IN THE SUPREME COURT OF THE STATE OF FLORIDA

J. B. PARKER, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 63,177

ANSWER BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

(no longer on A.D.'s as of 2-21-84)

LYDIA M. VALENTI
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Appellee

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PRELIMINARY STATEMENT

The appellant was the defendant and the State of Florida the prosecuting authority below in the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For Martin County, Florida.

The symbol "R" followed by a page number will refer to the appropriate record on appeal. They symbol "SR" followed by a page number refers to the supplemental record on appeal.

STATEMENT OF CASE

The appellee accepts the appellant's statement of the case. However, appellee would add that appellee requested this court relinquish jurisdiction and remand the case to the trial court in order to supplement the record with written findings of fact pursuant to §921.141(3). This court granted the motion by order of November 22, 1983. The trial court by Notice of Hearing, dated December 7, 1983, informed all parties involved of a hearing held December 19, 1983 concerning the supplementation. The trial court thereafter submitted its findings of fact pursuant to section 921.141(2), Florida Statutes.

STATEMENT OF THE FACTS

The appellee does not accept the appellant's Statement of Facts as they are extracted almost exclusively from the defendant's trial testimony. Appellant submits the following instead:

Frances Julia Slater, the eighteen year old, five foot seven inch (5' 7") and one hundred and nineteen pound (119) victim was requested to work the late night shift at a convenience store for the male clerk who had stepped on a nail. (R. 507, 576). Nervous and upset about working those hours alone, Frances stopped by the home of a friend, Marilyn McDevitt, earlier in the evening at about 9:30 p.m. (R. 509).

In the meantime, the four co-defendants, Bush, Cave, Johnson, and appellant had set out in Bush's car from Ft. Pierce to West Palm Beach. (R. 969). In a May 5th statement the appellant admitted that Bush had told appellant in the course of the trip that "We're going to rob something . . . ." Bush asked appellant, "You're riding, ain't ya?" Appellant replied, "Yeah, I'm ridin'." (R. 780, 972). The co-defendants subsequently decided that Stuart was as good a place to rob as West Palm Beach and stopped at several convenience stores there; Bush continuously talked about robbing them. (R. 781). [Though appellant testified at trial that he was hazy from alcohol and marijuana, that he had spent much of the ride asleep, and that he was unaware of the goings-on, his earlier detailed

statement of May 5, 1982 which lacks any reference to his being hazy or asleep indicates otherwise. The statement reflects that appellant saw Bush with a gun, and knew they were on a robbery spree (R. 781-782)].

At about 11:00 p.m. Frances left Marilyn's home and went to the convenience store to relieve the clerk on duty. (R. 507-509). Concerned for Frances' safety, Marilyn subsequently visited Frances there from 11:15 p.m. to 12:45 a.m. (R. 511). During Marilyn's stay, the four codefendants drove up. Bush parked the car at an adjacent filling station. Though appellant's May 5th statement was that he hid in the bushes while the others went into the store (R. 782), Marilyn testified that appellant came into the store while she was there (R. 512). She identified him in a photoline-up (R. 524). While staking out the store, appellant noticed that Frances was not alone; he exited the store. Appellant knew as early as this first robbery attempt that Bush intended "to take her [Frances] out of the store and ride off and kill her." (R. 790). Appellant and the other three co-defendants then drove to Jensen Beach.

Though collateral crime evidence--apparently of another robbery--was not admitted, Richard Douglas testified that he was on Jensen Beach and saw four black males at about 2:00 a.m. on April 27, 1982. Douglas identified Bush in a photoline-up. (R. 630-631).

The four co-defendants then left Jensen Beach and returned to the convenience store at almost 2:45 a.m. (R. 533-534). This time Bush parked his car at the front of the store.

(R. 536, 782). Like the first time, appellant went in to the store to stake it out. When he "ain't seen nobody," he motioned to Bush and Cave who with the gun went in. (R. 782-783). Frances was in the back of the store. Cave went to get her. Bush demanded money. Appellant heard a car pull up and walked out of the store because he was afraid he would be recognized (R 983). Bush and Cave followed with the girl and the money. They ordered Frances into the car, positioning her in the back seat between Johnson and Cave. Frances pleaded,"You aren't going to hurt me." Bush responded, "Man, I'm going to kill this bitch. I done been to prison for six years and I ain't going back, 'cause this whore going to identify us." (R 784).

For approximately thirteen (13) miles and twenty (20) minutes, all five rode from the convenience store to State Road 76, Frances pleading, "Just don't hurt me. Just don't hurt me." Yet both the appellant and Frances knew her execution was imminent. (R. 790). Indeed, the medical examiner testified that when he examined Frances, her bladder "was completely and absolutely voided," a fact which is "consistent with her being in great fear prior to her death . . ." and not equally consistent with a bladder voiding because of death. "It's not equal because it's highly unusual to have the bladder completely emptied, and also the staining around the pants." (R. 669).

