Supreme Court of Florida

No. SC00-458

JASON LOONEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[November 1, 2001]

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Jason Looney. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the judgment and sentence.

In the early morning hours of July 27, 1997, the charred bodies of Melanie King and Robin Keith Spears were found in the victims' burning home in Wakulla County, Florida. Looney, Guerry Hertz, and Jimmy Dempsey were each indicted for the first-degree murders of the victims, and each codefendant was also charged

with burglary of a dwelling while armed, armed robbery with a firearm, arson of a dwelling, and use of a firearm during the commission of a felony as a result of this incident. Prior to trial, codefendant Dempsey negotiated a plea with the State and was sentenced to consecutive life sentences in return for providing his testimony at Looney and Hertz's joint trial.

The evidence presented at the trial revealed the following facts. At approximately 11 p.m. on July 26, 1997, Looney and his codefendants left an acquaintance's house on foot within walking distance from the victims' home. All three men were armed with guns. A resident who lived about 500 yards from the victims testified that Hertz appeared at her door at about 2 a.m. asking to use her phone because "his truck had broken down." When she refused, the trio continued down the road towards the victims' home and, upon seeing the victims' black Mustang, Looney said, "There's my car right there. That's the one I want."

Dempsey and Hertz went to the victims' front door as a decoy and asked if they could use the phone. King provided them with a cordless phone, and Dempsey feigned making a phone call. When Dempsey attempted to return the phone, Hertz pointed his gun at King and forced his way in. Looney then entered and pointed his rifle at Spears. Spears and King were bound and gagged with duct tape and placed face down on their bed. Looney and his codefendants removed a

significant amount of the victims' property, including a VCR, a television, jewelry, furniture, and CDs, and loaded the victims' belongings into the victims' two vehicles. Looney also found approximately $1500 of the victims' money in an envelope, which was ultimately divided equally among the three.

Looney and Hertz concluded that they could leave no witnesses and informed Dempsey of their decision. Dempsey said Looney and Hertz then poured accelerants throughout the victims' home. All three men, still armed, went to the bedroom where the victims were bound, side-by-side, face down on their bed. When they entered the back bedroom, King said that she would "rather die being burnt up than shot." She stated, "Please, God, don't shoot me in the head." Hertz replied, "Sorry, can't do that," and then he proceeded to open fire; Looney followed and then Dempsey. The victims died as a result of the gunshot wounds.

Subsequent to the shootings, the victims' home was set ablaze. Hertz drove away in the victims' white Ford Ranger, and Looney drove the victims' black Ford Mustang, with Dempsey as a passenger. According to Dempsey, the whole episode at the victims' home lasted about two hours. The trio proceeded to Hertz's house and unloaded the stolen items and divided up the money. Two employees at the Wal-Mart in Tallahassee testified that the three men made purchases at the store at around 5 a.m. the morning of the murders, before

“showing off” their new vehicles, i.e., a black Mustang and a white Ford Ranger, to both of the employees. A Wal-Mart receipt for a clothing purchase was later found in the victims’ Mustang, corroborating the employees’ testimony.

Looney and his codefendants made their way to Daytona Beach Shores where, later that day, they were involved in a pursuit and shootout with police. Looney and Dempsey were arrested after abandoning and fleeing from the victims’ black Mustang. Hertz abandoned the victims’ Ford Ranger after being shot, and he paid a cabdriver $100 to drive him to his aunt’s house in St. Augustine. Hertz was arrested that same day in St. Augustine, and victim Spears’ .9mm gun was recovered from Hertz’s bag.

A firearms expert with FDLE testified that one of the bullets recovered from the area of the victims’ burned bed was fired from the .380 Lorcin handgun recovered from Looney at the time of his arrest in Daytona Beach, i.e., the same handgun owned by Keith Spears and used, according to Dempsey, by Hertz to shoot the victims. The other bullet was fired from a .30 caliber carbine rifle, not inconsistent with .30 caliber rifle used by Looney to shoot the victims, and later recovered in the victims’ Mustang. A roll of duct tape, Looney's wallet with $464, and Dempsey's wallet with $380 were also found in the Mustang. A fingerprint analyst with FDLE analyzed latent fingerprints taken from the Mustang and

concluded that Looney and his codefendants had all touched the car. The chemist found evidence of various accelerants on items of clothing found in the Mustang. In addition, a law enforcement investigator with the State Fire Marshal's Office testified that the kind of damage that was done by the fire does not happen unless an accelerant is used.

The state medical examiner testified that the bodies were severely burned. He graphically detailed the condition of the bodies as depicted in the photographs: the legs were burned off below the knees, the hands were burned to nubs, the bones of the arms were fractured by the fire, and the skulls were burned partially away. The victims had to be positively identified by dental records. The medical examiner also testified that there could have been other injuries that were not detected due to the extensive burns.

King was shot at least two times in the head, which caused her death. However, the medical examiner was not able to trace the path of the bullet because the skull was burned away. He testified that it was possible that other bullets struck the body, which could not be determined because of the fire. King lived one to two minutes after she was shot. However, there was no soot in the trachea, indicating that she was not alive when the fire started. Spears was shot at least one time in the head, which caused his death. The bullet went in the back of the neck

and exited above the right eye. Spears also lived one to two minutes after he was shot, and again, no soot was discovered in his trachea, meaning that he was dead at the time of the fire. The defense did not present any evidence.

A jury convicted both Looney and Hertz of the first-degree murders of King and Spears, burglary of a dwelling while armed with a firearm, armed robbery with a firearm, arson of a dwelling, and use of a firearm in the commission of a felony. By a majority vote of ten to two, for each murder, the jury recommended and advised that the death penalty be imposed against Looney and Hertz. By written order, the judge imposed a sentence of death for each murder.

With respect to Looney, the trial court found as aggravating factors that (1) Looney was previously convicted a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Looney was engaged in the commission of a burglary, arson, and robbery; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the crime was committed for financial or pecuniary gain (the court merged this aggravating factor with the fact that the capital felony was committed during the course of a burglary, arson, or robbery); (5) the murder was especially heinous, atrocious, or cruel, and (6) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification.

In mitigation, the trial court found (1) Looney's age of 20, which was given only moderate weight; (2) as to all other nonstatutory mitigation, (a) Looney's difficult childhood was given significant weight; (b) the fact that Looney had no significant criminal history or no history of violence and the fact that he posed no problems since being incarcerated were given marginal weight; (c) that Looney was remorseful was given moderate weight; (d) the fact that society would be adequately protected if he were to be given a life sentence without the possibility of parole was entitled to little weight, and (e) the fact that a codefendant, Dempsey, received a life sentence following a plea, was given significant weight and substantially considered by the trial court.[1] On appeal, Looney raises a variety of challenges to his convictions and death sentence.[2]

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1. In the four noncapital cases, the judge sentenced Looney to life on the burglary of a dwelling while armed (count III); life on the robbery with a firearm (count IV); 30 years on the arson of a dwelling (count V); and 15 years for the use of a firearm during the commission of a felony (count VI). All sentences were ordered to run consecutive to one another.

2. Looney claims: (1) The trial court improperly excused for cause a venire member whose opposition to the death penalty did not prevent or substantially impair her ability to perform her obligations as a juror; (2) the details of the collateral crimes in Volusia county became a feature of the trial causing prejudice that substantially outweighed the probative value of the evidence; (3) the trial court erred by admitting gruesome photographs of the bodies at the crime scene and the autopsy; (4) the trial court erred by refusing to grant a mistrial after the State's witness testified about the hearsay statement by a nontestifying codefendant which incriminated Looney; (5) the evidence was insufficient as a matter of law to sustain

Voir Dire

First, Looney argues venireperson Free was impermissibly struck from the jury venire on the erroneous grounds that her opposition to the death penalty rose to the level justifying exclusion under Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985). The United States Supreme Court has articulated the standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment:

> [The] standard is whether the juror's view would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." . . . [T]his standard likewise does not require that a juror's bias be proved with "unmistakable clarity."

