IN THE SUPREME COURT OF FLORIDA

CHARLES LEWIS BURR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 62,365

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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I. PRELIMINARY STATEMENT

Charles Lewis Burr was the criminal defendant in the court below and will be referred to as Appellant or the Defendant. The State of Florida was the prosecuting authority below and will be referred to as Appellee or the State.

The record on appeal consists of eight volumes of trial record and transcript, numerically labelled 1 through 1559, and two volumes containing supplemental record material, the first volume numerically labelled 1 through 57; the second volume numerically labelled 1 through 39.

The following symbols will be utilized in this brief, followed by the appropriate page number(s) in parentheses:

"AB" -- Appellant's Initial Brief

"R" -- Record on Appeal

"1SR"-- Supplemental Record on Appeal pp. 1-57

"2SR"-- Supplemental Record on Appeal pp. 1-39

II. STATEMENT OF THE CASE AND FACTS

While Appellee considers Appellant's Statement of the Case (AB 1-3) and Statement of the Facts (AB 3-8) generally accurate, the following reflects areas of disagreement and/or includes information and facts omitted by Appellant and considered necessary by Appellee for proper disposition of the eight issues on appeal.

a. Statement of the Case

Regarding Appellant's Motion to Dismiss (R 53, 54), counsel entered into a stipulation regarding various facets of selection of grand jury foremen in Leon County since 1955. (R 72). The Motion to Dismiss was ruled upon by Judge J. Lewis Hall, Jr., prior to trial. The motion was denied without argument or testimony beyond that contained in the supplemental record on appeal. (R 269, 355-358).

Appellant's Motion in Limine in reference to similar fact evidence (R 43-52), was denied by Judge J. Lewis Hall, Jr., after a pre-trial hearing. (R 355-394). Judge Hall found sufficient basis to allow the similar fact evidence to be presented at trial, but made it clear that the ultimate decision regarding the admissability of the evidence would rest with the trial judge. (R 391-394). Judge Charles E. Miner, the trial judge, did precisely what Judge Hall anticapated. No reference to the similar fact evidence was allowed

during opening statement (the State agreed to refrain from mentioning it) or the first phases of the trial. (R 481-484). After a number of witnesses had testified on behalf of the State, the similar fact evidence was proffered to the court (R 975-1014) and after argument by counsel (R 1015-1040), the evidence was deemed relevant and admissable. (R 1040-1042).

Appellee strongly objects to Appellant's repeated reference to crimes he was acquitted of subsequent to the instant case.[1] (AB 1, 6 at n.2, 29).

b. Statement of the Facts

Domita Williams identified Appellant as the man who picked her up at her house in order to take her to work on August 20, 1981. (R 830). Williams testified as stated in Appellant's brief as to the Suwannee Swifty stop except it should be added that she knew the victim as "Steve" because she had stopped there before (R 834); that she specified that the brand of candy bar she purchased was a Kit-Kat (R 834); that she and Appellant arrived at the store "roughly around 7:00 [a.m.], a little after 7:00 [a.m.], a little before..."

1. Appellant correctly states that this Court denied his Motion to Supplement the Record with portions of his Brevard County trial (Order entered April 20, 1983), yet Appellant persists in attempting to make an issue out of that trial and in fact argues that the result of that trial supports his argument regarding similar fact evidence. In anticipation of such tactics Appellee requested that the attachments be stricken from Appellant's motion. This Court did not specifcally address Appellee's request.

(R 834); that no one besides the clerk was in the convenience store while she and Appellant were there and no one was in the parking lot area (R 835); that she could, in fact, see Appellant and the victim from the car, upper part only, and, after hearing a gunshot, she looked up again and saw Appellant, but not the victim (R 836, 837; 852, 853); that she was crying because "he [Appellant] had shot Steve" and she had "never witnessed anything like that before..." (R 837); that Appellant was wearing blue jeans and a "Master Red" shirt at the time (R 838) [Williams also identified State's Exhibit number one as being Appellant's shirt (R 839)]; and that the gun imprint she noticed in Appellant's pocket was a pistol-type handgun (R 838).

Williams further testified that after the incident at the convenience store she and Appellant drove to an apartment where Appellant was staying with Katrine Jackson and her family. (R 840). Williams sat down and told Katrine Jackson and Tammy Footman, who were present in the apartment, what had happened at the store and what she had seen. (R 840).

Subsequent to the apartment visit, Williams was taken to work at Sunland by Appellant and once there she told her supervisor, Katherine Haygood, about the incident at the store, but she did not tell her the truth about what happened. (R 841).

Williams specifically stated that she did not drive her mother to work on August 20, 1981 and that her mother had drove her own car to work that day. (R 845). She also

testified that someone, not named at the time, had tried to get her to change her testimony, but that her testimony before the jury was true. (R 845).

On cross-examination it was established that Williams was afraid of Appellant and apparently feared for her baby. (R 856, 857). Williams denied telling her mother or anyone else that she had lied in her statement to Charlie Ash and that her mother was lying about August 20, 1981. (R 858-861).

On re-direct examination Williams explained her fear of Appellant and testified that Appellant did not run out of the store after the shooting, nor did he drive away rapidly from the store. (R 863).

Kim Miller testified as stated in Appellant's brief. He identified State's Exhibit number two as being a photo of the victim in the condition he found him. The crime scene was not disturbed prior to authorities arriving. (R 867).

Robert Bailey, a paramedic, responded to Kim Miller's 911 call and discovered the victim to have a bullet wound behind his left ear and determined him to be dead. The victim appeared to be on his knees. (R 871).

Deputy Ray Wood secured the area thereafter and did not allow the area to be disturbed. (R 874).

Johnny McCord testified that $252.75 was missing from the store's register and safe. (R 877, 878).

Bill Gunter, a crime scene technician, described the store for the jury via photographs. (R 881, 882). He also

identified State's Exhibit number five as being bullet fragments removed from the victim's head. He received those from Dr. Wood during the autopsy. (R 887-889).

Charlie Ash, Jr., an investigator with the Leon County Sheriff's Office, testified that he arrested Appellant on September 29, 1981, after conducting an investigation. He also recovered Appellant's "Master Red" shirt from Domita Williams. (R 903).

Sam Bruce, another sherrif's investigator, recovered two .22 caliber bullets from the apartment where Appellant was staying prior to his arrest. (R 905, 906). Appellant's counsel stipulated to the admissability of the bullets. (R 908, 909). Donna Cormier testified only in order to prove the chain of custody of the "Master Red" shirt and it was admitted into evidence. (R 910).

Don Champagne, a firearms examiner for the Florida Department of Law Enforcement, testified that the fragments removed from the victim's head were the remains of a .22 caliber bullet. (R 913). The fragments were entered into evidence. (R 914).

Katrine Jackson verified Domita Williams' prior testimony. On August 20, 1981 Williams came to the apartment and was tense and nervous. Appellant acted abnormally later in the day. Williams told her about what she had seen happen at the store earlier that morning. (R 921). Jackson allowed officers to search Appellant's room on September 29, 1981.

(R 921, 922). The first indication that the trial would take unexpected paths occurred at this point; Jackson's testimony surprised the prosecutor. (R 924-956). Jackson eventually took the stand again and admitted she lied on cross-examination. (R 956, 957). Jackson then testified that Williams did tell her about what Appellant did the morning of August 20, 1981. (R 957, 958).

Dr. Thomas Wood's deposition was read to the jury by agreement. Dr. Wood performed the autopsy on Steve Harty, the victim. (R 964). He found a bullet wound behind the left ear. (R 965). The autopsy revealed that the shot was fired from close range and that the gun's relative position to the victim's head would have been behind the victim's head, slightly to the left, and probably pointed downward somewhat. (R 966). Death was rapid and no purposeful motion on the part of the victim would have been likely after the shot was fired. (R 967, 968). Dr. Wood's findings were consistent with the victim being shot while on the floor. (R 969).

At this point in the trial the similar fact evidence was proffered and deemed admissable by the trial court. (R 975-1042).

Emil Farrell testified as stated in Appellant's brief, but also testified that he identified Appellant from among many photographs shown to him (R 1056, 1057), that Appellant shot him without provocation (R 1053), and that he was shot by a small caliber gun. (R 1060). Appellant had brought

items to the register area prior to pulling the gun. (R 1052). Mr. Farrell was shot early on Sunday morning, August 23, 1981, three days after the Hardy murder. (R 1051).