At State Road 76, the defendants dragged Frances out of the car by her hair. The chief criminalist for the Regional Crime Lab testified that he found samples of her hair in Bush's

vehicle that had "been yanked out of the head by--with root and tiddue areastill attached." (R. 867). The criminalist testified that though the hair could have been dislodged if it had been caught on something, the hair that was forcibly removed was in such a condition as to be "consistent with someone yanking it out of her head with five fingers." (R 868-869).

Appellant admitted that after Frances was removed from the car, "I [appellant] shot her, and John [Bush] stabbed her," (R. 889) though the stabbing occurred first. As Bush got out of the car, he reached down on the side of the seat and got a knife (R. 984) which he thrust into Frances' stomach. The wound was consistent with Frances "jumping back in a defensive nature at the time [it] was inflicted . . . and [was] consistent with being inflicted by [a] person . . . in front of [her] . . . ." (R. 662-663). Moreover another wound "along the little finger side of the body" indicated "an instinctual reaction [by Frances] throwing up [her] arm in a protective or defensive manner." (R 665). Still pleading for her life (R. 785), Frances apparently sank to the ground in a kneeling posture as indicated by the gunshot wound's direction. Appellant pulled the trigger two feet from the back of her head (R. 663-664). The gunshot, not the stabbing--which was a two-inch shallow wound--killed her (R. 668-669). The co-defendants left the body there, which was discovered the next day (R 580-582). They drove back to Ft. Pierce and stopped at Cave's house where they split up the money four ways. Appellant received twenty ($20) to thirty ($30) dollars. (R. 802-803).

When the appellant's girlfriend saw him the following day, the appellant had altered his appearance. He had his hair "cut lower," so low that his girlfriend commented that she "could see the scalp . . . ." (R 726).

Subsequently, Bush made two statements to law enforcement officers. (R 707). On May 5, 1982, Appellant was arrested and incarcerated. When the administrator of the detention center, Jackson, passed by the booking desk, he heard appellant call out to him. (R 739) Aware that Bush had made a statement to law enforcement officers, appellant told Jackson that he wanted to talk about the case. Jackson told appellant he could not talk to him. "[H]e had to talk to his attorney." Appellant responded, "I don't want to talk to my attorney . . . . I want to talk to the sheriff." (R 740).

Sheriff Holt was summoned. Like Jackson, Holt also told appellant that he could not talk to him, and that appellant had appointed counsel to represent him. Holt then called the public defender's office, and spoke directly to the elected Public Defender, Schwartz. (R 742). Schwartz sent Mr. Greene over to advise appellant not to say anything.

> [PROSECUTOR]: So it was your advice to Mr. Greene to tell Mr. Parker--Mr. Greene was going over there in the capacity of advising Mr. Parker--in essence, keep your mouth shut.
>
> [SCHWARTZ]: Keep your mouth shut and don't go into the facts of the case with him. (SR 60)

Greene was practicing law at the Public Defender's office under Article 18 of the Integration Rules of the Florida Bar. (SR 61). He advised appellant several times (R. 743, 775-776) not to make any statements. Notwithstanding appellant insisted that he "want[ed] to go ahead and speak anyway and clear his conscience." (R. 776). The purpose of the May 5th statement was "to tell you I didn't kill that girl." (R. 780).

Though Greene had told appellant he was representing him (R. 777), there was an apparent ambiguity as to whether the appellant wished to exercise his sixth amendment right to counsel. On the one hand, appellant repeated that he wanted to see if his mother got a lawyer. At the same time he maintained that he still wanted to make a statement. Sheriff Holt cleared up the ambiguity by asking:

> HOLT: I think I understand where you're coming from. You asked me to come over and that's why I'm here. I went back and explained to you that you did have a lawyer appointed for you. Nobody is going to make you make a statement. You asked me could you talk to me and explain to me just exactly what happened, that you felt like that there was something being put on you that wasn't right. You wanted to tell me the story just like it was. Am I correct in that?
>
> PARKER: Yes, sir.
>
> HOLT: Okay, you can still give me a statement without signing that. All that says right there is that you understand that you don't have to. Do you still wish to give us a statement at this time?

PARKER: Yes, sir.
(R. 779)

Not only did appellant affirmatively persist in his desire to make the May 5th statement, appellant also never indicated that he did not want to make the statement.

During the course of the May 5th statement, appellant agreed to retrace the route he and his co-defendants took to show officers where the knife was tossed out of the car. (R. 785). At the crime scene, the appellant admitted to them that "that's where WE put the body," (R 848) (emphasis in the original transcript), and that "This is where 'they' [referring to himself and his co-defendants] took the victim out of the car." (R 798).

Georgeanne Williams went to visit her boyfriend, Bush, in jail. Bush told her who shot Frances Julia Slater. Parker's cell was close by. Georgeanne walked over to appellant's cell and asked appellant what had happened.