Wainwright v. Witt, 469 U.S. 412, 424 (1985) (footnote omitted) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). "The trial judge has the duty to decide if a challenge for cause is proper, and this Court must give deference to the judge's determination of a prospective juror's qualifications." Castro v. State, 644 So. 2d

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the convictions; (6) the trial court erred in denying the defense motion to require a unanimous verdict; (7) the statute authorizing the admission of victim impact evidence is an unconstitutional usurpation of the Court's rulemaking authority under article V, section 2, of the Florida Constitution, making the admission of such testimony unconstitutional and reversible error; (8) four of the seven aggravating factors upon which the jury was instructed and which the trial court found are legally inapplicable and their consideration was not harmless error; and (9) the death sentence in this case is disproportionate.

987, 989 (Fla. 1994) (citing Witt, 469 U.S. at 426).

The decision to deny a challenge for cause will be upheld on appeal if there is support in the record for the decision. See Gore v. State, 706 So. 2d 1328, 1332 (Fla. 1997). "It is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999) (citing Mendoza v. State, 700 So. 2d 670, 675 (Fla. 1997)). "A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate prospective jurors' answers than does this Court in our review of the cold record." Mendoza, 700 So. 2d at 675.

In Hannon v. State, 638 So. 2d 39 (Fla. 1994), this Court stated that "[t]he inability to be impartial about the death penalty is a valid reason to remove a prospective juror for cause." In the instant case, venireperson Free unequivocally stated during three separate responses that she could not impose the death penalty.[3]

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3. The transcript reports the following exchange:

> [Prosecutor]: If you do a verdict of guilty of first-degree murder, then the death penalty is a possibility. Could you vote to impose-- to convict somebody when the death penalty is a possibility?
> [Venireperson Free]: No, sir.
> . . . .
> [Defense Counsel]: Ms. Free, you saying you can't even vote in the guilt phase whether the person is guilty or innocent because you

Moreover, counsel for the defendants attempted to rehabilitate Free under a misconceived notion that because a juror may be willing to convict a defendant of first-degree murder, there is no need for that juror to have an open mind with regard to both the aggravation and mitigation to be presented in the penalty phase of a case. The record is clear, however, that Free was not willing to consider all of the penalties provided by state law, i.e., the death penalty, and, therefore, the State's challenge for cause was properly upheld. See Gore, 706 So. 2d at 1332; see also Castro, 644 So. 2d at 989.[4] For the foregoing reasons, we find no manifest error

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know that there is a possibility of the death penalty, is that correct?
[Venireperson Free]: Yeah.

. . . .

[Defense Counsel]: So assuming you have all this discussion, an open discussion about the possibility of one sentence or the other, are you going to tell us today that you still couldn't participate in that discussion if you were on a jury?

[Venireperson Free]: I just don't believe that I could actually be--take a person life. Even if they were found guilty of killing someone, I would just rather them spend the rest of their life in jail because its not going to bring the person back, anyway.

. . . .

[Defense Counsel]: You would try. But you don't necessarily want to be in that position, do you?

[Venireperson Free]: Well, I mean, if I am, it wouldn't matter. My opinion is I just would not want to take someone else's life, just because -- I mean, I know it's bad that they killed someone or anybody kills anybody, but it wouldn't bring that person back.

4. Furthermore, Farina v. State, 680 So. 2d 392 (Fla. 1996), sentence vacated, 763 So. 2d 302 (Fla. 2000), on which Looney relies, is inapposite. The

by the trial court in excusing venireperson Free for cause and, therefore, deny Looney's claim.

Collateral Crime Evidence

Looney next claims the trial court erred in admitting evidence of collateral crimes committed in Volusia County. This Court has stated that the admission of evidence is within the trial court's discretion and will not be reversed unless defendant demonstrates an abuse of discretion. See Medina v. State, 466 So. 2d 1046 (Fla. 1985); Jent v. State, 408 So. 2d 1024 (Fla. 1981). "Even if the evidence in question tends to reveal the commission of a collateral crime, it is admissible if found to be relevant for any purpose save that of showing bad character or propensity." Randolph v. State, 463 So. 2d 186, 189 (Fla. 1984).

> The law is well settled that "[w]hen a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the

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juror in question in Farina stated that she would try to be fair and that she would "fairly consider the imposition of the death penalty, depending on the evidence [she] heard in the courtroom," and, in fact, could impose a death sentence in a murder case, depending on the circumstances presented. Farina, 680 So. 2d at 396-98. Thus, although she had "mixed feelings" about capital punishment, she never expressed uncertainty about her ability (or unwillingness) to vote for it in a proper case, according to the appropriate legal standards. See id. Moreover, the prosecutor in Farina never stated the ground on which he was challenging this juror, and the trial court apparently granted the State's challenge "because it had just granted a defense challenge." Id. at 398. Therefore, none of the bases supporting this Court's reversal in Farina apply to the instant case.

> fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). However, we have held that in order to admit this evidence, there must be a nexus between the flight, concealment, or resistance to lawful arrest and the crime for which the defendant is being tried in that specific case. See Escobar v. State, 699 So. 2d 988 (Fla. 1997). Moreover, such an interpretation should be made with a sensitivity to the facts of the particular case. See Bundy v. State, 471 So. 2d 9 (Fla. 1985) (citing United States v. Borders, 693 F.2d 1318, 1325 (11th Cir.1982)).
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> In prior cases, we have upheld the introduction of similar flight evidence as consciousness of guilt where the defendant flees from police after committing a murder. See Shellito v. State, 701 So. 2d 837, 840 (Fla. 1997) (even though defendant committed several robberies between the murder and his arrest, evidence that defendant resisted arrest the day after the murder was admissible as consciousness of guilt of the murder); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) (even though defendant escaped after being arrested for misdemeanor traffic warrants, evidence of escape could be used as consciousness of guilt of the murder); Bundy, 471 So. 2d at 20 (evidence of defendant's attempt to flee officers six days after the murder was admissible as consciousness of guilt even though defendant was wanted for several murders in other states). In these cases, we upheld the introduction of the flight evidence even though the flight could have been attributed to different crimes or warrants.

Thomas v. State, 748 So. 2d 970, 982 (Fla. 1999).[5]

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5. In Thomas, this Court found a "strong nexus" between the defendant's flight and the victim's murder such that the trial court did not abuse its discretion in admitting the flight evidence to show consciousness of guilt:

> [T]he evidence established that police spotted Thomas eleven days after the murder driving at speeds in excess of 90 miles per hour. After being pursued for a while, Thomas eventually stopped and the officers instructed him and his passenger to show their hands. When Thomas did not respond to this request, one of the officers approached the

In the instant case, the nexus between the flight or resistance to lawful arrest and the murders appears as strong as, if not stronger than, that in Thomas. The only collateral crime testimony that was introduced was the testimony of Daytona Beach Shores police officers Shawn Rooney and Greg Howard regarding how, on the day of the murders, Hertz attempted to hit Officer Howard and knock him down with the Ford Ranger.[6] The facts and circumstances surrounding the pursuit and subsequent

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> car, opened the door, and grabbed Thomas. Thomas immediately sped away, and the officer let go of his arm to avoid being dragged down the interstate. A high-speed chase ensued for several miles and ended when Thomas crashed into a ditch, exited the vehicle and fled on foot before eventually being arrested.

Id. at 982-83 (emphasis added).

6. The sum total of that testimony reflects that Officer Rooney testified that Hertz was driving the Ford Ranger and he saw the truck turn around and start coming back at him and then make a right turn on Hickory Lane. At that point the truck was headed in Officer Howard's direction, and Officer Rooney said he heard a thump and saw a mike go flying into the air. He walked over to Hickory Lane and saw Officer Howard fall down; he got back in his vehicle and then saw the Ford Ranger coming at a high rate of speed in reverse towards his car. He jumped out and watched as the Ranger backed up past him. He positively identified the Ranger being driving by Hertz. At that point, the officer fired his weapon and Hertz drove away. On cross-examination, Officer Rooney testified that the Ranger did not hit him or Officer Howard and he never saw anyone in the Ranger fire a weapon.