James Griffin testified as stated in Appellant's brief, but also testified Appellant shot him without provocation with a small caliber handgun. (R 1063). Griffin identified Appellant from among a hundred or so photographs. (R 1066). Appellant was casual and did not run out of the store, but walked. (R 1064). Griffin was preparing for clean-up late in the evening of August 28, 1981 when this occurred. There was no one else in the store. (R 1061, 1062). This occurred eight days after the Harty murder; five days after the Farrell shooting.

Lloyd Lee testified as stated in Appellant's brief, but also testified that Appellant shot and robbed him late in the evening of September 1, 1981. (twelve days after the Harty murder; four days after the Griffin shooting). No one else was in the store. Appellant pretended to reach for his wallet to pay for some items, but pulled a gun instead. It was a small caliber gun. (R 1069, 1070). The shooting was unprovoked. (R 1071). Appellant did not run away, but walked rapidly. (R 1072). Lee identified him from hundreds of photographs. (R 1073). The state rested. (R 1076).

The Defendant's case progressed as stated in Appellant's brief, with Domita Williams recanting her previous testimony. (R 1266-1286). On cross-examination the following was revealed:

Williams disputed that she had ever told Katherine Haygood, her supervisor, that she had been in the Suwannee Swifty the morning of the robbery/murder (R 1136, 1137; compare to 1286-1288); she admitted her mother was pressuring her to change her testimony (R 1288); she never saw the ambulance Ruth and Valarie Grant claimed they saw at the same time they saw Domita in her mother's car (R 1289); she admitted that when she gave her original statement to Charlie Ash she knew Katrine Jackson and Tammy Footman had previously given statements, but did not know the content of their statements (R 1290, 1291); she couldn't explain the "cheeseburger story" away... how it cropped up in everyone's statements (R 1292-1294); she was aware that "[m]urder, you can get the chair" and "[p]erjury, I don't know what you can get" (R 1294); she admitted saying no threats were made when she gave her statement (R 1295); she acknowledged that her deposition testimony (where no threats were made) was consistent with her statement (R 1296, 1297); she acknowledged that her Grand Jury testimony (where no threats were made) was the same (R 1297, 1298); she acknowledged discussing her expected trial testimony with the prosecutor the Friday before trial (where no threats were made) and it was the same (R 1298, 1299); she acknowledged that Mr. Meggs had never threatened her or acted mean to her (R 1299); she verified that although Mr. Modesitt used strong language, Mr. Meggs only emphasized "the importance of telling the truth" (R 1302); she stated that "after

[she] found out that they didn't have any evidence against [Appellant]," that at that point she decided to "tell the truth" (R 1303-1304); that Mr. Meggs calmed her down and she agreed that her original statement was true (R 1304, 1305); she told Mr. Meggs that she was scared and people were trying to persuade her to change her testimony and Mr. Modesitt apologized to her (R 1305); she acknowledged that she had received a call from defense counsel after her original trial testimony and but for that call she didn't "think" she would have returned and recanted her original testimony (R 1307); she emphasized once again that she was scared of Appellant, for herself and for her baby (R 1307, 1308); and she denied ever discussing the Suwannee Swifty incident in the presence of Appellant and Darrell Footman (R 1309; compare to R 1140-1144).

Leola Powell testified as the first rebuttal witness. She saw Appellant's car at Williams' house between 6:30 a.m. and 7:00 a.m. August 20, 1982. (R 1335). At 7:45 a.m. the car was gone. (R 1336, 1337).

Tammy Footman's testimony was proffered because it was agreed that she had heard the previous day's testimony, but not Williams' recantation. (R 1320, 1322, 1323, 1324, 1325, 134201352). Appellant's counsel suggested the proffer and at it's conclusion admitted the testimony was "along the lines of her statement". (R 1325, 1351). Footman was allowed to testify and in the process verified Katrine Jackson's prior

testimony and specifically stated that Williams told her the "cheeseburger story" the morning of the incident. (R 1357, 1358-1361).

Ray Wood testified that the ambulance was already at the Suwannee Swifty when he arrived at 7:21 a.m. on the morning of the robbery/murder and that no ropes were strung until at least 7:30 a.m. (R 1367-1369).

Charlie Ash was recalled and imparted the details of his investigation. (R 1370-1373). He knew Williams had information after talking to Katrine Jackson and Tammy Footman, but he never told Williams what they had stated. (R 1376-1378). Williams' mother was hostile (R 1374) and he got no response from her when he asked how she knew if her daughter knew something about the Suwannee Swifty incident. (R 1374, 1375). Ash denied ever threatening Domita Williams. (R 1375). The taped interview he conducted with Williams was played for the jury for the purpose of determining the atmosphere of that statement. (R 1382, 1386). The state rested and all testimony concluded.

III ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT

[Appellant's Issue I, restated by Appellee]

Appellant asserts the instant argument in reliance upon the arguments and testimony involved in Wiley v. State, 427 So.2d 283 (Fla. 1st DCA 1983). Similar arguments were made in Whitfield v. State, ___ So.2d ___(Fla. 1st DCA, June 30, 1983) [8 FLW 1729], Case No. AM-171. In Appellant's case no additional testimony was taken per agreement by counsel. (R 355-358). A stipulation was entered regarding this issue. (R 72).

The stipulation reflects that between the time Wiley was argued and Appellant's indictment a black foreman has served. (R 72; Wiley, supra, at 285). Considering the fact that the defendant in Wiley was indicted on May 28, 1980 and Appellant on October 29, 1981, it would appear that in the intervening 16 months a black foreman served on the grand jury.[2] While Appellee agrees with the holding in Wiley (to be subsequently discussed), the above fact substantially

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2. While Appellee does not adopt Appellant's formula regarding "chance" (AB 10 at n.3), nor consider it valid, if we assume three grand juries were selected during the 16 month period, the result would be that at least 33 1/3 per cent of all foremen during the period were black. This exceeds any percentage asserted by Appellant reflecting total black citizen population.

diminishes the thrust of Appellant's contention.

Appellant accurately states the requirements necessary for making out a prima facie case of racial discrimination in the selection of grand jury foremen. Rose v. Mitchell, 443 U.S. 545, 565 (1979). Appellee submits that Appellant did not make the required showing and that the prosecutor's comments in the supplemental record on appeal do not amount to agreeing that said showing was made. In any event, the prosecutor's comments do not bind this or any other court. See Rose v. Mithcell, supra, at 573, 574.

When confronted with a similar challenge in Wiley v. State, supra, the First District Court of Appeal held: (a) the appellant had presented insufficient evidence to establish a prima facie case of racial discrimination in the selection of grand jury foremen, citing to both Rose v. Mitchell, supra, and this Court's opinion in Bryant v. State, 386 So.2d 237 (Fla. 1980); and (b) even assuming a prima facie case had been demonstrated, the State had presented adequate evidence to rebut it, citing to United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) and United States v. Holman, 680 F.2d 1340 (11th Cir. 1982). Wiley, supra, at 285. The district court reaffirmed Wiley in Whitfield v. State, supra.

Appellant cites Section 905.08, Florida Statutes (1981), and concludes the grand jury foreman selection process is susceptible of abuse. (AB 10). Appellant fails to men-

tion that this Court had upheld the constitutionality of Florida's jury selection process numerous times. See Bryant v. State, supra, at 239, n.3. Appellant does not mention that this Court has recognized that Circuit Judges are particularly suited to the task of selecting grand jurors for consideration and service. Seay v. State, 286 So.2d 532, 537 (Fla. 1973), cert. denied, 419 U.S. 847 (1974). Apellant had failed to demonstrate that Florida's grand jury foreman selection method is susceptible to abuse.

Further, Appellant's statistical argument is necessarily premised upon the proposition that there should have been more blacks selected as grand jury foreman and since there weren't, racial discrimination is the cause. Appellant's "chance" argument is not persuasive. This Court has stated that a law or official act is not violative of equal protection principles "solely because it has a racially disproportionate effect." Bryant v. State, supra, at 239. What Appellant has demonstrated is an arguably disproportionate effect; not that racial discrimination caused it. Further, Appellant's statistical data is lacking of any figures reflecting how many black citizens were registered to vote during the years in question, registered voters being the group from which juries are selected. Thus, the percentages regarding general population, even if accepted as accurate, do not reflect the actual range of citizens who were subject to jury service and, therefore, service as a grand jury foreman. Appellant has failed to demonstrate a prima facie case.