> [WILLIAMS]: I asked him what had happened. He said, "Didn't John tell you." I said, "No, John didn't tell me anything." I said, "I just want to know who shot the girl, that's all."
>
> [PROSECUTOR]: Okay. And after you told J. B. Parker you just wanted to know who shot the girl, what did J. B. Parker tell you, Georgeanne?
>
> [WILLIAMS]: He told me, he said, "I shot her and John stabbed her." And he said if I mentioned it, it would be my word against

> his. He said that John already had a past record, it would be on him, anyway. (R. 882-883)

Williams in turn recited appellant's admission to her mother and sister. (R. 884) Her mother told her "to not get involved." (R. 918). Williams did not repeat the statement to law enforcement, nor to Bush's attorney (R. 883). She did not repeat it to anyone until her deposition by appellant's lawyer and then again at appellant's trial. (R. 884-885)

Prior to examining Williams' at trial, appellant argued that he should be permitted to impeach Williams' credibility with the question "Were you ever arrested for petit larceny?" He urged that the question would demonstrate that Williams had lied in the past to her mother because though Williams would answer that she had told her mother, her mother would testify to the contrary. (R. 872). The trial court refused to admit the question because it was improper in form and pertained to a collateral matter (R. 876). Notwithstanding by other questions asked during cross-examination, appellant tried to impeach Williams. Though the propounded questions included questions that brought forth that Williams had lied in the past about Bush's criminal record in order to continue dating Bush, the thrust of the cross-examination was to demonstrate that Williams was lying in order to save Bush from the death penalty by implicating appellant.

[DEFENSE COUNSEL]: Georgeanne, you knew that John Earl Bush was facing the death penalty, didn't you?

[WILLIAMS]: Everybody else knowed it, too, who read the paper.

[DEFENSE COUNSEL]: Okay. Is that answer "yes"?

[WILLAIMS]: Yes.

[DEFENSE COUNSEL]: And didn't you also know that if it could be proved -- or, didn't you also think, that if it could be proved that somebody else killed the girl, that John Earl Bush might not be executed, didn't you also think that?

[WILLIAMS]: (Shaking head negative.)

[DEFENSE COUNSEL]: No?

[WILLIAMS]: No. Because in--the way they had it wrote up in the paper that all of them was going to get the chair one way or the other. My word ain't good on nothing. I'm just going by what it was told to me.

[DEFENSE COUNSEL]: You didn't think at all that if somehow it could be indicated or proved or established that John Earl Bush didn't kill the girl, you didn't think at all that he might not be executed, you didn't think about that at all?

[WILLIAMS]: No. After John had got started on his trial and everything, it was over with between me and him, before his trial even got started good.

> I had quit going to the jail-house to visit him all together. Every now and then I would go up there.
>
> [DEFENSE COUNSEL]: Georgeanne, would you lie to save John Earl Bush's life?
>
> [WILLIAMS]: No.
>
> [DEFENSE COUNSEL]: But you lied to continue to date him, didn't you?
>
> [WILLIAMS]: That's one thing, that's different from this. (R. 902-903).

In turn, the State introduced Williams' prior consistent statement to her mother and sister to refute the charge of recent fabrication allegedly recited to save Bush's life.

In closing argument, the prosecutor made the same statement he had earlier asked in question form to appellant on cross-examination to demonstrate that appellant made the exculpatory statement of May 5th because he knew that Bush had told law enforcement who actually shot Slater. (R 1154). Appellant never objected to the statement in question form on cross-examination. (R. 1016). Further appellant never objected, nor requested a curative instruction before moving for mistrial after the alleged improper closing comment. Additionally, the evidence demonstrated that appellant implicated Bush, that Bush gave a statement to law enforcement, and that an officer stated Bush had admitted his involvement (R. 705). It also indicated that Cave was at some point holding the gun. (R. 782-783).

Consequently, the trial court denied the motion for mistrial finding that the jury could conclude that someone other than appellant was that person who Bush told law enforcement shot Frances Julia Slater. (R. 1155-1156).

The trial court agreed to give a jury instruction on the independent acts of others. (R. 953). The only difference between what was requested and what was given was that the instruction given added the words from the felony murder jury instruction, "that the kidnapping and murder did not occur as a consequence of and while J. B. Parker or an accomplice was escaping from the immediate scene of the robbery." (R. 942-943). The appellant had earlier agreed that if the evidence demonstrated that the death occurred as a consequence of and while appellant or an accomplice was escaping from the immediate scene of the robbery, he could be convicted of first degree felony murder (R. 999-1000).

At the sentencing phase, the appellant waived the mitigating circumstance of no significant prior criminal history (R. 1205-1206). Yet he subsequently called Dr. Eddy, a psychologist, to testify that it was Dr. Eddy's opinion that the appellant was a passive, nonaggressive individual (R. 1259). Dr. Eddy stated that his opinion was based on psychological tests and on the appellant's past personal and social developmental history, which included select references to past prior criminal conduct related to him by the appellant. (R. 1247, 1291-1292, 1296, 1298).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT WAS CORRECT IN ALLOWING THE STATE TO INTRODUCE GEORGEANNE WILLIAMS PRIOR CONSISTENT STATEMENT MADE TO HER MOTHER AND SISTER TO REBUT THE CHARGE AT TRIAL THAT SHE WAS LYING IN ORDER TO SAVE BUSH FROM THE DEATH PENALTY?

POINT II

WHETHER THE TRIAL COURT GAVE A JURY INSTRUCTION ON THE INDEPENDENT ACTS OF OTHERS?