Officer Howard testified that he heard a vehicle coming up from behind him and saw a white Ford pickup. The truck hit him and knocked him down. He testified that he could not get out of the way. He positively identified Hertz as the driver of the Ford Ranger and said that as a consequence of being hit he lost his radio and he, too, started shooting at the vehicle. On cross-examination, he testified that the truck hit him from behind; but he sustained no serious injuries.

arrest of Hertz, Looney, and Dempsey were "relevant to the consciousness of guilt which may be inferred from such circumstance." Straight, 397 So. 2d at 908.[7]

Looney also argues that he was unfairly prejudiced by the admission of such evidence because it became the "feature" of this capital murder trial and, thus, this Court should reverse his conviction as it did for the defendant in Steverson v. State, 695 So. 2d 687 (Fla. 1997).[8] In contrast to Steverson, however, the record in the

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7. The cases cited by Looney as examples of inadmissible collateral crimes do not involve evidence of flight or resistance to arrest. See Gore v. State, 719 So. 2d 1197, 1199 (Fla. 1998) (holding collateral crime evidence of defendant's "reprehensible action of leaving a two-year-old child naked in a burned and abandoned house in thirty-degree weather" had no relevance in trial and was highly prejudicial); Pope v. State, 679 So. 2d 710, 714 (Fla. 1996) (finding fact that defendant battered wife in the past irrelevant to the issue of her murder); Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990) (holding collateral crime evidence that defendant was an escaped convict not relevant).

8. In Steverson,

> the jury heard virtually every detail of [a police officer shooting] case, including every emotional aspect of the shooting, the detective's injuries, his bloodied face, his staggering, his yelling, the frantic "officer down" response by numerous law enforcement officers and undercover agents, the hospital treatment, and the time he had to take off work due to the "deadly force" situation. In addition to a lengthy recitation about the shooting, [the officer] personally and graphically described his injuries; and twelve photographs of his injuries were admitted over objection for review by the jurors. [The officer] went on to narrate how blood dripped over his eyeglasses and face, how he awaited help, staggered down the street and yelled into his radio. He described his medical treatment at the hospital and the birdshot that remained in his body. [The officer's partner] then gave his own "blow-

instant case reflects that the collateral crime evidence that was introduced at the guilt phase of Looney and Hertz's trial was a de minimis part of the evidence presented in support of the murder, robbery, and arson charges. Only three of the State's thirty-five witnesses discussed the Volusia County pursuit and capture. More importantly, the evidence in the instant case was not nearly as "unnecessary and inflammatory" as this Court concluded was the evidence surrounding the shooting of the police officer in Steverson. See Steverson, 695 So. 2d at 690 (finding "the twelve photographs of [the police officer's] injuries alone were so unnecessary and inflammatory that they could have unfairly prejudiced the jury against Steverson"). Accordingly, because the evidence of the defendants' actions in Volusia County was relevant to consciousness of guilt and did not become an impermissible feature of the trial, we deny Looney's claim.

Gruesome Photographs

Looney next argues that the trial court erred by admitting into evidence several

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> by-blow" recounting of the details surrounding the shooting; and further testified about [the officer's] condition--how he saw his partner down on the sidewalk, startled, bloody, and yelling. In addition, two other officers who arrived at the scene shortly after the shooting, but did not witness it, also reiterated for the jury in great detail the nature of [the officer's] injuries, and how police and emergency personnel aided him at the scene.

Steverson, 695 So. 2d at 690.

particularly gruesome photographs of the victims' bodies. In Czubak v. State, 570 So. 2d 925 (Fla. 1990), this Court discussed the admissibility of gruesome photographs:

> This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. Where photographs are relevant, "then the trial judge in the first [instance] and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." We have consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence.

Id. at 928 (citations omitted).

With respect to the first photograph at issue, i.e., State's Exhibit 1-C (depicting the charred bodies of the victims as found at the crime scene), this Court has found no abuse of discretion in admitting allegedly inflammatory photographs when relevant "to assist the crime scene technician in explaining the condition of the crime scene when the police arrived." Pope v. State, 679 So. 2d 710, 713 (Fla. 1996). We find State's Exhibit 1-C is relevant to show the position and location of the bodies when they were found by police and assisted the crime scene technician in describing the crime scene. See Pope, 679 So. 2d at 713-14; see also Pangburn v. State, 661 So. 2d 1182, 1188 (Fla. 1995) (finding no abuse of discretion in admitting

gruesome photographs when "introduced to assist a law enforcement officer in documenting the scene where the victims were found"); Nixon v. State, 572 So. 2d 1336, 1342 (Fla. 1990) (finding no abuse of discretion in admitting seven gruesome photographs of victim in charred state when "introduced to aid the detective in explaining the condition of the crime scene when the police arrived").[9]

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9. Moreover, this Court has also said, "[r]elevant evidence which is not so shocking as to outweigh its probative value is admissible." See Pope, 679 So. 2d at 714. Although undeniably a gruesome photograph, Exhibit 1-C is probative of other material issues in this case. First, because the picture depicts the bodies lying side-by-side and face down on the victims' bed, it corroborates Dempsey's testimony that the victims were shot execution-style in the backs of their heads while bound face down on their bed. Second, the position of the victims' bodies is also relevant (and, thus, so is Exhibit 1-C) because it assisted crime scene investigator Yao in describing how the victims' bodies "protected" some of the victims' clothing from fire debris and, thus, how such evidence was recoverable for testing of accelerants. Third, the photo assisted the State Fire Marshal investigator during his testimony in describing areas of the bedroom where accelerant was likely poured, e.g., on the flooring immediately surrounding the bed where the photo depicts flooring as completely missing. Fourth, the photo depicted for the jury the massive damage done by the fire to the victims and the area immediately surrounding them such that, as investigator Yao opined, it significantly interfered with the recovery of projectiles and other forensic evidence. Finally, and although not argued by the parties, Exhibit 1-C is also probative of the avoid arrest aggravating circumstance, where it is clear from the photo that the defendants sought to leave no shred of evidence linking them to this crime by torching the victims and their immediate surroundings. See Gudinas v. State, 693 So. 2d 953, 963 (Fla. 1997) (holding allegedly gruesome photos relevant to proving aggravating circumstance). Nor can State's Exhibit 1-C be called cumulative. Although State's Exhibits 1-T and 1-U are photographs of the victims' charred bed area, these pictures do not provide nearly as clear a depiction of the position of the victims' bodies, nor do they illustrate the burned-out flooring immediately surrounding the

Looney next argues the gruesome autopsy photos, i.e., State's Exhibits 39-A through 39-E, were not used by the medical examiner to illustrate his opinion of the cause of death and were, therefore, irrelevant.[10] This Court has stated that autopsy photographs may be admissible when used to "illustrate the medical examiner's testimony and the [victim's] injuries," Pope, 679 So. 2d at 714, or when "relevant to the medical examiner's determination as to the manner of the victim's death," Mansfield v. State, 758 So. 2d 636, 648 (Fla. 2000). Moreover, "[t]o be relevant, a photo of a deceased victim must be probative of an issue that is in dispute." Almeida v. State, 748 So. 2d 922, 929 (Fla. 1999).

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bed, as does Exhibit 1-C.

10. Although Looney argues the jury was improperly shown State's Exhibits 39-A, 39-B, 39-C, 39-D, and 39-E, the record indicates that State's Exhibits 39-B, 39-C, and 39-E were not shown to the jury and were subsequently withdrawn from evidence at the request of the State:

> [Prosecutor]: Your honor, yesterday our medical examiner testified, I had introduced five photographs anticipating that he would use those in his testimony and three of those photographs were not used or displayed to the jury. They are State's Exhibit Number 39B, 39C and 39E.
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> And at this point -- I've discussed this with counsel for the defendants – the State would request that these be removed from the evidence. The jury has not seen them and we'd ask that these exhibits not be part of the evidence. So I'd like to withdraw those from evidence.