Assuming, arguendo, that a prima facie case was established by Appellant, the State thoroughly rebutted it.

In Wiley, supra, the district court noted that the "various circuit judges who testified below all denied ever making race a factor in the selection of a grand jury foreman" and they "cited such factors as leadership qualities, extent of education, and experience of the candidates in making the selection." Wiley, supra, at 285. The stipulation in the instant case reflected that the circuit judges, if asked to testify again, would maintain their selections were "never based on race." (R 72). Appellant may be correct that the mere assertion that race is not considered fails to rebut a prima facie case (AB 13), but in the supplemental record on appeal there is convincing evidence that rational, objective criteria were utilized as well.

Appellant essentially demonstrates this by discusssing United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982). It should be noted that in Perez-Hernandez the sufficient rebuttal testimony came exclusively from the mouths of the federal judges choosing foremen during the years in question. Id. at 1387. Apparently, judges may not be able to rebut a prima facie case by merely stating race is not considered, but their testimony undoubtedly can rebut the case. In Perez-Hernandez, each judge employed similar guidelines which consisted of: (1) occupation and work history; (2) leadership and management experiences; (3) length of time in

the community; and (4) attentiveness during the jury empanelment. Id. The Court specifically noted that such guidelines avoided the situation where "arbitrary and unrelated criteria operated to exclude distinct groups from a position." Id. at 1388. [The Court then cites to Turner v. Touche, 396 U.S. 346 (1970), upon which appellant relies, as being a case involving arbitrary and unrelated criteria].

The supplemental record on appeal essentially echos the guidelines listed in Perez-Hernandez. Judge Cooksey looked for someone who could lead a group, be a presiding juror. He looked for someone who was "level-headed" and the other jurors would respect. [(1SR 20)]. This rings of "leadership". Judge Rudd stressed employment history, length of time in the county, and leadership qualities. [(1SR 31, 32)] (three of the four factors listed in Perez-Hernandez, supra.) Judge Miner mentioned general background of the person, level of education, employment history, and decision-making capabilities. [(1SR 40)]. Chief Judge Willis stated that the cirucit judges discussed judicial policies, but that no specific directives had been issued which instruct judges on the selection process. [(2SR 10)] (judges acting independently of one another). Judge Willis tries to select educated or experienced persons to serve as presiding officers. [(2SR 12)]. He specifically looked for persons with business experience, since they would know about "procedures to chair a meeting." [(2SR 16)]. By way of comparison with Perez-Hernandez, the judges utilized almost identical guidelines.

Further, in light of the recent federal court opinion of United States v. Holman, supra, it is apparent that the State rebutted Appellant's questionable prima facie case. In Holman the court held that the fifth amendment claim "was rebutted by the government's proof of lack discriminatory intent." Holman, supra, at 1357. The State of Florida proved the same in the instant case.

Holman also dispenses with Appellant's claim to the extent that it is asserted under the sixth amendment. See: Holman, supra, at 1356-1357; United States v. Hernandez-Perez, supra, at 1385.

Appellee submits that the lower court properly denied Appellant's Motion to Dismiss the Indictment.

ISSUE II

THE TRIAL COURT PROPERLY ADMITTED THE SIMILAR FACT EVIDENCE

[Appellant's Issue III as restated by Appellee]

Trial judges enjoy wide discretion in areas concerning admission of evidence and their rulings in that regard will not be distrubed on appeal unless abuse of discretion is demonstrated. Booker v. State, 397 So.2d 910 (Fla. 1981), cert. denied, 454 U.S. 957 (1981); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979). In order for this Court to now rule that the similar fact evidence should have been excluded from Appellant's trial, it must conclude that not one, but two Circuit Judges abused their discretion in deeming this similar fact evidence relevant and admissable. (R 391-394; 1040-1042). Appellee submits the trial court properly admitted the evidence.

Williams v. State, 110 So.2d 654 (Fla.) cert. denied, Williams v. Florida, 361 U.S. 847 (1959), provided this Court with the opportunity to clarify a basic rule of evidence. The premise behind Williams was that "any fact relevant to prove a fact in issue is admissable into evidence unless its admissability is precluded by some specific rule of exclusion." Williams v. State, supra, at 658. Thus, the judge below properly categorized the Williams rule as a "rule of inclusion." (R 361-364). And, as stated in Williams, relevancy is the test of admissability. Id. at 660, 611.

Appellant first offers a strained argument that the evidence was unnecessary to prove either identity or intent since neither element was "seriously at issue in this trial." (AB 26). While Appellee rejects the contention that the similar fact evidence was only relevant to establish the above two elements, it is interesting to note that Appellant, while conceding that only Domita Williams' testimony could establish identity, argues in his Issue II that "her testimony was so small as to be insubstantial" and that she was "an incompetent witness." (AB 18). It is wholly inconsistent for him to now assert and expect this Court to believe that identity was not seriously at issue. (See AB at 30, where the State's case is characterized as "extraordinarily weak"). Further, necessity has never been established by this Court as an essential requisite to admission of similar fact evidence. Ruffin v. State, 397 So.2d 277, 279 (Fla. 1981), cert. denied, 454 U.S. 882 (1981).

Appellant next contends that "no court" has extended pattern of criminality use of similar fact evidence beyond "child sex cases." (AB 31). Appellee would point to Sireci v. State, 399 So.2d 964, 968 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) (crime charged: first-degree murder; ". . . evidence of another crime is admissable if it casts light on the character of the act under investigation by showing . . . a system or general pattern of criminality . . ."") and Ashley v. State, 265 So.2d 685, 693 (Fla. 1972) (same as above), as

being two cases wherein this Court has held similar fact evidence could be utilized to show a system or pattern of criminality when the evidence was relevant.

Appellant's core argument is essentially one that would require evidence of collateral crimes be identical to the crime charged and not only similar. This is not the standard.

Appellant places heavy reliance on this Court's opinion in Drake v. State, 400 So.2d 1217 (Fla. 1981). Appellant did not have the benefit of Chandler v. State, ___ So.2d ___ (Fla., opinion filed July 28, 1983), Case No. 60, 790, wherein this Court discussed Drake. In Chandler the State introduced evidence of a seven-year old Texas conviction (Appellant had been incarcerated for most of the intervening period) in order to establish identity. (Both Drake and Chandler deal exclusively with identity). The Texas victim, like the Florida victim, "had been abducted against his will, taken to a remote area, and, with his hands tied behind his back, beaten about the head with a blunt instrument, and robbed." Slip opinion at 3. Chandler relied on Drake and argued a couple of coincidental details did not similar fact evidence make. This Court disagreed and pointed out that Drake involved a number of significant dissimilarities between the collateral crime and the crime charged (the collateral crimes involved no serious injury to the victim, but various sexual abuses; the crime charged involved a murder, with little or no

evidence of sexual abuse).

This Court held that while the common characteristics taken alone may not have established a modus operandi, the trial court did not err in admitting the similar fact evidence since the individual characteristics, taken together, "establish a sufficiently unique pattern of criminal activity to justify admission . . . as relevant to the issue of identity in the crime charged." Slip opinion at 3.

Appellee submits that all of the common characteristics between the Brevard County armed robberies and attempted murders and the crimes charged, when taken together, establish a similar pattern of criminality relevant to show identity, common plan, motive, and intent.

Some of the similarities established at the Motion in Limine hearing and during the trial proffer were: 1) all the victims were white males; 2) all the businesses were convenience stores; 3) the crimes occurred either very early in the morning or very late in the evening when few persons would be patronizing the stores; 4) the crimes in fact occurred when no one besides Appellant and the clerk was in the store; sometimes Appellant would wait until customers exited; 5) all of the victims were shot with small caliber pistols, at least two were .22 caliber guns; 6) none of the clerks provoked the Appellant; 7) Appellant never rushed or panicked, always walking out of the stores, not running; 8) the collateral crimes occurred at a regular rate of every three to five days

after the Harty robbery/murder; 9) all of the victims of the collateral crimes identified Appellant as the perpetrator of the crimes from among hundreds of photographs; 10) the apparent motive for shooting the clerks was to eliminate them as potential witnesses; and 11) a car was used each time. (R 376-380; 1028-1038).

