defendant can adjust to prison life; (5) the defendant could have received a minimum mandatory fifty years and (6) the codefendant could not receive the death penalty as a matter of law).

has determined that the death sentence was proportionate for a defendant who murdered someone in a domestic relationship and affirming the death penalty where the defendant killed ex-girlfriend and where there was only a single aggravator of HAC). Moreover, as this Court pointed out in *Way v. State*, 760 So.2d 903, 921 (Fla. 2000), in many of the domestic dispute cases where the death penalty was found to be disproportionate, substantial mental mitigation was present. Here, by contrast, Hutchinson does not suffer from any major mental illness.

Appellant's reliance on *DeAngelo v. State*, 616 So. 2d 440 (Fla. 1993), is misplaced. *DeAngelo* was a single aggravator case where only the cold, calculated and premeditated aggravator was found. It involved a single victim who was an adult. Here, by contrast, there are three aggravating circumstances and three child victims. Hutchinson is a mass murderer - a mass murderer of young children. Thus, the death penalty is proportionate.<sup>50</sup>

#### ISSUE ON CROSS APPEAL

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<sup>50</sup> This Court also reviews the sufficiency of the evidence to support the conviction regardless of whether it is raised as an issue on appeal by appellant. *Mora v. State*, 2002 WL 87463, \*7 (Fla. 2002)(noting the Court's independent duty to ensure the sufficiency of the evidence regardless of whether the issue is raised). Here, the evidence is sufficient. Hutchinson admitted to killing his family on the 911 tape, owned the murder weapon, and had had fight with Renee prior to the murders. *Jennings v. State*, 718 So.2d 144, 154 (Fla. 1998)(concluding as a matter of law that the evidence is sufficient to support the murder convictions where the defendant made inculpatory statements made to law enforcement personnel, owned the murder weapon, and had a dislike of Cracker Barrel and one of the victims). The State discussed the sufficiency of the evidence to support premeditated murder in ISSUE V.

WHETHER THE AGGRAVATED CHILD ABUSE AGGRAVATOR IS PROPERLY  
CONSIDERED SEPARATELY FROM THE UNDER 12 YEARS OF AGE  
AGGRAVATOR?

The "defendant engaged in the commission of an aggravated child abuse" aggravator is properly considered separately from the "less than 12 years of age" aggravator. These two aggravators are not referring to the same aspect of the crime. The first aggravator refers to the defendant's conduct; whereas, the second aggravator refers to the victim's status. This Court should recede from its prior holding in *Lukehart v. State*, 776 So.2d 906, 925 (Fla. 2000). One aggravator concerns the defendant's conduct and the other concerns the victim's status as a child. Hence, the trial court improperly merged the two aggravating circumstances.

The trial court's ruling

The trial court in its sentencing order found that weighing both the aggravated child abuse aggravator and under the 12 years of age aggravator would "constitute improper doubling of aggravating circumstances" and therefore, considered only the under 12 years of age aggravator. (XIV 2705).

Preservation

The prosecutor sought both aggravators, arguing at the *Spencer* hearing and in the written sentencing memo, that it was not improper doubling because one aggravator referred to the murder of the other children while the less than 12 years old aggravator was personal to each child. (XXXI 2572-2582).

Defense counsel argued that the use of the aggravators would involved improper doubling. XXXI 2593).<sup>51</sup>

#### The standard of review

Normally, the determination of what weight, if any, is to be given to a particular aggravating or mitigating circumstance is left within the sound discretion of the trial court. *Stephens v. State*, 787 So.2d 747, 761 (Fla. 2001). However, here, the trial court was not exercising its discretion nor making a factual finding; rather, it felt bound by the rule of law that concurrent use of both aggravating circumstances would be improper doubling. *Willacy v. State*, 696 So.2d 693, 695 (Fla.1997)(noting that this Court reviews the record to determine whether the trial court applied the correct rule of law for each aggravating circumstance). Thus, because the issue is the correct rule of law to be applied, the standard of review is *de novo*.