Without objection, exhibits 39-B, 39-C, and 39-E were removed from evidence.

In this instance, the jury viewed two gruesome autopsy photographs showing the effects of the fire, which, all parties agree, occurred after the victims' deaths.[11] Because the victims' bodies were so damaged by the fire, neither of the admitted autopsy photos (each depicting close-ups of the charred remains of the victims) are probative of the medical examiner's determination as to the manner of the victims' deaths. The photographs at issue were only used by the medical examiner to describe the damage done to the victims' bodies by the ensuing fire.[12] Said another way, the damage caused to the deceased victims' bodies by the fire after their deaths was not an issue in dispute. Moreover, the medical examiner's testimony about the

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11. It was the medical examiner's opinion that the deaths were caused by gunshot wounds and that there was no evidence that the fire caused the deaths, as there was no evidence of soot in either of the victims' tracheas.

12. Exhibit 39-A is an autopsy photograph depicting the torso and abdomen of a male victim's body. The medical examiner testified that the photograph revealed that there were "extensive burns on the right side and intestinal material coming out of the right side as a result of the burns"; that "a large portion of the arm [was] burned away"; that burns extend[ed] down into the hip region"; and that "muscle . . . [was] burned away and . . . intestines [were] coming out." (Emphasis added.) Exhibit 39-D is an autopsy photograph depicting the central part of a female victim's body. The medical examiner testified that the photograph revealed that the body was "severely burned"; that there were extensive burns on the side and extending into the buttock area"; and that "on the left side . . . the intestines are coming out of the body cavity as a result of the burns." (Emphasis added.)

cause of death did not rely at all on the photographs.[13]

Because the photographs were not relevant, that is, not probative of any fact in issue, we find it was error to admit the autopsy photographs. See Almeida, 748 So. 2d at 930. However, given Dempsey's direct evidence implicating Looney, the physical and testimonial evidence corroborating Dempsey's account of the events, and the minor role the autopsy photos played in the State's case, we find any error harmless. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); see also Almeida, 748 So. 2d at 930 (finding admission of irrelevant autopsy photo harmless "in light of the minor role the photo played in the State's case"); Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993) (finding error in admission of irrelevant autopsy photographs harmless).[14]

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13. In fact, when describing the actual cause of death, i.e., the gunshot wounds, it appears from the record the medical examiner pointed to his own head to demonstrate the entry and exit wounds of the male victim--and not to any of the autopsy photos offered by the State.

14. We also find no error by the trial court in permitting the State to publish the photographs before the jury on the television-like "DOAR" system. First, the trial court here looked at the monitor and its position in the courtroom and found that the pictures were not inordinately enlarged. The trial court even had the 36-inch monitor moved further away from the jury so that they were given the proper perspective. Second, in Ruiz v. State, 743 So. 2d 1 (Fla. 1999), upon which Looney relies, this Court found error in the introduction of the blown-up photo because, unlike in the instant case, "the standard-size photo from which the blow-up was made had already been shown to the jury during the guilt phase." 743 So. 2d at 8. That was not the case in this instance and, therefore, we find the trial court

Bruton Error

Looney next argues the trial court erred by refusing to grant a mistrial after the State's witness testified about the hearsay statement by a non-testifying codefendant which incriminated Looney. The State presented the testimony of Robert Hathcock, an inmate who made the acquaintance of Hertz when they shared a cell at the Leon County Jail.[15] Hathcock testified that Hertz told him that "he and two of his codefendants had been involved in two murders in Crawfordville and that they had killed." Counsel for Looney objected and moved for a mistrial, arguing the statement incriminated his client and he was unable to cross-examine Hertz. The State acknowledged that Hathcock's statement "should not have come out," but also argued that the mistake was "inadvertent" and the problem could be solved with a curative instruction. The record reflects that at this point the parties continued presenting arguments to the trial court before the court finally recessed for the evening. The next morning, the trial court instructed the jury to disregard as a matter of law any testimony by Hathcock.

Looney argues that the admission of Hertz's statement violated his Sixth

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did not abuse its discretion in permitting the State to publish the photos on the DOAR system.

15. The State apparently presented this witness to testify to the admission by Hertz that he had committed the murders.

Amendment right to confront witnesses as explained in Bruton v. United States, 391 U.S. 123 (1968). In Bruton, the United States Supreme Court held that a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated by the introduction of a non-testifying codefendant's confession which named and incriminated the defendant at a joint criminal trial. Id. at 126. The crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant. In the instant case, because Hertz chose not to testify at the defendants' joint trial, Hathcock's testimony regarding Hertz's implication of Looney clearly denied Looney his Sixth Amendment right to confront Hertz. As such, the admission of Hertz's statement to Hathcock was clearly a violation of the standard set in Bruton. Id.

The State, however, argues that the trial court's curative instruction, i.e., to "disregard" Hathcock's testimony, was sufficient to ameliorate any potential error. But the Bruton Court itself held that a jury instruction to the effect that the codefendant's confession must be disregarded in determining the defendant's guilt or innocence is ineffective and cannot overcome the prejudicial effect of the incriminating statement on the jury. Id. at 124. As such, the trial court's curative instruction in the instant case was insufficient to cure the erroneous admission of

Hertz's statement to Hathcock.

Nonetheless, this Court has also recognized that a Bruton violation does not automatically require reversal of an otherwise valid conviction but, rather, is subject to a harmless error analysis. See Farina v. State, 679 So. 2d 1151, 1155 (Fla. 1996) (citing Harrington v. California, 395 U.S. 250, 254, (1969)); see also Franqui v. State, 699 So. 2d 1312, 1322 (Fla. 1997) (holding Confrontation Clause violation was harmless beyond a reasonable doubt and thus upholding first-degree murder conviction); Smith v. State, 699 So. 2d 629, 644-45 (Fla. 1997) (finding Bruton violation in first-degree murder case harmless beyond a reasonable doubt).

Indeed, the United States Supreme Court has recognized that:

> The mere finding of a violation of the Bruton rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Schneble v. Florida, 405 U.S. 427, 430 (1972) (upholding murder conviction after finding Bruton error harmless).

In Harrington, Justice Douglas stated that in order to determine whether a Bruton error is harmless, "[o]ur judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the . . .

confessions <u>on the minds of an average jury</u>." 395 U.S. at 254 (emphasis added); <u>see</u> <u>also</u> <u>Schneble</u>, 405 U.S. at 432 (upholding conviction after <u>Bruton</u> violation because the "'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to [the codefendant's] admissions been excluded").

In this case the State presented live, direct testimony showing beyond a reasonable doubt that Looney was guilty of first-degree murder. There is significant eyewitness testimony from Dempsey as to Looney's involvement in the murders. Dempsey's testimony places Looney together with him and Hertz at Tommy Bull's house a few hours before the murder. This testimony was corroborated by Bull himself at trial. Bull also testified that Looney was armed with a pistol and that the three, i.e., Looney, Hertz, and Dempsey, sought a ride from Bull but, after he refused, "left walking" around 11 p.m. that evening.

Dempsey testified that Looney played in integral part in the robbery and murder of the victims. Dempsey testified that Looney followed Hertz's violent entry into the victims' home by putting a rifle to the head of victim Spears. Looney also took an active part in removing items from the victims' trailer, including approximately $1500 of the victims' cash. Moreover, it was Looney and Hertz who indicated to Dempsey that they could leave no witnesses shortly before Looney took

part in the execution-style killing of the victims. Finally, Dempsey testified that Looney drove away in the victims' black Mustang loaded with the stolen property.