Appellant points to dissimilarities which are, on the whole, insignificant. He tries to categorize each convenience store robbery in Florida as fitting the above mold. This is erroneous. Clerks are various races, are robbed at all hours, are robbed in the presence of others, are sometimes injured, sometimes not, the weapons vary, some clerks are abducted and found later, some clerks resist the robbery, some robbers are nervous and hyped-up, and robbers walk, ride bicycles, etc. Appellee submits it would be difficult, if not impossible, to randomly find four convenience store robberies in Florida where the clerk is shot, and have them all share the similarities discussed above. As stated in Ruffin, supra, the similar fact evidence herein was relevant because it cast "light on the character of the crime" charged. Ruffin, supra, at 280.

In Ashley v. State, supra, this Court upheld the admissability of four collateral murders in a separate murder prosecution, even though the similar fact evidence may not have been necessary since the defendant's confession was in evidence and there was an eyewitness to the murder. Ashley,

supra, at 692-694. In the instant case, due to the twists and turns of the trial, the similar fact evidence was more crucial for purposes of establishing identity in particular.

In Capo v. State, 406 So.2d 1242 (Fla. 1st DCA 1982), it was held that evidence of the defendant's involvement in a marijuana importation operation subsequent to the similar crime charged was relevant and admissable "because it establishes Capo's continuous pattern of similar conduct." Id. at 1244.

In Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118 (1981), this Court held admission of similar fact evidence proper where that evidence consisted of a motel robbery of a couple and a sexual assault on the female. Said offenses were subsequent to the crimes charged, i.e., rape, robbery, and murder of a female clothing store clerk. This Court held that the motel robbery "was relevant to establish both the identity of the appellant and to show a common scheme or general pattern of criminality." Id. at 695. Had this Court desired to focus on insignificant differences between the crimes, it could have said one robbery involved only one person and the other involved two persons. It could have noted one occurred in a store, another in a motel. It could have pointed out that one victim was murdered, the others not. This Court did not focus on the insignificant differences, but on the relevancy of the testimony and the pattern of criminality it revealed. Nor did this Court find the evidence

"unnecessary" simply because a co-defendant testified as to most of what was established through the similar fact evidence. Appellee submits that this Corut should similarly scrutinize the present case.

In Ferguson v. State, 417 So.2d 633, (Fla. 1982), witnesses were allowed to testify that Appellant was present during the "Carol City murders," which occurred on July 27, 1977, at a trial wherein Appellant was charged with two counts of first-degree murder, one count of involuntary sexual battery, one count of attempted robbery and two firearms violations, all of which occurred around January, 1978. The "Carol City murders" were drug murders wherein several defendants were involved; the crimes charged related to the rape, robbery, and murder of two teenagers wherein the appellant acted alone. The key relevancy factors were identity and the firearm used in the crimes charged. The "Carol City murders" evidence linked Appellant with the murder weapon. Id. at 635.

In the instant case the crimes were but days apart, not months. Additionally, the testimony regarding the Melbourne crimes put small caliber guns in the possession of Appellant shortly after the Harty murder/robbery. (R 1060, 1063, 1069, 1070). That evidence was highly relevant considering the actual murder weapon was never found. In conjunction with the recovery of two .22 caliber bullets from Appellant's former room, the evidence strengthened the case substantially. (R 905, 906, 913-915, 921, 922).

Appellee submits the similar fact evidence was properly admitted and additionally submits said evidence did not become the "feature of the trial." Williams v. State, 117 So.2d 473 (Fla. 1960).

The feature of the trial, beyond any doubt, was Domita Williams' vacillating testimony. It is apparent that the jury thought so. The jury never requested a re-reading of the testimony on Emil Farrell, James Griffin, or Lloyd Lee; they wanted to hear again what Katrine Jackson, Tammy Footman, and Katherine Haygood had testified to. (R 1553).

Further, the trial court was extremely cautious regarding the similar fact evidence. It was not mentioned at all through most of the State's case. Eleven live witnesses testified and one deposition was read into testimony prior to the proffer and subsequent testimony regarding collateral crimes. The similar fact evidence consisted of twenty-seven pages of transcript. (R 1049-1076). Of that, at least one-fourth consisted of Appellant's cross-examination. The State's case consisted of well over two hundred pages of testimony. (R 828-1076). Thus, even if this was a page-counting contest, Appellee submits the similar fact evidence did not become the "feature of the trial." See: Wilson v. State, 330 So.2d 457 (Fla. 1976) and Sias v. State, 416 So.2d 1213 (Fla. 3d DCA 1982).

Appellee submits Appellant has failed to demonstrate error regarding this issue on appeal.

ISSUE III

THE TRIAL COURT PROPERLY ALLOWED TAMMY FOOTMAN'S REBUTTAL TESTIMONY SUBSEQUENT TO THE PROFFER.

[Appellant's Issue V as restated by Appellee]

At the outset of the trial potential witnesses were informed that the "rule" had been invoked. (R 799, 800). It is unchallenged that Tammy Footman was neither referred to as a possible State witness (R 799), nor was she placed under the "rule" at that time. (AB 39, n.18).

It is clear that Footman heard portions of the testimony at trial, but that she had not heard Domita Williams' defense testimony--the testimony she was being called upon to rebut. (R 1322).

The entire context of the rebuttal testimony must be considered as well. The trial court was extremely cautious regarding all proposed rebuttal witnesses. (R 1325-1327). As to Footman, the trial court concluded that her testimony would be proffered and if it in any way varied from her previous statement, he would rule accordingly. (R 1325, 1328). Appellant's counsel, in fact, suggested the proffer. (R 1325).

Following the proffer (R 1342-1351), the following exchange between the trial court and Appellant's counsel transpired:

> THE COURT: Now, let me see, Mr. Keith. I'll hear what you have to say about the proffer.

> MR. KEITH: Your Honor, I believe in general that her testimony here is somewhat along the lines of her statement. There was an inconsistent statement about the time.

(R 1351).

Although Appellant's counsel did not specifically concede that Footman's testimony wasn't influenced (R 1352), he essentially stated that she had testified during the proffer consistent with her deposition testimony. Appellant's counsel at no time requested further inquiry, nor did he suggest the prosecutor might have been involved in Footman's presence in the court room the previous day. The trial court made it clear to the witness that she was to testify to the truth and made sure she understood the oath she had taken. (R 1352).

Just as a criminal defendant has the right to present witnesses on his behalf, so does the State. Steinhorst v. State, 412 So.2d 332, 336 (Fla. 1982). The Steinhorst holding, along with Dumas v. State, 350 So.2d 464 (Fla. 1977), stand for the proposition that the test for any violation of the "rule" is ". . .whether the testimony of the challenged witness was substantially affected by the testimony he heard, to the extent that his testimony differed from what it would have been had he not heard testimony in violation of the rule." Steinhorst, at 336. (Emphasis supplied). In the instant case there is convincing evidence that Footman did not become affected by any testimony she may have heard. She

testified during the proffer to the same facts as had been recorded in a prior deposition, and Appellant's counsel acknowledged as much. (R 1351). The very purpose of the "rule" is to purify trial testimony; to avoid the coloring of a witness's testimony. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978); Ali v. State, 352 So.2d 546 (Fla. 3d DCA 1977). It is apparent that where a witness testifies during a proffer in a consistent fashion with a prior statement, no "coloring" has occurred due to any procedural violation. It is equally clear that no prejudice resulted to Appellant when Footman simply testified as he expected her to testify. Appellant has failed to demonstrate any actual prejudice to his case. Zamora, supra, at 782. See also: Palmes v. State, 397 So.2d 648, 653 (Fla. 1981).

It is well-established that determining whether a witness shall be allowed to testify after violating the "rule" is within the sound discretion of the trial court. Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880 (1962); Rollins v. State, 256 So.2d 541 (Fla. 4th DCA 1972). As stated in Odom v. State, 403 So.2d 936 (Fla. 1981), cert. denied, 456 U.S. 925 (1982), the trial court herein made an adequate inquiry and issued a ruling that was "eminently fair and reasonable." Id. at 941. The trial court did not abuse its discretion.

As stated in Steinhorst, supra, Appellant's contention that the trial court should have gone beyond the

proffer and arguments made by counsel, i.e., "the court, on its own motion, should have inquired into the effect of and state complicity in the violations," is without merit. Id. at 336.