POINT III

WHETHER THE TRIAL COURT CORRECTLY EXCLUDED THE CROSS-EXAMINATION OF GEORGEANNE WILLIAMS CONCERNING AN ARREST FOR PETIT LARCENY BECAUSE IT WAS IRRELEVANT AND IMMATERIAL AND FURTHER BECAUSE IMPEACHMENT USING A PRIOR ARREST IS IMPROPER UNDER THE EVIDENCE CODE?

POINT IV

WHETHER THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS AND ADMITTED INTO EVIDENCE THE TAPED STATEMENT?

POINT V

WHETHER THE TRIAL COURT CORRECTLY ALLOWED THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S PAST CRIMINAL HISTORY TO DEMONSTRATE THAT THE EXPERT'S TESTIMONY WAS INACCURATE: THOUGH THE OPINION WAS PREDICATED ON THE APPELLANT'S PRIOR SOCIAL DEVELOPMENTAL AND PERSONAL HISTORY, THE EXPERT WAS NOT AWARE OF ALL THE FACTS?

POINT VI

WHETHER THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND THE AGGRAVATING FACTORS?

POINT VII

WHETHER THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION FOR MISTRIAL?

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN ALLOWING THE STATE TO INTRODUCE GEORGEANNE WILLIAMS PRIOR CONSISTENT STATEMENT MADE TO HER MOTHER AND SISTER TO REBUT THE CHARGE AT TRIAL THAT SHE WAS LYING IN ORDER TO SAVE BUSH FROM THE DEATH PENALTY.

There is no merit to appellant's contention. The prior consistent statement was introduced to rebut the impeachment on cross-examination that Williams was lying at trial in order to save her boyfriend, Bush, from the death penalty. Further to the extent there was error it was harmless in light of the overwhelming evidence of guilt , including appellant's own admissions to law enforcement of his participation in the crimes. Consequently, this court must affirm.

Georgeanne Williams testified on direct at trial that the appellant told her that he shot the victim and Bush stabbed her. (R. 883). On cross-examination appellant attempted to impeach Williams to demonstrate: that Williams was lying at trial, that the appellant had never made the admission to her, and that her motive to falsify was to save Bush from the death penalty by implicating appellant instead.

> [DEFENSE COUNSEL]: Georgeanne, you knew that John Earl Bush was facing the death penalty, didn't you?
>
> [WILLIAMS]: Everybody else knowed it, too, who read the paper.

[DEFENSE COUNSEL]: Okay. Is that answer "yes"?

[WILLIAMS]: Yes.

[DEFENSE COUNSEL]: And didn't you also know that if it could be proved -- or, didn't you also think, that if it could be proved that somebody else killed the girl, that John Earl Bush might not be executed, didn't you also think that?

. . . .

[DEFENSE COUNSEL]: Georgeanne, would you lie to save John Earl Bush's life? (R. 902-903).

The State properly offered the prior consistent statement of Williams in response to the impeaching cross-examination under section 90.801(2)(b), Florida Statutes (1981) and in accordance with the caselaw on the use of prior consistent statements. Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982); Trainer v. State, 346 So.2d 1081 (Fla. 1st DCA), cert. denied, 352 So.2d 175 (Fla. 1977); Kellam v. Thomas, 387 So.2d 733 (Fla. 4th DCA 1974).

Contrary to the appellant's contention, the prior consistent statement was made prior to the existence of a fact said to indicate a motive to falsify. Williams' alleged motive to falsify, for impeachment purposes at trial, was the motive to falsify in order to save Bush from the death penalty--and not a motive to falsify in order for her to continue dating

Bush. The fact or facts that could indicate that Williams' motive to falsify was to save Bush from the death penalty were her trial testimony and the deposition of her taken by appellant's counsel prior to trial on October 19,1982. The deposition and the trial testimony were the only two instances in which Williams' statement concerning Parker's admission could have made a difference, if in fact it was her motive to exculpate Bush from the death sentence by inculpating the appellant, because they were the only two times in which Williams' recited the admission to persons who could have made a difference in the outcome.

The statement made to Nealie Bell Williams and Sandra Williams, Georgeanne's mother and sister respectively, was prior to the existence of either of these two situations. The statement that Williams made to them does not indicate a motive to falsify in order to save Bush from the death penalty, because neither her mother or sister could affect the outcome of the cases. Moreover, Williams' mother at that time told Georgeanne to stay out of it, to "not get involved " (R. 918). Following the advice, Williams never recited the admission by appellant to law enforcement officers (R. 884-885). She did not even recite the admission to Bush's lawyer (R. 883).

Further to the extent that the motive to falsify was the motive to falsify in order to make Bush look good with her family, the appellant's argument is still without merit. If Williams wanted to place Bush in good light, she would not have told her

mother and sister that the appellant said that he shot the victim and that Bush stabbed her. Rather, she would have told her mother and sister that the appellant said that he both shot and stabbed the victim. Indeed, Williams had no motive to falsify at all at the appellant's trial -- either to cast Bush in a favorable light, or to save him from the death penalty -- because she had already testified against Bush at his trial held before that of the appellant's.