Dempsey's direct testimony is corroborated by other State witnesses and evidence. Two Wal-Mart employees each independently identified Looney as being among the three men who came into Wal-Mart within a couple of hours of the murder. Both witnesses specifically recalled seeing Looney and the others drive off in a black Mustang and white truck. A Wal-Mart receipt later recovered in the victims' Mustang also corroborated Looney's presence at the Wal-Mart with Dempsey and Hertz on the morning of the murders.

In addition, a Volusia County Sheriff's Deputy testified that he arrested Looney less than twelve hours after the murders driving the victims' black Mustang. The gun retrieved from Looney's pocket was the .380 Lorcin automatic handgun identified by the gun shop owner as having been sold to victim Spears. The FDLE firearms expert testified that one of the two bullets recovered from the area of the victims' bed was fired from this same handgun. A .30 caliber carbine rifle was also found in the Mustang that Looney was driving, resembling the one Dempsey testified that Looney carried during the forced entry of the victims' home.[16] Also,

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16. Although the firearms expert could not conclusively say whether the other bullet recovered from the crime scene was fired from this precise .30 caliber

fingerprints belonging to Looney, Hertz, and Dempsey were all found on the victims' Mustang. Finally, Looney's wallet found in the victims' Mustang contained $464 in cash.

All of this testimony and evidence provides overwhelming proof of Looney's guilt.[17] The erroneous admission of Hathcock's testimony would in no way "vitiate the entire trial." See Reaves v. State, 639 So. 2d 1, 5 (Fla. 1994). Therefore, after careful review of this record, we hold that the introduction of the challenged statement was harmless beyond a reasonable doubt and, therefore, reject Looney's claim.

Sufficiency of Evidence

Looney next argues that the evidence was insufficient as a matter of law to sustain the convictions. In Williams v. State, 437 So. 2d 133 (Fla. 1983), this Court enunciated its proper role in evaluating sufficiency of the evidence arguments in capital cases:

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carbine rifle, he could definitely identify the bullet as a .30 caliber projectile.

17. The circumstances of this case are not unlike those in Smith, where this Court found that errors in the admission of non-self-inculpatory portions of codefendants' confessions, i.e., Bruton violations, were harmless beyond a reasonable doubt in the guilt phase of the trial. See Smith, 699 So. 2d at 644-45. In Smith, this Court relied, at least in part, on the State's presentation of "live, direct testimony" from two of Smith's convicted codefendants regarding Smith's participation in the robbery and murder of the victims.

> [A]n appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.
>
> It is our function, then, to see if there is substantial, competent evidence to support the verdict.

Id. at 134 (quoting Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981)) (alterations in original) (citations omitted).

In the present case, the State sought first-degree murder convictions on alternative theories of premeditated murder and felony-murder with the underlying offenses of armed robbery, burglary, or arson. Thus, because a general verdict form was used in this case, in order to affirm Looney's first-degree murder convictions, there must be substantial, competent evidence supporting either premeditated or felony murder (predicated on armed robbery, burglary, or arson).

In this instance, there is direct evidence that Looney killed the victims in both a premeditated manner and during the course of a robbery, burglary, or arson.[18]

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18. See Davis v. State, 90 So. 2d 629, 631 (Fla. 1956) ("Direct evidence is that to which the witness testifies of his own knowledge as to the facts at issue."); see also Ehrhardt, Florida Evidence § 401.1 (2000 ed.) ("Direct evidence is evidence which requires only the inference that what the witness said is true to prove a material fact; e.g., 'I saw A shoot B' is direct evidence that A shot B.").

Accordingly, this case is unlike those cases based wholly on circumstantial

Dempsey's testimony places Looney together with him and Hertz at Tommy Bull's house a few hours before the murder. This testimony was corroborated by Bull himself at trial. Bull also testified that Looney was armed with a pistol at his house and Looney, Hertz, and Dempsey sought a ride from Bull but, after he refused, they "left walking" around 11 p.m. that evening.

Dempsey testified Looney followed Hertz's violent entry into the victims' home by putting a rifle to the head of victim Spears. Dempsey also testified that, after Looney and Hertz told him the victims had to be killed, Looney followed Hertz in the execution-style killing of the victims. Under these facts, there was clearly sufficient time before the killing for Looney to have formed a premeditated design to kill.[19]

Dempsey also testified that Looney participated in the armed robbery of the victims, which occurred contemporaneously with the killings and prior to the arson

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evidence and thus would require a special standard of review where a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. See, e.g., Thorp v. State, 777 So. 2d 385 (Fla. 2000); State v. Law, 559 So. 2d 187 (Fla. 1989).

19. "Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill." Green v. State, 715 So. 2d 940, 943 (Fla. 1998). This purpose to kill must exist for such a time before the homicide "to permit reflection as to the nature of the act to be committed and the probable result of that act." Id. at 944.

of their dwelling. Looney took an active part in removing items from the victims' trailer, including approximately $1500 of the victims' cash. Looney poured accelerants throughout the victims' home and fled the scene in the victims' Ford Mustang. Looney and his codefendants then unloaded the stolen items at Hertz's residence. [20]

Dempsey's direct testimony is corroborated by other State witnesses and evidence. Two Wal-Mart employees each independently identified Looney as being among the three men who came into Wal-Mart shortly after the time of the murders. Both witnesses specifically recalled seeing Looney and the others drive off in a black Mustang and the white Ford Ranger. A Wal-Mart receipt later recovered in the Mustang also corroborates Looney's presence at the Wal-Mart the morning of the murders.

Moreover, a Volusia County Sheriff's Deputy testified that, subsequent to a

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20. Looney argues that this Court should disregard Dempsey's testimony. Determining the credibility of witnesses, however, is within the province of the jury. See Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990) (noting that credibility of accomplice's version of murder is question for jury). Thus, it is the jury's duty to weigh the evidence and resolve any factual conflicts, and its findings will not be disturbed on appeal absent a clear showing of error. See Jent v. State, 408 So. 2d 1024, 1028 (Fla. 1981). It is not within the province of this Court to pass on the credibility of a witness presented at trial. After hearing all of the evidence in this case, the jury clearly chose to believe Dempsey's version of the facts, as much of his testimony was corroborated by testimonial and physical evidence.

high-speed pursuit and shoot-out, he arrested Looney less than twelve hours after the murders driving the victims' black Mustang.[21] Moreover, the gun retrieved from Looney's pocket was the .380 Lorcin automatic handgun identified by the gun shop owner as having been sold to victim Spears. The FDLE firearms expert testified that one of the two bullets recovered from the area of the victims' bed was fired from this same handgun. A .30 caliber carbine rifle was also found in the Mustang Looney was driving when arrested.[22] Moreover, fingerprints belonging to Looney, Hertz, and Dempsey were all found on the victims' Mustang when it was recovered in Daytona. Finally, Looney's wallet found in the Mustang contained $464 in cash. Therefore, we find there was competent, substantial evidence to sustain Looney's convictions.

Finding no reversible error as the guilt phase of Looney's trial, we affirm his convictions.

Jury Verdict

Looney raises seven issues relating to the penalty phase proceedings. First, Looney argues that, in light of the United States Supreme Court's decision in

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21. Looney's attempt to flee from police can be considered circumstantial evidence of guilt. See Straight v. State, 397 So. 2d 903, 908 (Fla. 1981).

22. Although a firearms expert could not conclusively say that the other bullet recovered from the crime scene was fired from this precise .30 caliber carbine rifle, he could definitely identify the bullet as a .30 caliber projectile.

Apprendi v. New Jersey, 530 U. S. 466 (2000), the trial court erred in denying Looney's motion to require unanimity in the jury's sentencing recommendation. This Court, however, recently addressed whether Florida's death penalty sentencing scheme violates the principles espoused in Apprendi. See Mills v. Moore, 786 So. 2d 532 (Fla. 2001). In holding that it does not, this Court stated, "[T]he plain language of Apprendi indicates that the case is not intended to apply to capital schemes." Id. at 537. Therefore, "Apprendi preserves the constitutionality of capital sentencing schemes like Florida's." Id. This Court's decision in Mills forecloses Looney's claim and, therefore, it is denied.