ISSUE IV

THE STATE'S CLOSING ARGUMENT WAS FAIR COMMENT UPON THE EVIDENCE; LACK OF OBJECTION PRECLUDES REVIEW OF MOST COMPLAINED-OF COMMENTS.

[Appellant's Issue IV as restated by Appellee]

Challenged arguments of prosecutors will only be reviewed when an objection, in proper form and on proper ground, is timely made. Steinhorst v. State, 412 So.2d 332, 338, 339 (Fla. 1982); Moore v. State, 418 So.2d 435, 437 (Fla. 3rd DCA 1982); Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982); Gibson v. State, 351 So.2d 948, 950 (Fla. 1977); Songer v. State, 322 So.2d 481, 483 (Fla. 1975); Jones v. State, 204 So.2d 515, 519 (Fla. 1967). It was in Jones that this Court stated that"... henceforth [the Court] will review challenged arguments of prosecutors only when an objection is timely made." Id.

In the instant case only one objection was voiced by Appellant's counsel regarding the prosecutor's closing argument and it was made upon a solitary ground. (R 1458-1460). Appellant's counsel moved for a mistrial, arguing that comments regarding "threats" were prejudicial to Appellant. (R 1459). The trial court denied the motion, concluding any such comments were but fair inferences from the evidence presented. (R 1459, 1460). The prosecutor in fact only stated that "people are scared in this case" (R 1428) and that the Appellant "executes people." (R 1443). In fact, both state-

ments were supported by the evidence. Domita Williams was afraid of Appellant. (R 856, 862, 1307, 1308, 1311). The evidence amply supported the conclusion that Steve Harty was murdered execution-style as well. (R 870, 888, 965, 966, 969).

The prosecutor stated that Williams was afraid; she herself had said so. The prosecutor never stated that anyone had directly threatened anyone. It is well-established that considerable latitude is allowed in arguments on the merits of a case and that logical inferences from the evidence are permissable. Thomas v. State, 326 So.2d 413, 414, 415 (Fla. 1975); Spencer v. State, 133 So.2d 729, 731 (Fla. 1961), cert. denied, 369 U.S. 880 (1962). Appellee submits that the comments objected to were based upon the evidence and logical inference from that evidence.

Further, "the power to declare a mistrial and discharge a jury should be exercised with great care and caution and should be done only in cases of absolute necessity." Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978); Sykes v. State, 329 So.2d 356, 359 (Fla. 1st DCA 1976). See also: United States v. Hastings, ___ U.S. ___ (1983) [33 Cr.L.R. 3091, 3093 at n.5]. The declaration of a mistrial is appropriate only if the error committed is so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230 (Fla. 1979). Appellee submits no error existed so no mistrial was called for. Even if this Court disapproves of the com-

plained-of comments, it is obvious that no prejudice resulted to Appellant. The jury already knew that witnesses were vacillating and also knew at least one witness was scared of Appellant. The jury saw the witnesses in person. Perhaps their faces did show fear. See: Palmes v. State, 397 So.2d 648, 653 (Fla. 1981); and § 924.33, Florida Statutes (1981).

As to the remainder of the comments now challenged, this Court should not review them since no objections whatsoever were made. Steinhorst, supra. Appellant apparently contends that fundamental error occurred. Fundamental error exists only "where the issue reaches right down into the very legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged." Gibson v. State, 194 So.2d 19, 20 (Fla. 2nd DCA 1967). Moreover, Florida courts are wary of allowing the fundamental error rule to become an "open sesame" for consideration of alleged trial errors not preserved for review. Id. at 19. This Court has stated that "every constitutional issue does not amount to fundamental error cognizable initially upon appeal." State v. Smith, 240 So.2d 807, 810 (Fla. 1970).

Appellee submits no fundamental error was made during the closing arguments of Appellant's trial.

Appellant complains about being referred to as the "master of disaster." (AB 32, 33). Beyond the fact that there was no objection to this, Appellant's "master red" shirt was in evidence (R 910) and it was displayed to the jury.

(R 1424). Appellant wore that shirt and advertised to all that he considered himself the "master of disaster." Any comments by the prosecutor were fair and based upon the evidence. Collins v. State, 180 So.2d 340 (Fla. 1965).

Wilson v. State, 294 So.2d 327 (Fla. 1974), is distinguishable. That defendant was acquitted of a charge of murdering her husband and subsequently tried for perjury. The prosecutor therein referred to the murder 16 times, three times accusing the defendant of committing it outright. Id. at 329. There were numerous other comments held to be improper. This Court stated that an "accused cannot be convicted of murder under the guise of perjury..." and noted that the entire "flavor" of the trial amounted to a retrial on the murder charge. Id. at 329. Further, objections were voiced and sustained in Wilson, yet the prosecutor persisted. The present case is entirely different.

Nor does Glassman v. State, 377 So.2d 208 (Fla. 3d DCA 1979), support Appellant's position. In Glassman the prosecutor, in between numerous objections and requests for a mistrial, repeatedly implied that the defendant was guilty of a "whole series of criminal offenses for which the defendant was not on trial," accused the defendant of making his living by filing false insurance claims, accused the defendant of perjury, and attacked the defendant as a "quack-quack." Id. at 210, 211. Glassman is distinguishable.

Green v. State, 427 So.2d 1036 (Fla. 3rd DCA 1983), is equally distinguishable. Green involved numerous

alleged errors and objections were voiced. No tangible evidence established the defendant referred to herself as a "dragon lady," rather the references were "the prosecutor's own prejudicial characterizations'." Id. at 1038. Such is not the case herein. Appellant wore a shirt announcing to the world that he was the "master of disaster."

Appellant particularly perverts the holding in Davis v. State, 397 So.2d 1005 (Fla. 1st DCA 1981). Davis involved impeachment of a testifying defendant by means of prior convictions; it did not deal with similar fact evidence at all.

Appellant complains of his counsel being called the "master of confusion;" Appellant's counsel did not do so at trial. Even the trial court humorously referred to the rhetoric, but counsel never objected. (R 1459). The prosecutor explained the label. (R 1437; "... I don't brand him the Master of Confusion other than just for emphasis.") Appellant's counsel used the label in his own argument. (R 1471, 1473; "I don't know whether to take that as a compliment or not;" "Mr. Meggs is a pretty good master of confusion himself. I think he's the teacher, in fact.") This was no more than legal sparring and was not prejudicial to Appellant. Juries are presumed to be more intelligent than to be led astray by such rhetoric. Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), modified, 408 U.S. 935 (1972).

Finally, any reference to Ed McFarland was supported

by the record. Minnie Pompey admitted she had never told her story until Ed McFarland contacted her the week before trial. (R 1174). Ruth Grant didn't tell her story until McFarland contacted her the week before trial. (R 1203). Valarie Grant testified similarly. (R 1224). Surely the prosecutor could point out to the jury how many of the defense witnesses had surfaced late in the investigation. Any comment was no more than fair comment.

In summary:

> Defendant also argues that the prosecutor, in his closing argument, improperly "continued to use his own comments to influence the jury", and made other statements not supported by the record. We have reviewed the transcript, and are of the opinion that there was a basis in the record for the allegedly unsupported statements.
>
> As for the other comments complained of, we cannot say that they were "of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered." Oliva v. State, 346 So.2d 1066, 1068-69 (Fla. 3d DCA 1977), cert. denied, 434 U.S. 1010, 98 S.Ct 719, 54 L.Ed.2d 752 (1978). They did not "materially contribute to this conviction", Zamot v. State, 375 So.2d 881, 883 (Fla. 3d DCA 1979) were not "so harmful or fundamentally tainted so as to require a new trial", Smith v. State, 354 So.2d 477, 478 (Fla. 3d DCA 1978); and were not so inflammatory that they "might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise ...", Darden v. State, 329 So.2d 287, 289 (Fla.1976), cert. dismissed, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977). As we noted in Paramore v. State, 229 So.2d 855, 860 (Fla.1969), modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972), "it will not be presumed that ... [jurors] are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel." The statements here

complained of do not warrant a new trial for defendant.

Blair v. State, 406 So.2d 1103, 1107, (Fla. 1981).

So it is here.