Finally to the extent that there was error, it was harmless. Teffeteller v. State, ___So.2d___(Fla. 1983) [8 FLW 306, op. filed August 25, 1983, case no. 60,337]. There was overwhelming evidence of appellant's guilt, including his own admissions to participation in the murder -- as for example, his statements to law enforcement officers at the crime scence : "This is where 'they' [referring to himself and his co-defendants] took the victim out of the car " (R. 798); and his statement to Deputy Vaughn that "that's where WE put the body." (R. 848) (emphasis in the original transcript.) See also Statement of Facts herein.

In sum, the motive to falsify in order to save Bush from the death penalty was not present at the time the admission was recited by Williams to her mother and sister. Even if there were error, it was harmless. Therefore, this court must affirm.

POINT II

THE TRIAL COURT GAVE A JURY INSTRUCTION ON THE INDEPENDENT ACTS OF OTHERS.

Though this issue has been preserved for appeal (R. 1075, 1076), appellant's argument is without merit. The trial court gave the requested instruction on independent acts of others. The only difference between what was requested and what was given was the addition of the proviso that the jury could return a guilty verdict if it found that the murder was committed while appellant or an accomplice was fleeing from the robbery, a correct statement of the law. Hence, there is no error and this court must affirm.

The trial court agreed to give an instruction on independent acts of others (R. 953) and did instruct the jury as to the independent acts of others:

> If you find that the kidnapping and murder was outside the scheme or design of the robbery of Frances Julia Slater, and that the kidnapping and murder did not occur as a consequence of and while J.B. Parker or an accomplice was escaping from the immediate scene of the robbery, and if you further find that the kidnapping and murder were totally independent acts of someone other than J.B. Parker; that the kidnapping and murder of Frances Julia Slater were committed by a person or persons other than J.B. Parker; and that J.B. Parker did not participate in the kidnapping and murder, then you should find J.B. Parker not guilty of first degree felony murder. (R. 1183).

Hence, the appellant's reliance on Bryant v. State, 412 So.2d 347 (Fla. 1982) is inapplicable, because in Bryant no instruction at all as to the independent acts of others was ever given. Moreover, the entire scenario in the case at bar was one where all four defendants were present at all times during the robbery, kidnapping, and murder -- unlike Bryant in which Bryant left ; then a co-defendant thereafter sexually battered the victim causing death.

Furthermore there was no error in the modified instruction given because the only difference between it and the one requested (R. 942-943) was the addition to the requested instruction of the words,"that the kidnapping and murder did not occur as a consequence of and while J.B. Parker or an accomplice was escaping from the immediate scene of the robbery." Under the appellant's unmodified instruction which is silent as to the fleeing concept, the jury could find that the defendant or an accomplice was fleeing from the robbery and that the murder was a consequence thereof -- as for example, Bush saying in the course of the robbery, "Man, I'm going to kill this bitch. I done been to prison for six years and I ain't going back, cause this whore going to identify us" (R784)--yet be precluded from rendering a guilty verdict based on felony murder. The unmodified jury instruction requested is contrary to Florida law. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, F.S. 782.04 (1) (a) Felony-Murder - First Degree 64 (1981 ed.); Campbell v. State, 227 So.2d 873

(Fla. 1969), cert dismd., 400 U.S. 801, 97 S. Ct. 7, 27 L. Ed.2d 33 (1970); Mills v. State, 407 So.2d 218 (Fla. 3rd DCA 1981) (Upholding the conviction for first degree felony murder where the killing was said to be a predictable result of the felonious transaction.).

Moreover the appellant himself takes an inconsistent position in his objection to the instruction as modified because he agreed that if the death occurred as a consequence of and while appellant or an accomplice was escaping from the immediate scene of the robbery, he could be convicted of first degree felony murder. (R. 999-1000).

To have given only the version that the appellant requested would have resulted in the giving of an incomplete and inaccurate statement of the law of the State of Florida. It would have prejudiced the State of Florida, because the instruction to the jury would have required the jury to return a not guilty verdict if they found that the appellant had not participated in the kidnapping, notwithstanding that the murder occurred as a consequence of the robbery.

In sum, the instruction given was an instruction on the independent acts of others incorporating a correct statement of the law. Therefore, this court must affirm.

POINT III

THE TRIAL COURT CORRECTLY EXCLUDED THE CROSS-EXAMINATION OF GEORGEANNE WILLIAMS CONCERNING AN ARREST FOR PETIT LARCENY BECAUSE IT WAS IRRELEVANT AND IMMATERIAL AND FURTHER BECAUSE IMPEACHMENT USING A PRIOR ARREST IS IMPROPER UNDER THE EVIDENCE CODE.

The appellant urges reversible error based on a sixth amendment violation; specifically, he was precluded from asking Williams whether she had a prior arrest for petit larceny in order to demonstrate that she lied to her mother, thereby impugning her credibility. This argument is without merit for several reasons: first, it concerned an immaterial, collateral matter that did not demonstrate Williams' bias or prejudice against the appellant; second, the form of the question concerning an "arrest," rather than a "conviction," is improper under the Florida Code of Evidence; third, the appellant demonstrated that Williams had lied in the past to her mother through other evidence; thus even if there were error, it was harmless. Consequently, the judgment and sentence must be affirmed.