#### Merits

Improper doubling occurs when aggravating factors refer to the same essential feature or aspect of the crime. *Banks v. State*, 700 So.2d 363, 367(Fla. 1997). However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators

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<sup>51</sup> The State filed a notice of cross appeal seeking review of the trial court's decision to merge aggravated child abuse aggravator with the under 12 years of age aggravator. (XIV 2762). The notice of cross appeal was filed on March 5, 2001 within 10 days of the notice of appeal. Fla.R.App.P. rule 9.140(c)(1)(j).

and not merely restatements of the other. *Banks v. State*, 700 So.2d 363, 367 (Fla. 1997).

The State acknowledges that this Court previously has held that the aggravated child abuse aggravator is properly merged with the under 12 years of age aggravator. *Lukehart v. State*, 776 So.2d 906, 925 (Fla. 2000)(holding that trial court improperly doubled by finding separately the two aggravating circumstances that the murder was committed by a person engaged in aggravated child abuse and that the victim was under twelve years of age because both aggravators are based upon the victim's status as a child allowing the two to operate as separate aggravators constitutes improper doubling). However, this holding is not correct. Contrary to the *Lukehart* Court's reasoning, both of the challenged aggravators are not based upon the victim's status as a child.<sup>52</sup>

In *Banks v. State*, 700 So.2d 363, 367(Fla. 1997), this Court rejected an improper doubling argument for the committed during the commission of a sexual battery aggravator and the HAC aggravator where the sexual battery was the basis for both aggravators. The *Banks* Court reasoned that the two aggravators were not merely restatements of one another because the defendant engaged in the commission of a enumerated felony aggravator focuses on the defendant but the HAC aggravator focuses on the impact on the victim.

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<sup>52</sup> The State, in *Lukehart*, did not make the same argument advanced here; rather, the State's brief argued that because the aggravated child abuse could involve a child over twelve and the under twelve aggravator could not, the aggravators were not the same.

Here, as in *Banks*, these two aggravators are not referring to the same aspect of the crime. The first aggravator refers to the defendant's conduct; whereas, the second aggravator refers to the victim's status. The language of the first statutory aggravator is that the defendant was engaged in the commission of certain enumerated felonies, one of which is aggravated child abuse. The focus of this aggravator is the defendant's conduct. The under twelve aggravator, by contrast, focuses on the victim's age. These are two separate aggravating circumstances because they do not refer to the same aspect of the crime. Granted that a child must be involved for both aggravators to apply but overlapping facts are not sufficient to constitute improper doubling. *Rose v. State*, 787 So.2d 786, 801 (Fla. 2001)(rejecting an argument that the concurrent use of the prior violent felony and parole aggravators constituted improper doubling where both aggravators were based on the same prior conviction); *Jennings v. State*, 718 So.2d 144,153 (Fla. 1998)(rejecting an improper doubling claim although both aggravators shared certain facts because each was also supported by distinct facts and involved different aspects of the crime). Here, one aggravator concerns the defendant's conduct and the other concerns the victim's status as a child.

Additionally, *Lukehart* is distinguishable. Each child was killed during the course of child abuse involving the other siblings. For example, Geoffrey was killing during the course of a child abuse on Amanda and Logan while Geoffrey himself was less than twelve. So, one aggravator refers to the murder of

the other children while the less than 12 aggravator applies to the victim. The dual use of these aggravators is permissible under the unique facts of this case. Thus, there was no improper doubling and the trial court should have considered the two aggravating circumstances separately.

CONCLUSION

The State respectfully requests that this Honorable Court affirm appellant's convictions and death sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Kepler B. Funk of Platt, Jacobus, Fielding, Szachacz, Funk & Torres, LLC 1990 West New Haven Avenue #201, Melbourne, FL 32904 this 10th day of May, 2002.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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