ISSUE V

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICTS OF GUILT; APPELLANT SHOULD NOT BE AFFORDED A NEW TRIAL

[Appellant's Issue II as restated by Appellee]

a. Sufficiency of the Evidence

It has long been established that when a criminal defendant moves for a judgment of acquittal that "he admit[s] the facts adduced in evidence and every conclusion favorable to appellee which is fairly and resaonably inferable therefrom." Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911 (1976), reh.denied, 429 U.S. 874 (1976). In reviewing the sufficiency of the evidence to support a jury verdict of guilty:

> [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. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.

Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). See also Lynch v. State, 293 So.2d 44 (Fla. 1974); Brown v. State, 294 So.2d 128 (Fla. 3rd DCA 1974).

Furthermore, the test to be applied to a motion for judgment of acquittal by both trial and appellate courts is

not whether the totality of the evidence, in the opinion of the court, fails to exclude every reasonable hypothesis of innocence, but whether a jury might reasonably so conclude. Jackson v. Virginia, 443 U.S. 307 (1979); Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969); Victor v. State, 193 So. 762 (Fla. 1940); Amato v. State, 296 So.2d 609 (Fla. 3rd DCA 1974); Tillman v. State, 353 So.2d 948 (Fla. 1st DCA 1978); Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981); Rose v. State, 425 So.2d 521 (Fla. 1982).

Appellant is no doubt well-acquainted with the above standard (AB 17), but he contends it does not apply in this case. Such a contention is unsupportable. Appellant would have this Court create an exception to the well-established standard of review based upon the facts of his case. Understandably, Appellant cites no authority to support his contention.

This Court has stated that "... when it is shown that the jurors have performed their duty faithfully and honestly and have reached a reasonable conclusion, more than a difference of opinion as to what the evidence shows is required for this Court to reverse them." Hitchcock v. State, 413 So. 2d 741, 745 (Fla.), cert. denied, ____ U.S. ____, 103 S.Ct. 274 (1982); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Appellee submits that Appellant simply offers a "difference of opinion" as to what the evidence showed at his trial.

Further, it is well settled that the credibility of witnesses and the weight to be given testimony is for the jury to decide. Hitchcock v. State, supra; Clark v. State, 379 So.2d 97 (Fla. 1979), Coco v. State, 80 So.2d 346 (Fla.), cert. denied, 349 U.S. 931, cert. denied, 350 U.S. 828 (1955). The jury's province is not eroded simply because a witness vacillates in her testimony.

The jury concluded that Appellant murdered and robbed Steve Harty beyond any reasonable doubt. (R 288-291). In so concluding, as Appellant's counsel argued on closing (R 1467, 1499, 1500, 1505), the jury had to accept Domita Williams' original testimony and reject her later testimony. They did so for good reason. Katrine Jackson's testimony corroborated Williams' original testimony and contradicted her later testimony. (R 921, 957, 958). Tammy Footman's rebuttal testimony did the same. (R 1357-1361). Katherine Haygood's testimony did the same. (R 1136, 1137). The jury specifically focused on the testimony of the above three witnesses, asking that it be read back to them during deliberations. (R 1553).

Further, the jury knew that Williams' original trial testimony was consistent with her initial statement to police, her grand jury testimony, her deposition testimony, and what she had told the prosecutor again the Friday before trial. (R 1278, 1279, 1295-1302). Her later testimony was inconsistent with all prior recorded statements and consistent

with nothing but the recently discovered testimony of her mother, aunt, and cousin. (R 1174, 1203, 1224). Two of the three defense witnesses who testified for the purposes of disputing Williams' original testimony and possibly creating a "mystery man" suspect admitted they were unsure of the time they were at the Suwannee Swifty the morning of the robbery/ murder. (R 1089, 1096, 1097). As Appellant's counsel noted during his closing argument, the key issue in the trial was the identity of the person who committed the criminal acts. (R 1464). Williams identified that person as Appellant and other witnesses supported that identity by verifying portions of Williams' original testimony. The jury concluded, upon substantial, competent eivdence, that Appellant committed the crimes charged.

Even where a defendant's testimony is consistent with a hypothesis of innocence, a jury has the right to deem that hypothesis wholly unreasonable and reject it. McBride v. State, 191 So.2d 70 (Fla.1st DCA 1966); Conner v. State, 106 So.2d 416 (Fla. 1958). In the instant case the jury obviously deemed Williams's defense testimony as unreasonable and rejected it. She admitted being afraid of Appellant (R 856, 862, 1307, 1308, 1311) and that she didn't "think" she would have changed her testimony except for Appellant's counsel's call the previous evening. (R 1307). She contradicted what other defense witnesses had stated in their testimony. (R 1309; compare to R 1140-1144; and R 1289; compare

to R 1195). Finally, she was aware Appellant was facing the "chair" (R 1294) and she only decided to "tell the truth" when she became aware the State had little evidence against Appellant outside of her. (R 1303, 1304).

As to recantation testimony generally, this Court has stated that such testimony is "exceedingly unreliable." Henderson v. State, 135 Fla.548, 185 So. 625, 630 (1939). The jury properly so concluded in the instant case. Appellee submits the evidence was sufficient to sustain the verdicts of guilt.

b. In the Interest of Justice

Appellant contends that he was denied "due process" at his trial due to the "many unfair things" which occurred. (AB 20). While Appellant's trial was full of suspense and the lawyers involved were jockeying for position throughout, Appellee submits it was a fair trial and no new trial should be granted.

Appellant cites three cases as examples of where new trials were granted in the interest of justice. They are worthy of scrutiny. Dukes v. State, 356 So.2d 873 (Fla.4th DCA 1978), involved prosecutorial transgressions deemed so serious as to amount to fundamental error, i.e., the district court ordered a new trial in the absence of defense objection to many of the perceived wrongs. The prosecutor there improperly impeached the defendant and his key witness and then

utliized the improperly adduced evidence to prejudice the jury during closing arguments. The district court noted that the prosecutor also violated Canon 7, DR 7-16 of the Code of Professional Responsibility by asserting his personal belief as to the credibility of witnesses. Id. at 876. Besides the obvious distinction that Dukes involved prejudicial comments made directly to the jury, the case is in no manner similar to the instant case.

Wright v. State, 348 So.2d 26 (Fla.1st DCA 1977), was primarily a sufficiency of the evidence case. Id. at 31. Also, the district court perceived the fundamental error to be the admission of a medical examiner's testimony, the only "proof" of premeditation, which the court deemed to be conjecture beyond the competence of the witness. Id. at 31. The district court vacillated on the fundamental error issue, at one point stating "even if such evidence is beyond review, [due to lack of objection to its admission], we must consider the fact that there were no witnesses to the events causing death." Id. at 27. Wright was clearly a sufficiency of the evidence case.

Webb v. State, ____ So.2d ___ (Fla. April 14, 1983) [8 F.L.W. 145], Case No. 58, 306, rehearing denied July 12, 1983, stands for nothing more than the established fact that this Court will review the entire record in capital cases "in the interest of justice." Id. This Court most assuredly did not grant Solomon Webb a new trial; the conviction was affirmed. Id. at 146.

Appellee takes strong exception with Appellant's contention that the State "admitted" to "molding" Domita Williams' testimony or "admitted" to "coercing Domita Williams to implicate Burr." (AB 20). What the prosecutor did do was fully reveal the circumstances leading up to her original testimony to opposing counsel, the court, and the jury. (R 932-933, 1295-1305).

As previously mentioned, Domita Williams had testified regarding her observations of August 20, 1981, several times before trial. All of that testimony was consistent with her original trial testimony. On the previous occasions when Williams had related her story, no threats were ever made to induce her to testify one way or another. (R 1295-1299). Charlie Ash and the tape of her original statement completely rebutted Williams' later claim of being afraid at that time. (R 1375, 1382, 1386).

The prosecutor told the court the following at one point during the trial:

> Today has been just a bundle of surprises for me. When I got to the office this morning with Domita Williams, she tells me initially that she has lied to me about the entire thing; that she was never in the car; that she is afraid; that she is afraid that she made up this whole story; that she was in her mother's car that morning and never saw Charlie Burr.
>
> We talked about that for a little while and determined that she won't tell me who it was but that someone has gotten to her. She will not tell me who it was. We talked to her. I don't mind telling you it was kind of strong because her store had been the same throughout this thing up until 8:30 this morning. She

> changed her story drastically 180 degrees away.
>
> At that very point in time, I was trying to explain to her that her testimony that she had originally given made sense because that was the same thing that Katrine Jackson was saying that she said. She could not have made it up an hour after the crime and would not have made up this story about seeing Burr shoot or hearing Burr shoot someone in the store.