Indeed both the United States and Florida Constitutions grant an accused the right to confront witnesses. U.S. Const. amend. VI; Fla. Const. art. 1, §16. However that right of confrontation is not a limitless right encompassing impeachment of a witness on cross-examination with collateral matter which is

immaterial and irrelevant. Stinson v. State, 76 Fla. 421, 80 So. 506 (Fla. 1981); Herndon v. State, 73 Fla. 451, 74 So. 511 (1917); Tully v. State, 69 Fla. 662, 68 So. 934 (Fla. 1915), Schwab v. Tolley, 345 So. 2d 747, 754 (Fla. 4th DCA 1977); Whitley v. State, 265 So.2d 99, 101 (Fla. 3rd DCA), cert. denied, 268 So. 2d 906 (Fla. 1972). Cf United States v. Valenzuela - Bernal, ___ U.S. ___.102 S.Ct. 3340, 73 L.Ed. 2d 1193 (1982); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967) (In somewhat analogous cases concerning compulsory process, the United States Supreme Court in discussing the sixth amendment right to confrontation held that there is a violation only where an accused is "arbitrarily deprived of 'testimony' [that] would have been relevant and material, and . . . vital to the defense.")

As the First District Court of Appeal held:

> While a wide range of cross-examination is to be permitted in discrediting a witness, a defendant has no unqualified right to insist upon the introduction of immaterial testimony solicited for the purpose of refuting or impeaching other immaterial testimony . . . .

Carter v. State, 101 So. 2d 911, 914 (Fla. 1st DCA), cert. denied, 104 So. 2d 594 (Fla. 1958), modified on other grounds in Faulk v. State, 104 So. 2d 519 (Fla. 1958).

In the case at bar, the appellant was attempting to introduce a collateral, irrelevant issue -- specifically, whether the witness, Georgeanne Williams, was ever arrested --

for the purpose of showing that Williams did not tell her mother about it. This question on cross-examination concerning an arrest for petit larceny has no bearing on whether Williams has an interest, bias, or prejudice against the appellant, the demonstration of which is necessary before there can be an admission of such a question. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974); Davis v. Ivey, 93 Fla. 387, 112 So. 2d 264 (1927); Hannah v. State, 432 So.2d 631 (Fla. 3rd DCA 1983); Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980). The arrest question involved a totally collateral matter. Thus the trial court was correct in frustrating what was no more than attempt to impeach a State's witness on an immaterial issue. Faulkner v. State, 151 So.2d 17, 18 (Fla. 2nd DCA 1983), cert. denied, 156 So. 2d 389 (Fla. 1963).

> The admission or rejection of such evidence rests in the sound discretion of the trial court who must judge the propriety thereof from what transpires upon the trial and the conduct of the witness upon the stand. And this discretion will not be interfered with unless abused.

Carter, 101 So. 2d at 915. Where as here reasonable persons could have taken the view of the trial judge, there was no abuse of discretion; his ruling must be affirmed. Ford Motor Co. v. Kikes, 401 So. 2d 1341 (Fla. 1981); Matire v. State, 232 So.2d 209, 211-212 (Fla. 4th DCA 1970).

Further, the question"Were you ever arrested for petit larceny?" (R. 871-872) is an improper question to

demonstrate to a jury a witness's lack of veracity. As this court held in Fulton v. State, 335 So.2d 280, 283 (Fla. 1976):

> Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.

Jordan v. State, 107 Fla. 333, 144 So. 669 (1932); Rolle v. State, 386 So. 2d 3 (Fla. 3rd DCA 1980). See Section 90.610(1), Florida Statutes (1981). ("A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year . . . , or if the crime involved dishonesty or a false statement regardless of the punishment, ...").

The proper method of impeaching Williams' credibility arising out of her involvement in petit larceny, would have been to ask her whether she had been convicted of petit larceny -- the subject of the State's motion in limine -- and, moreover, to show "that such crime involve[d] some element of deceit, untruthfulness, or falsification bearing upon the [witness's] capacity to testify truthfully." Hall v. Oakley, 409 So.2d 93, 97 (Fla. 1st DCA), pet. for rev. denied, 419 So.2d 1200 (Fla. 1982); Rivers v. State, 423 So.2d 444 (Fla. 4th DCA 1982). The appellant failed to ask the proper question

pertaining to a conviction, thus the trial court was correct in excluding the improper question concerning her arrest.

Finally, assuming for the sake of argument only without conceding, that there was error in excluding questioning about the arrest for petit larceny, it was harmless. Sloan v. State, 427 So. 2d 808 (Fla. 4th DCA 1983); Bailey v. State, 411 So.2d 1377 (Fla. 4th DCA 1982). The thrust of the excluded question was to demonstrate that Williams had lied in the past. Appellant elicited this through other questions which revealed that Williams had lied to her parents about her boyfriend. (R. 898). Thus, the appellant achieved his end goal. The arrest question would have merely elicited repetitive testimony.