Victim Impact Evidence

Looney next argues that section 921.141(7), Florida Statutes (Supp. 1996), allowing the admission of victim impact evidence, is a usurpation of this Court's rulemaking authority vested in it by the Florida Constitution. See art. V, § 2(a), Fla. Const.[23] We find Looney's argument is without merit. In Maxwell v. State, 657 So. 2d 1157 (Fla. 1995), this Court addressed the following question certified to be of great public importance: "Is section 921.141(7), Florida Statutes, allowing victim

23. Unlike codefendant Hertz, Looney did properly raise this claim in a motion filed at trial and, thus, did preserve the issue for review. See Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased and Memorandum of Law.

impact evidence, unconstitutional?" This Court answered in the negative and, thus, specifically upheld the constitutionality of section 921.141(7), Florida Statutes (1993). See Maxwell, 657 So. 2d at 1157. Moreover, in rejecting various arguments attacking the constitutionality of section 921.141(7), this Court has stated: "We have also repeatedly upheld section 921.141 against claims that the capital sentencing statute improperly regulates practice and procedure." Burns v. State, 699 So. 2d 646, 653 (Fla. 1997) (finding admission of victim impact evidence is relevant and statute does not violate ex post facto laws or equal protection).[24]

Nevertheless, Looney argues because this Court, in Windom v. State, 656 So. 2d 432, 439 (Fla. 1995), declared section 921.141(7) to be "procedural," the Legislature's enactment must necessarily infringe upon this Court's rulemaking authority. We have said, however, that such a violation occurs when the "legislatively imposed 'procedure' is interfering with and intruding upon the procedures and processes of this Court and conflicts with this Court's own rule regulating the procedure." Jackson v. Florida Dep't of Corrections, 790 So. 2d 381,

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24. It should also be noted that the U.S. Supreme Court has ruled that victim impact testimony serves "entirely legitimate purposes" by informing sentencing authorities about the specific harm caused by the crime in question and, thus, passes constitutional muster. See Payne v. Tennessee, 501 U.S. 808, 825 (1991). In addition, "Congress and most of the States have, in recent years, enacted similar legislation . . . ." Id. at 821.

385 (Fla. 2000) (emphasis added). In Jackson, the Court had already promulgated a rule which regulated the procedure (for seeking indigency status) and the new statute added new procedures and, thus, conflicted with this Court's own rule. See Id. Accordingly, this Court found the statute to be unconstitutional as a violation of separation of powers and as a usurpation of this Court's rulemaking authority.[25]

In the instant case, however, this Court had promulgated no rule or procedure governing the admissibility of victim impact evidence at the time of the Legislature's enactment (or at any time since). Accordingly, the legislatively enacted statute does not "interfere with," "intrude upon," or "conflict this Court's own rule." As such, it cannot be said that the statute unconstitutionally violates separation of powers.

Avoid Arrest Aggravator

Looney next argues the trial court erred in finding that the murder was committed for the purpose of avoiding arrest. We have said the facts supporting commission of murder to avoid arrest must focus on the defendant's motivation for the crime. See Rodriguez v. State, 753 So. 2d 29, 48 (Fla. 2000). In order to

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25. In Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000), upon which Looney relies, this Court found that the legislatively-enacted Death Penalty Reform Act (DPRA) was procedural and, unlike the instant case, also significantly changed Florida's postconviction procedures as already promulgated by this Court. Accordingly, this Court held that the DPRA unconstitutionally encroached upon this Court's rulemaking authority. We do not have those facts today.

establish that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness. See Zack v. State, 753 So. 2d 9, 20 (Fla. 2000); Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996). Mere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator. See Bates v. State, 465 So. 2d 490, 492-93 (Fla. 1985). Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator. See Consalvo, 697 So. 2d at 819.

In the present case, however, the trial court made the following findings pertaining to this aggravating circumstance:

> The evidence clearly established that after the defendant, Looney, and the co-defendants had entered the dwelling and subdued the victims that it was realized that the victim Melanie King had gone to school with the defendants Hertz and Dempsey. At one time, the victim King and her family lived across the street from the Hertz family. The defendants, Looney and Hertz, discussed and determined that they would leave no witnesses and the defendant, Dempsey, was informed of this. The methodical execution of the victims by the defendant and his co-defendants with multiple shots to the head and destruction of the victims' home and bodies by fire to eliminate evidence establishes a dominant motive to eliminate witnesses and evidence for the purpose of avoiding or preventing arrest. According to the testimony of Dempsey, the defendants, Hertz and Looney, had obviously discussed the necessity to kill the victims prior to his being told of this by the defendant, Hertz. This aggravating factor was proven beyond all

> reasonable doubt and accorded great weight in determination of any appropriate sentence.

Sentencing Order at 3-4, State v. Looney, No. 97-215 (Fla. 2d Cir. Ct. Feb. 18, 2000).

At trial, Dempsey testified that after examining King's license, he concluded he had gone to school with King and was "pretty sure" that Hertz had as well. Moreover, King's mother testified that she had lived in the same area for approximately 27 years and that Hertz lived across the street, giving rise to the inference that King would know Hertz. Dempsey also testified that neither he nor Hertz was wearing anything to cover their faces and that he believed the victim had seen his face while he was standing on the porch (and implied it was possible she had also seen Hertz's face). This evidence is unrebutted by any testimony presented by Hertz. So while it is possible the victim knew (and could possibly identify) the defendants, Looney is correct in asserting that this, alone, is not enough to support establishment of this aggravator. See Consalvo, 697 So. 2d at 819.

In this case, however, there is other competent substantial evidence to support establishment of this aggravator beyond a reasonable doubt. First, the avoid arrest aggravator "has been applied to cases in which . . . the defendant had expressed an apprehension regarding arrest." Zack, 753 So. 2d at 20. In this case, there is direct

testimony from Dempsey that the defendants told Dempsey, while the victims were bound and restrained, that "we can't have no witness to all this stuff . . . so we're going to have to do this here." This appears to be exactly the type of apprehension regarding arrest this Court finds determinative of establishing the avoid arrest aggravator. See Trease v. State, 768 So. 2d 1050, 1056 (Fla. 2000) (finding avoid arrest aggravator was supported by witness's testimony that "Trease told her that the victim had to be killed because he could identify them, in addition to evidence that the victim would have been able to identify Trease if he had lived because he and Trease were acquaintances").

This Court has also said this factor may be proved by circumstantial evidence from which the motive for the murders may be inferred. See Preston v. State, 607 So. 2d 404, 409 (Fla. 1992). Had the sole motive for the murders in this case been for financial gain, the defendants' purpose would have been accomplished upon receipt of the stolen property. See Knight v. State, 746 So. 2d 423, 435 (Fla. 1998). In addition, Looney and his codefendants were not prevented in any manner from leaving the premises without injuring or killing, as they had access to both of the victims' vehicles while both victims were immobilized and, therefore, unable to resist. See id. Once the defendants had obtained the victims' property and secured an uncontested getaway, there was no reason for the victims to be killed--except to

eliminate them as witnesses. See Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994) (upholding avoid arrest aggravator where "[o]nce Thompson had obtained the $1,500 check from [the victims], there was little reason to kill them other than to eliminate the sole witnesses to his actions").[26] Accordingly, we find competent, substantial evidence to the support the trial court's finding that, beyond a reasonable doubt, the dominant motive for the murders of the two victims was the elimination of witnesses in order to avoid prosecution.

CCP Aggravator

Looney next argues the trial court erred in finding the murder was committed in a cold, calculated, and premeditated (CCP) manner.