[R 932, 933]

Later, the jury heard about the pre-trial discussion between the witness and State Attorney Modesitt and Mr. Meggs. The witness acknowledged that Mr. Meggs had never threatened or even acted mean towards her. (R 1299). The witness told the jury of Mr. Modesitt's strong language, but verfied that Mr. Meggs had only emphasized "the importance of telling the truth." (R 1302). The jury was told that Mr. Meggs and Domita Williams left Mr. Modesitt's office, she calmed down, and verified that her previous statements were true. (R 1304, 1305). After Mr. Meggs had explained to Williams why her "new" story didn't make sense in light of the testimony of other witnesses, she explained that she was scared and people had been trying to persuade her to change her expected testimony. (R 932, 933, 1305). Mr. Modesitt apologized for his harsh words. (R 1305). This is not a case where a witness has had her testimony "molded" or "coerced." No one could have molded the cheesburger and Kit-Kat story out of thin air. During her initial testimony, Williams stated that she was telling the jury the truth and

acknowledged that someone had tried to get her to change her story. (R 845). This was a case of a young woman being afraid to testify - for whatever reason - and a prosecutor attempting to allay those fears and emphasize the importance of telling the truth. That same prosecutor, during his closing argument, fully explained the discussions with Domita Williams to the jury. (R 1448-1450). He admitted getting upset, but he also told the jury that Williams' apprehension about testifying came from fear, not any coercive element on the part of the State. (R 1450).

Appellant relies on Davis v. State, 334 So.2d 823 (Fla.1st DCA 1976), to support his argument. Davis referred to both Lee v. State, 324 So.2d 694 (Fla.1st DCA 1976) and Matthews v. State, 44 So.2d 664 (Fla. 1950). It is appropriate to start at the beginning.

Matthews v. State, supra, stood for the premise that an attorney not only has the right, but the duty, to interview all witnesses known to him. Id. at 669. In Matthews the error occurred when the trial court told the jury that the defense attorney had acted improperly by interviewing an opposing witness without the knowledge of either the prosecutor or the court. Id. at 670.

Lee v. State, supra, dealt with a number of politicians charged with bribery. The district court "lifted" language out of this Court's Matthews opinion and found that the prosecutor therein had attempted to "inject certain information"

and to influence the testimony of a former defense witness. Id. at 698. The prosecutor allegedly threatened to file perjury charges (even though the witness intended to testify consistent with his deposition testimony) and allegedly stated he had hoped the witness might "eventaully tell what I considered to be the truth in this case." Id. The witness testified for the State after entering a negotiated plea.

Davis v. State, supra, then applied Lee in a unique fashion. The district court therein held that prosecutors had coerced and threatened a balking prosecution witness when they had explained to her she could be held in contempt of court for refusing to testify, charged with perjury if her testimony conflicted with former sworn testimony, or she could testify truthfully. Id. at 825. Declining to note the factual difference in Lee, the court granted the defendant a new trial.

Davis has been more often distinguished than followed.

In Miller v. State, 389 So.2d 1210 (Fla.1st DCA 1980), the district court held that the prosecution had done nothing wrong under the following circumstances: a state witness was granted immunity from prosecution for testimony against the appellant. This witness balked, so the State filed criminal charges. The witness then agreed to testify. Finding nothing improper on the part of the State, the court distinguished Lee and Davis.

In Armstrong v. State, 399 So.2d 953, (Fla. 1981), this Court distinguished both Lee and Davis from that factual context. [State agreed to drop perjury charges against a witness if she would tell "the truth" at appellant's trial.] This Court said that the error in Lee was not in allowing the witness to testify, but in keeping from the jury information relating to how the State gained the cooperation of the witness. Id. at 960. Davis involved injection of information on the part of the prosecutor. Id.

In Edmund v. State, 399 So.2d 1362 (Fla. 1981), this Court made the same distinctions in a co-defendant's case.

Thus, it would appear that two situations might possibly sustain this challenge: 1) the prosecutor injected information during an interview with the witness and did so in a coercive manner; and/or 2) the jury was not informed of the circumstances of the witness's testimony.

In the instant case, neither situation occurred. The jury was fully informed of the pre-trial discussions. And, unlike Davis, assuming it is good law, Williams was never pressured into choosing between jail and testifying. She admitted fear and pressure from the "outside" and once calmed down, agreed to testify truthfully. (R 1304, 1305). All Mr. Meggs ever did was emphasize "the importance of telling the truth." (R 1302).

Appellant's contention that the prosecutor "thwarted" the intent of the rule by meeting with his witnesses before

before trial is erroneous. First, only Domita Williams even referred to such a meeting and it is not clear under what circumstances the witnesses were questioned. (R 1282). Second, the rule is designed to avoid coloring witness testimony by what they hear from the stand. Spencer v. State, 133 So.2d 729, 731 (Fla. 1961), cert. denied, 369 U.S. 880 (1962). Finally, the prosecutor had both the right and the duty to meet with his witnesses prior to trial. Matthews, supra.

Appellant is not entitled to a new trial. His own attorney was contacting a witness after she had already testified and but for that contact, Domita Williams didn't "think" she would have recanted her original testimony. (R 1307). Rules of fair play do not transform themselves depending on which attorney is involved.

ISSUE VI

THE SENTENCE OF DEATH WAS PROPERLY IMPOSED.

[Appellant's Issues VI, VII, and VIII as restated by Appellee]

This Court has upheld imposition of the death sentence after the jury rendered an advisory sentence of life imprisonment in a number of cases. Sawyer v. State, 313 So.2d 680 (Fla. 1975), cert. denied, 428 U.S. 911 (1976); Douglas v. State, 328 So.2d 18 (Fla.), cert. denied, 429 U.S. 871 (1976); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978), remand for resentencing, 362 So.2d 657 (Fla. 1978), sentence aff'd, 411 So.2d 1310 (Fla. 1981), aff'd, ____U.S.____, (1983) [33 Cr.L.R. 3292, opinion filed July 6, 1983]; Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978); Dobbert v. State, 328 So.2d 433 (Fla. 1976), aff'd, 432 U.S. 282 (1977), aff'd after Gardner Order, 375 So.2d 1069 (Fla. 1979); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, 454 U.S. 882 (1981); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982); White v. State, 403 So.2d 331 (Fla. 1981); Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982); Stevens v. State, 419 So. 2d 1058 (Fla. 1982); Bolender v. State, 422 So.2d 833 (Fla. 1982); Porter v. State, 429 So.2d 293 (Fla. 1983); Spaziano v. State, 393 So.2d 1119 (Fla.), cert. denied, 454 U.S. 1037

(1981), aff'd. after Gardner Order, ____So.2d____ (Fla. 1983). [8 F.L.W. 178, Opinion filed May 26, 1983, Case No. 50,250].

Appellee submits the instant case is one wherein the jury's advisory sentence was clearly unreasonable under the circumstances of this cause, McCrae, supra, at 1155, the advisory sentence was not based upon any valid mitigating factor discernible from the record, Stevens, supra, at 1065, and the trial court properly declined to follow the jury's recommendation since the facts indicating that a sentence of death was appropriate under the law were "so clear and convincing that virtually no reasonable person could differ." Tender v. State, 322 So.2d 908, 910 (Fla. 1975). A discussion of the trial court's findings of fact in support of the imposed sentence is necessary.

The trial court, after laboriously stating the facts upon which he relied, found the following aggravating factors to have been established beyond a reasonable doubt: 1) the execution murder of Steve Harty was committed by Appellant while he was engaged in the commission of armed robbery, See: § 921.141(5)(d), Florida Statutes (1981); 2) the execution murder of Steve Harty was committed by Appellant for the purpose of avoiding or preventing lawful arrest for the armed robbery of Steve Harty, See § 921.141(5)(e); and 3) The murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. See: § 921.141(5)(i). The trial court found no mitigating factors

to be supported by the evidence. (R 319, 320). Appellant essentially concedes no mitigation existed beyond what he terms "the weakness of the state's case." (AB 43). Appellant does not challenge the first finding above and again essentially concedes that the murder was "cold, calculated and premeditated." (AB 53). Therefore, Appellee will primarily address Appellant's argument regarding the finding that the murder was committed to avoid lawful arrest.