In sum there was no abridgment of appellant's sixth amendment right to confrontation, because the question propounded was improper in form and concerned a matter collateral and irrelevant. Further, to the extent there was any error, it was harmless because through other questions on cross-examination, the appellant demonstrated that Williams had lied to her mother -- the reason for appellant's wanting to ask the excluded question about Williams' petit larceny arrest. Thus because there was no error, and even if there were it was harmless, the judgment and sentence must be affirmed.

POINT IV

THE TRIAL COURT CORRECTLY DENIED THE MOTION TO SUPPRESS AND ADMITTED INTO EVIDENCE THE TAPED STATEMENT.

There is no merit to appellant's argument because the statement was voluntary and thus not within the ambit of the fifth amendment protection. Even if the fifth amendment was invoked the totality of the circumstances demonstrated a knowing, intelligent, voluntary waiver of the right to remain silent and of the right to counsel. Even if the right to counsel were not waived, the accused had adequate representation by the public defender. Finally, to the extent there was error it was harmless because the statement was exculpatory. Hence, the trial court must be affirmed.

The argument of the appellant erroneously assumes that the statement made by him was within the ambit of the fifth amendment. On the contrary, the taped statement was not the product of an in-custodial interrogation initiated by Sheriff Holt. Rather it was volunteered in narrative form at the behest of the appellant who initially wanted to tell the jailer about the case. When the jailer told the appellant that he, the jailer, could not talk to the appellant and that the appellant had to talk to his attorney, the appellant replied that he did not want to talk to an attorney. He wanted to talk to the sheriff instead. (R. 740). Repeatedly the appellant voiced his desire to recite thefacts and clear his

conscience. (R. 743, 776, 780). Thus, this scenario is one in which the accused volunteered his statement. Consequently, compliance with Miranda was not required at all because "[v]olunteered statements of any kind are not barred by the Fifth Amendment . . . ." Miranda v. Arizona, 384 U.S. 436, 478, 86 S.Ct. 1602, 1629, 16 L.Ed. 2d 694, 726; Antone v. State, 382 So. 2d 1205 (Fla.), cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed. 2d 141 (1980); Castillo v. State, 412 So. 2d 36 (Fla. 3rd DCA 1982); Spikes v. State, 405 So. 2d. 430 (Fla. 3rd DCA 1981); Dempsey v. State, 238 So. 2d 446, 448 (Fla. 3rd DCA 1970) (Statements volunteered to officer after accused had been arrested and booked and refused to make formal statement deemed admissible and not within the contemplation of the fifth amendment.)

Notwithstanding even if there were invoked a fifth amendment protection, the appellant's refusal to sign the waiver form was not a conclusive indication that he wished to remain silent. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed. 2d 286 (1979); Jones v. State, ____ So. 2d ___ (Fla. 1983) [8 FLW 362, case no. 61,492; op. filed September 15, 1983]; Donovan v. State, 417 So. 2d 674 (Fla. 1982). The totality of the aforementioned circumstances demonstrated the voluntariness of statement. Donovan, 417 So. 2d at 676; Williams v. State, 156 Fla. 300, 22 So. 2d 821 (1945). The State met its burden of demonstrating such by a preponderance of the evidence. DeConingh v. State, 433

So. 2d 501 (Fla. 1983). Hence, the trial court was correct in determining the statement to be freely and voluntarily made (R 796).

Apparently the real thrust of the appellant's complaint concerns the waiver of counsel provision under the fifth amendment. There is no reversible error as an analysis based on Cannady v. State, 427 So. 2d 723 (Fla. 1983) will demonstrate. In Cannady, the context in which the appellant made his request created an ambiguity. On the one hand it appeared that he desired an attorney, which presumably indicated a wish to refrain from further questioning, but on the other, he continued to evidence his desire to continue to talk to the police without the benefit of an attorney. In Cannady, this court determined that the officer asked a question of the appellant in order to clarify the ambiguity in the appellant's wishes. When Cannady answered in the affirmative, then this affirmative answer indicated that his earlier statement was not a request for counsel; thus, there was an effective waiver.

Similarly, in the case at bar, to the extent that the appellant's request is construed as a request for an attorney--and appellee is not conceding that it was, especially in light of the appellant's failure to ever indicate that he did not want to make the statement--it created an ambiguous situation analogous to Cannady. On the one hand appellant wanted to "see if his mom has a lawyer," yet he still maintained his stance that he wanted to talk "to get this off

my mind." (R. 777-778). Sheriff Holt correctly responded by clarifying appellant's wishes. Holt asked:

> [HOLT]: "I think I understand where you're coming from. You asked to come over and that's why I'm here. I went back and explained to you that you did have a lawyer appointed for you. Nobody is going to make you make a statement. You asked me could you talk to me and explain to me just exactly what happened, that you felt like that there was something being put on you that wasn't right. You wanted to tell me the story just like it was. Am I correct in that?"
>
> [PARKER]: "yes, sir."
>
> [HOLT]: "Okay. You can still give me a statement without signing that. All that says right there is that you understand that you don't have to. Do you still wish to give us a statement at this time?"
>
> [PARKER]: "Yes, sir." (R. 779).