> [I]n order to find the CCP aggravating factor . . . the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), and that the defendant exhibited heightened premeditation (premeditated), and that the

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26. This case is not unlike the circumstances in Riley v. State, 366 So. 2d 19 (Fla. 1978). In Riley, the defendant and an accomplice entered the business where the defendant worked for the purpose of robbing it. See 366 So. 2d at 20. The pair then threatened several of the defendant's coworkers with pistols, forced them to lie on the floor, bound and gagged them, and then shot each of them in the head. See id. In light of the fact the victims knew the defendant and were immobilized and rendered helpless, coupled with one perpetrator's expressed concern for subsequent identification, this Court found that the record supported the conclusion that the victims were killed to avoid identification. See id. at 22.

> defendant had no pretense of moral or legal justification.

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994) (citations omitted); accord Walls v. State, 641 So. 2d 381 (Fla. 1994).

> Additionally, a murder may be both CCP and committed to avoid arrest as long as distinct facts support each circumstance. [T]he facts supporting CCP must focus on the manner in which the crime was executed, e.g., advance procurement of weapon, lack of provocation, killing carried out as a matter of course, whereas the facts supporting the commission to avoid arrest must focus on the defendant's motivation for the crime.

Rodriguez v. State, 753 So. 2d 29, 48 (Fla. 2000) (citation omitted) (citing Stein v. State, 632 So. 2d 1361 (Fla. 1994)).

"The 'cold' element generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts . . . ." Walls, 641 So. 2d at 387-88. Here the calm and deliberate nature of the defendants' actions against the victims establish this element beyond any reasonable doubt. In this instance, the victims were bound and gagged for two hours and, thus, were unable to offer any resistance or provocation. More importantly, during this time the defendants had ample opportunity to calmly reflect upon their actions, following which they mutually decided to shoot the victims execution-style in the

backs of the their heads.[27] See Walls, 641 So. 2d at 388 (holding "execution-style slaying . . . by its very nature is a 'cold' crime").

With respect to the "calculated" prong, Looney correctly argues that the "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). Although it appears the defendants initially only sought to steal a vehicle, there is competent substantial evidence that the defendants armed themselves in advance, discussed killing the victims, did so by killing them execution-style, and deliberately poured accelerants throughout the home before lighting the home on fire. See Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) (holding "[e]ven if Knight did not make the final decision to execute the two victims until sometime during his lengthy journey to his final destination, that journey provided an abundance of time for Knight to coldly and calmly decide to kill").[28]

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27. This case is unlike those cases based entirely on circumstantial evidence where evidence regarding premeditation is "susceptible to . . . divergent interpretations." Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992). Here, the evidence regarding the actions of the defendants during the night of the murder was supplied by Dempsey's direct testimony.

28. Looney cites Barwick v. State, 660 So. 2d 685 (Fla. 1995), where this Court concluded that "the evidence presented does not demonstrate that Barwick had a careful plan or prearranged design to kill the victim . . . [and, therefore,] the murder was not committed in a calculated manner." See id. at 696. Barwick, however, is distinguishable because, unlike that in the instant case, the murder in

With respect to the "heightened premeditation" prong, this Court stated in Alston v. State, 723 So. 2d 148 (Fla. 1998):

> We have previously found the heightened premeditation required to sustain this aggravator where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder. In this case, as the trial court properly pointed out, appellant had ample opportunity to release [the victim] after the robbery. Instead, after substantial reflection, appellant "acted out the plan [he] had conceived during the extended period in which [the] events occurred."

Id. at 162 (quoting Jackson, 704 So. 2d at 505) (citation omitted). In this case, with the victims bound and rendered harmless, the robbery of the victims' valuables complete, and having uncontested access to the victims' vehicles, it is clear the defendants had "the opportunity to leave the crime scene and not commit the murder but, instead, commit[ed] the murder[s]." Id; cf. Mahn v. State, 714 So. 2d 391, 398 (Fla. 1998) (finding no heightened premeditation when "rash and spontaneous killing evidenced no analytical thinking, no conscious and well-developed plan to kill").[29]

Barwick occurred after the victim resisted and during an unexpected struggle. See id. at 689, 696. In this instance, however, there was no victim resistance or struggle provoking the murder, and it is clear that the defendants had a "prearranged design to commit murder" before the execution of the victims and subsequent arson of their home. See Jackson, 648 So. 2d at 89.

29. In Rodriguez v. State, 753 So. 2d 29, 46 (Fla. 2000), this Court reviewed a strikingly analogous situation and found CCP:

> [The defendant] planned a ruse to enter the apartment but formulated a back-up plan to force his way into the

Finally, there is no evidence, much less a colorable claim, establishing a pretense of moral or legal justification for these murders. As to Looney, there is no construction of the facts that would support even a fragmentary claim of excuse or justification, or of a defense to homicide, because the victims here were bound and helpless when killed. See Walls, 641 So. 2d at 388. Because there is competent, substantial evidence in the record supporting the finding that the murder was cold, calculated, and premeditated without any pretense of moral or legal justification, we hold that the trial court did not err in its finding of the CCP aggravating circumstance.

HAC Aggravator

Looney next argues the trial court erred in finding the murders were committed in a heinous, atrocious, or cruel (HAC) manner. To qualify for the HAC circumstance, "the crime must be both conscienceless or pitiless and unnecessarily

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> apartment if the plan failed; [the defendant] armed himself with a loaded handgun and two pairs of latex gloves so as to not to leave any fingerprints in the apartment if the initial plan did not work; [the defendant] fired an additional shot into each victim from close range to make sure they were dead; none of the elderly victims offered any resistance; each victim was shot while seated and fully compliant . . . .

753 So. 2d at 46; see also Willacy v. State, 696 So. 2d 693, 696 (Fla. 1997) (finding CCP where defendant bound victim, obtained a can of gasoline from the garage, doused victim with gasoline, and set victim on fire).

torturous to the victim." Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). On the other hand, this Court has held that "'an instantaneous or near-instantaneous death by gunfire' does not satisfy the HAC aggravating factor." Donaldson v. State, 722 So. 2d 177, 186 (Fla. 1998) (quoting Robinson v. State, 574 So. 2d 108, 112 (Fla. 1991)). Moreover, "[e]xecution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim." Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996).

Along these lines, this Court has held that "the actions of the defendant preceding the actual killing are relevant to this aggravator. . . . [T]he fear and emotional strain of the victim from the events preceding the killing may contribute to its heinous nature." Gore v. State, 706 So. 2d 1328, 1335 (Fla. 1997) (citations omitted) (citing Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988)). As a result, the HAC aggravating circumstance has been repeatedly upheld where the victims were "acutely aware of their impending deaths." Zakrzewski v. State, 717 So. 2d 488, 492-93 (Fla. 1998) (quoting Wyatt v. State, 641 So. 2d 1336, 1341 (Fla. 1994)); see also Donaldson, 722 So. 2d at 187; Scott v. State, 494 So. 2d 1134, 1137 (Fla. 1986).

In this case, the record reveals that aside from holding the victims at gunpoint for over two hours, bound and taped while lying face down in bed, the codefendants

poured gasoline, lighter fluid, and turpentine throughout the dwelling prior to shooting the victims. Moreover, the record supports the conclusion that Melanie King was aware that accelerants were being poured throughout the trailer.[30] Although the fire was ultimately determined not to be the cause of the victims' death, the record provides factual proof that, prior to being shot, the victims were tormented with the prospect of being killed by fire or gunshots and, thus, were "acutely aware of their impending deaths." Accordingly, and based upon the aforementioned reasons, we find that there is competent, substantial evidence in the record to support the trial court's finding that this murder was committed in an especially heinous, atrocious, or cruel manner.