Appellant first contends that there were insufficient facts to support this finding, even while admitting the "manner of Hardy's [sic] killing certainly suggests that Hardy [sic] was killed to avoid lawful arrest." (AB 51). Appellant correctly points out that no one knows for certain what occurred in the store prior to Harty's murder. However, Domita Williams specifically stated that she saw Appellant and Harty one time prior to hearing the gunshot. (R 836, 837; 852, 853). Williams never observed any argument or circumstances indicating the shooting was provoked in any fashion.

Appellant seeks to rely upon Menendez v. State, 368 So.2d 1278 (Fla. 1978), and Shriner v. State, 386 So.2d 525 (Fla. 1980). Menendez did not involve similar fact evidence. Shriner did not require this Court to review a finding of avoiding lawful arrest, since the trial court did not consider such a factor. Appellant cannot speculate as to what this Court may have ruled if it had been confronted with an issue which it was not in fact confronted with. Appellant's argument appears to be that a criminal must either

abduct his victim, hide the corpse, or announce his intent to another before this finding can be sustained. Appellee respectfully disagrees. One method of proving this aggravating factor beyond a reasonable doubt is similar fact evidence.

Appellant told Emil Farrell he was going to kill him and inquired if Farrell recognized him. (R 1052). He shot and almost succeeded in killing three men after murdering Steve Harty, all in the course of robberies. The shootings were all unprovoked. (R 1053, 1063, 1071). All three victims came very close to death. (R 1056, 1066, 1074).

The trial court stated that he relied upon the above crimes in finding that Steve Harty's murder was for the purpose of avoiding lawful arrest. (R 319, 320). Appellant attempts to make light of the similar fact evidence. (AB 51). Appellant's knowledge as to the condition of any of the victims is mere speculation; Farrell's survival is not dispositive of the issue.

Concurrent motives for a murder may exist and still not defeat the instant finding. See: Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979). Appellant should not be rewarded for his poor marksmanship. Id. at 666.

Further, the trial court noted that Appellant made no attempt to cover or disguise his "very distinctive face." (R 317). In combine with the attempted murders, this fact strengthens the finding. In the instant case, Domita Williams

testified that she had frequented the Suwannee Swifty and knew the victim as "Steve." (R 834). Appellant was Williams' boyfriend at the time; it is highly likely that Harty recognized his "very distinctive face." There was testimony to the effect that Appellant disposed of a number of guns immediately following the murder, many of them .22 caliber. (T 844). Such facts strengthen the trial court's finding as well. See: Ferguson v. State, 417 So.2d 639, 643 (Fla. 1982). The simple fact that Appellant murdered one of two possible witnesses against him and made sure the other possible witness accompanied him to another county supports this finding.

Findings of a trial court are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support the findings. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979). Appellee submits the manner of Steve Harty's killing, the circumstances surrounding the murder, and the similar fact evidence amounted to substantial, competent evidence to support the trial court's finding that the murder was committed to avoid lawful arrest.

Appellant next contends that the finding that the murder was committed in a cold, calculated and premeditated manner and the finding that it was committed to avoid arrest amounts to a doubling of aggravating factors, relying on Provence v. State, 337 So.2d 783 (Fla. 1976). The contention is without merit.

While the trial court undoubtedly considered the "execution" as a factor in finding the murder was committed to avoid lawful arrest, the primary evidence of that circumstance was the similar fact evidence. (R 319, 320). Conversely, the similar fact evidence was unnecessary to sustain the latter finding.

As stated in Hill v. State, 422 So.2d 816, 818-819 (Fla. 1982), the findings herein contain "distinct proof as to each factor." One focuses primarily upon the motivation for the killing; the other primarily upon the method of the killing itself. These two findings coexisted in Raulerson v. State, 358 So.2d 826, 833 (Fla.) cert. denied, 439 U.S. 959 (1978), with this Court's approval. This Court has limited the "doubling" rationale to the precise situation which existed in Provence, i.e. robbery and pecuniary gain amount to but one aggravating factor. The rationale should not be extended to embrace the present findings.

Even assuming this Court concludes that the finding relating to avoiding lawful arrest was not an aggravating factor proved beyond a reasonable doubt, Appellant apparently concedes that two valid aggravating circumstances were so proved. There can be no doubt that the murder was committed during the course of a robbery. (R 877, 878). As Appellant points out, execution-style killings are in fact considered cold, calculated and premeditated. (AB 53); See also: Jones v. State, 411 So.2d 165, 169 (Fla. 1982); Magill v. State, 386

So.2d 1188 (Fla. 1980), cert. denied, 428 U.S. 923 (1976); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976).

Thus, even if this Court negates one aggravating factor, such would not change the result in this case since two valid aggravating factors remain and there is an absence of any valid mitigating factor. Barclay v. Florida, ____ U.S. ____ (1983) [33 Cr.L.R. 3292, 3297, Opinion filed July 6, 1983, No. 81-6908]; Shriner v. State; 386 So. 2d 525 (Fla. 1980), cert. denied, 449 U.S. 1103 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912 (1980); Elledge v. State, 346 So.2d 998 (Fla. 1977).

Appellant, however, contends that the jury's recommendation was reasonable in that it was based upon "genuine doubt" as to Appellant's guilt. (AB 42). Appellant relies on Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). Smith was a habeas action wherein that court, by means of rhetoric and dictum, discussed why a capital defendant might desire one jury for both guilt and sentence phases. Id. 580-582. Decisions of lower federal courts are not binding upon this Court; only decisions of the United States Supreme Court have such binding effect. See: Mitchum v. State, 244 So.2d 159 (Fla. 1st DCA 1971); Smith v. State, 239 So.2d 250 (Fla. 1970).

Appellant admits that the Model Penal Code is not binding upon this Court. (AB 46).

This Court has clearly rejected Appellant's contention:

> A convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Buford v. State, supra, at 953. (Emphasis supplied).

Therefore, if Appellant's jury in fact recommended life imprisonment for the reason asserted, such was unreasonable and not premised upon any valid mitigating factor discernible from the record. Stevens, supra.

There is no requirement that a trial court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in § 921.141(6), Florida Statutes (1981). Porter v. State, 429 So.2d 293, 296 (Fla. 1983). Clearly, the trial court in the instant case allowed any and all testimony the Appellant cared to present at sentencing. (R 410-472). None of that testimony established a valid mitigating factor. Simply because Appellant was a hard working, friendly, religiously-raised adolescent does not mean such established a valid mitigating factor. See: Salvatore v. State, 366 So.2d 745, 749 (Fla. 1978), cert. denied, 444 U.S. 885 (1979). Appellant's age did not establish a valid mitigating factor. Washington v. State, supra, at 667.

Although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision on whether the death penalty should be imposed rests with the trial judge.

White v. State, supra, at 340; Hoy v. State, supra, at 832. The trial judge has the benefit of this Court's opinions and has knowledge of other capital cases originating in his circuit. The jury does not. The trial court has a "levelling effect" in that it can insure that similar criminal acts receive similar lawful punishments, notwithstanding jury recommendations which would, in many cases, create disparity in punishments. See: Proffitt v. Florida, 428 U.S. 242, 252, reh. denied, 429 U.S. 87 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). This is one reason why Florida's captial punishment procedures have been deemed to lead to "greater consistency" in the imposition of capital punishment at the trial court level than statutes utilized by other states. Id. Therefore, trial courts should be afforded greater deference than juries when passing upon the issue of sentence. The present case exemplifies the above principle.

In the instant case two valid aggravating factors exist even if this Court nullifies the one factor challenged. No valid statuatory or otherwise mitigating factor is established from the evidence. It was within the trial court's authority to decide whether a particular mitigating factor was proved and any weight to be given it. See: Lucas v. State, 376 So.2d 1149 (Fla. 1979), remanded for resentencing, 417 So. 2d 250 (Fla. 1982).

In this context, where one or more valid aggravating factors were proved, death is presumed to be the proper sen-

tence in the absence of any mitigating factor. See: State v. Dixon, supra, at 9.

Appellee submits the sentences of death was properly imposed.

CONCLUSION

WHEREFORE, based on the foregoing, Appellee would respectfully request that the judgments and sentences of the trial court be AFFIRMED.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to DAVID A. DAVIS, Assistant Public Defender, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida 32302 this 17th day of August, 1983.

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