Pecuniary Gain Aggravator

Looney next argues the trial court erred in finding the murder was committed for pecuniary gain. This Court, however, has previously rejected Looney's argument that the pecuniary gain aggravator in inconsistent with a concurrent finding of the avoid arrest aggravator. See Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994) (citing Preston v. State, 607 So. 2d 404, 409 (Fla. 1992)); see also Hildwin v. State, 727 So. 2d 193, 195 (Fla. 1998) (holding that "in order to establish this aggravator

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30. Dempsey testified there was an odor of gasoline in the mobile home and that King cried that she "would rather die being burnt up in flames than being shot."

the state must prove beyond a reasonable doubt only that 'the murder was motivated, at least in part, by a desire to obtain money, property or other financial gain.'") (quoting Finney v. State, 660 So. 2d 674, 680 (Fla. 1995)).[31]

Proportionality

Finally, Looney argues that his death sentences are impermissibly disparate from Dempsey's sentences of life imprisonment. "A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." Sexton v. State, 775 So. 2d 923, 935 (Fla. 2000) (quoting Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997)).

Although Looney urges equal culpability with codefendant Dempsey in the present case, the trial court resolved this issue against Looney in discussing Dempsey's disparate life sentence as a mitigating factor:

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31. Moreover, and although finding the pecuniary gain aggravator was proven beyond a reasonable doubt, the trial judge expressly stated in his sentencing order that he gave "due regard against inappropriate double consideration" and found that this aggravator merged with another aggravator, i.e., that the murders were committed during the course of a burglary, arson, or robbery; therefore, both aggravators were only "considered as one" by the trial court. See Sentencing Order at 4, 10, State v. Looney, No. 97-215 (Fla. 2d Cir. Ct. Feb. 18, 2000). Having merged the two, the trial court was correct in setting forth the basis for doing so, as there is ample evidence in the record to prove Looney benefitted financially from these murders.

Finally, the defendant argues that the life sentences of co-defendant, Dempsey, mitigate and require life sentences for this defendant.

Although in his cross-examination testimony Dempsey testified that he "guessed" he was equally responsible for the acts committed by the three defendants on the night they committed their crimes and that he could have left several times during the course of the defendants' activity and chose not to do so, the totality of the facts and circumstances in the record competently and substantially show that his dastardly culpability and role in this night of terror was less than either of his co-defendants.

Apparently, Dempsey was the brightest and best educated of the three but after the initial violence and hostile entry into the victims' dwelling his role was more of a follower of Hertz and Looney who made the decisions concerning killing the victims and burning down their dwelling in which he reluctantly participated. When advised by Hertz that he and Looney had decided to kill the victims he was told by Hertz that if he did not participate with them there was a bullet for him also.

The State also points out that when Hertz and Looney came over to the place where Dempsey working [sic] on the day of the crimes Looney was armed with a 357 pistol he was displaying. When the three left to go steal a car, Dempsey took duct tape to tape the car window they would break in stealing a car. Dempsey was never seen driving either of the stolen vehicles of the victims. At Wal-mart, only one and a half hours after the murders, Dempsey was quiet and withdrawn while Hertz and Looney were festive and showing off the stolen pickup and Mustang respectively, to the store clerks as their new cars. When Dempsey and Looney were questioned in Daytona, Looney was armed with one of the murder weapons on his person while Dempsey was not armed. Dempsey gave a detailed confession consistent with the evidence less than 24 hours after the murders. According to Major Crum of the Wakulla Sheriff's Department who heard both, Dempsey gave the same consistent statement to him that he gave in his testimony to the jury. In both, Dempsey expressed genuine remorse. Prior to their killing, Dempsey had shown some compassion for the victims in loosening the tape cutting off their circulation and placing a pillow under

> one of the victims' head. Dempsey was the last to fire his weapon according to his testimony and believed Keith Spears was already dead when he fired. This factor, ably argued to the jury for its significant consideration and weight is entitled to and has been given substantial consideration and weight by the Court herein.

Sentencing Order at 8-10, State v. Looney, No. 97-215 (Fla. 2d Cir. Ct. Feb. 18, 2000). This thorough analysis by the trial court indicates that not only was the issue of the codefendant's life sentence presented to the jury as a mitigating factor, but also that the trial court carefully considered relative culpability.[32]

Furthermore, Ray v. State, 755 So. 2d 604 (Fla. 2000), upon which Looney relies, is distinguishable. In Ray, this Court reduced Ray's death sentence to life because his more culpable codefendant received a life sentence. Id. at 611-12. This Court did so, however, because "[m]uch of the evidence points to [the codefendant] as the dominant player in the crimes." Id. at 612 (emphasis added). Moreover, the codefendant "did nearly all the talking during the robbery and appeared to be in command of the operation." Id. (emphasis added). The same cannot be said for the

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32. Moreover, any argument that this Court should unilaterally reject Dempsey's testimony is also without merit. See Brown v. State, 721 So. 2d 274, 282 (Fla. 1998) (holding "[t]he question of whether an accomplice is credible and the weight to be given to the testimony are issues for the jury to determine"). Here, the judge and the jury were made aware of Dempsey's guilty plea and sentence, and it was within the judge's and jury's discretion whether to believe Dempsey's testimony. See Brown, 721 So. 2d at 282.

relative actions of Dempsey with respect to Looney. Indeed, and further unlike the instant case, the trial judge's own remarks in sentencing the codefendant in Ray reflected that "he believed Ray and [the codefendant] to be equally culpable in the shooting." Id. (emphasis added).

Hazen v. State, 700 So. 2d 1207, 1214 (Fla. 1997), upon which Looney also relies, is also distinguishable. In Hazen, this Court vacated the defendant's death sentence on disparate proportionality grounds because the codefendant who received life sentence was found to be the "prime instigator" of murder and was, therefore, more culpable. See Hazen, 700 So. 2d at 1214 (emphasis added). In Hazen, only the codefendant carried a gun and was the first to enter the home; moreover, the codefendant was not sure "if [the defendant] even knew what was going on." Id. Finally, and in contrast to the instant case, the majority in Hazen also specifically relied upon the defendant not doing the actual killing in reaching its conclusion of disparate treatment. We do not have those facts here. Accordingly, we find that the trial court's finding of relative culpability is supported by competent, substantial evidence and, thus, hold that Dempsey's life imprisonment does not render Looney's death sentence disproportionate.

Furthermore, in light of the circumstances of this case, including the existence of five aggravating circumstances (i.e., previous conviction of a violent felony;

commission during robbery and arson and for pecuniary gain; commission to avoid arrest; CCP; and HAC) and only one statutory mitigating circumstance, we find the imposition of the death penalty to be proportionate when compared to other similar cases. See Brown v. State, 721 So. 2d 274 (1998) (affirming death penalty where evidence established four aggravating factors--prior violent felony conviction; murder committed during robbery and pecuniary gain, merged; HAC; and CCP--and two nonstatutory mitigating factors); Gordon v. State, 704 So. 2d 107 (Fla. 1997) (affirming death penalty where evidence established four aggravating factors--murder during commission of burglary; pecuniary gain; HAC; and CCP--and only minimal evidence in mitigation for drowning murder and robbery of victim); Bryan v. State, 533 So. 2d 744 (Fla. 1988) (affirming death penalty for execution-style shooting where evidence established six aggravating factors--previous violent felony; committed during robbery and kidnaping; avoid arrest; pecuniary gain; HAC; and CCP--and only minimal nonstatutory mitigation).

For the reasons stated above, we affirm Looney's convictions and sentences.

It is so ordered.

SHAW, HARDING, and PARIENTE, JJ., concur.
ANSTEAD, J., concurs in result only.
QUINCE, J., concurs as to the conviction and concurs in result only as to the sentence.
LEWIS, J., concurs in result only and dissents in part with an opinion, in which WELLS, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

LEWIS, J., concurring in result only and dissenting in part.

I concur in result only and dissent in part as to the majority's analysis and determination that it was error and an abuse of discretion to admit the autopsy photos in this case based on my concurring in result and dissenting in part opinion in the connected case of Hertz v. State, No. SC00-457, (Fla. Nov. 1, 2001).

WELLS, C.J., concurs.

An Appeal from the Circuit Court in and for Wakulla County,

N. Sanders Sauls, Judge - Case No. 1997-215-CF

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