As in Cannady, by answering the question in the affirmative, the appellant indicated that his earlier statement was not a request for counsel. Subsequently, there was a knowing, voluntary, intelligent waiver. Cannady, 427 So. 2d at 729. Accord State v. Craig, 237 So. 2d 737, 741 (Fla. 1970) ("A verbal acknowledgment of understanding and willingness to talk, followed by conduct which is consistent only with a waiver of his right to have a lawyer present, by one who has been advised of his rights, constitutes an effective waiver of his right to counsel at that stage of the proceeding.") See also Oregon v. Bradshaw, ___ U.S. ___, 33 Cr.L.Rptr. 3211 (1983).

Notwithstanding, the appellant was represented by full, competent, and adequate counsel: the public defender. Though the advice not to talk was given by a certified legal intern, it was the exact advice of and at the direction of the elected Public Defender, Schwartz:

> [PROSECUTOR]: So it was your advice to Mr. Greene to tell Mr. Parker--Mr. Greene was going over there in the capacity of advising Mr. Parker--in essence, keep your mouth shut.
>
> [SCHWARTZ]: Keep your mouth shut and don't go into the facts of the case with him. (SR 60)

It is of no consequence that the intern did not inform the appellant that he was not a member of the Florida Bar. The integration rules do not require that an intern have a signed consent before relaying legal advice. The rules only require a signed consent before representation at a hearing or trial. Hudson v. State, 375 So. 2d 355 (Fla. 3rd DCA 1979); Cheatham v. State, 364 So. 2d 83 (Fla. 3rd DCA 1978), Integration Rule of the Florida Bar, art. XVIII.

Moreover the advice was good advice, and there was no showing that a lawyer admitted to practice would have been able to convince the appellant to act other than he did. Indeed the fact that the appellant did not know that Greene was an intern, would have more than likely lead appellant to follow Greene's advice--if the appellant was going to follow it at all--than if Greene had told the appellant he was an intern.

Finally, to the extent that there was any error, it was harmless because the statement was exculpatory; appellant simply denied any participation. Chapman v. California, 386 U.S. 18, 87, S.Ct. 824, 17 L.Ed. 2d 705 (1967); Nowlin v. State, 346 So. 2d 1020 (Fla. 1977); Lornitis v. State, 394 So. 2d 455 (Fla. 1st DCA 1981).

In sum, there is no merit to this point on appeal. The statements were voluntary, and to the extent they were not, they nevertheless were given after a knowing, voluntary and intelligent waiver of both the right to remain silent and the right to counsel. Even if the right to counsel was not waived, the appellant had adequate representation by counsel. To the extent that there was error, it was harmless. Hence, the trial court determination must be affirmed.

POINT V

THE TRIAL COURT CORRECTLY ALLOWED THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S PAST CRIMINAL HISTORY TO DEMONSTRATE THAT THE EXPERT'S TESTIMONY WAS INACCURATE; THOUGH THE OPINION WAS PREDICATED ON THE APPELLANT'S PRIOR SOCIAL DEVELOPMENTAL AND PERSONAL HISTORY, THE EXPERT WAS NOT AWARE OF ALL THE FACTS.

There is no merit to appellant's contention that it was error for the State to cross-examine the expert on matters pertaining to the appellant's prior criminal activity. The appellant opened the door by eliciting on direct examination, testimony that the expert had based his opinion on the appellant's past personal and social developmental history. Because wide latitude is permitted in the cross-examination of an expert witness to test the value and basis of his opinion, the State had the right on cross-examination to demonstrate to the jury that the expert had not taken into account all the facts of that history, thus revealing the inaccuracy of the opinion that the appellant was so passive and non-aggressive as to be incapable of pulling the trigger. Consequently, this court must affirm the conviction and sentence because the trial court did not abuse its discretion.

Appellant's reliance on Maggard v. State, 399 So. 2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed. 2d 598 (1981) is misplaced. In Maggard, the State presented extensive evidence of Maggard's prior criminal record

in order to rebut a mitigating factor upon which Maggard expressly stated he would not rely and which did not exist. On the contrary, the State in the case at bar did not present evidence of prior criminal activity in order to rebut such a mitigating circumstance. It propounded the cross-examination questions in order to demonstrate to the jury that the expert's opinion was in error; the expert had not been fully apprised of all the facts.

On direct examination , Dr. Eddy opined that the appellant was a passive, nonaggressive individual.

> [EXPERT]: . . . . But his basic orientation is one of passivity.
>
> [DEFENSE COUNSEL]: Passivity meaning what?
>
> [EXPERT]: Nonaggressive, non-acting-out. . . . (R. 1257)
>
> . . . .
>
> [EXPERT]: If anything is clear on the tests, he doesn't respond, except in very overly controlled ways, to emotional situations. There is too little emotionality shown in his personality. (R. 1259).

The appellant formulated a hypothetical question and asked the expert whether, under circumstances as in the case at bar, appellant could have pulled the trigger. The expert replied:

> [Expert]: . . . . Quite frankly, as you said, there was a difference of opinion as to people thinking or assuming that he in fact pulled the trigger and killed the girl, all I can say is that it's extremely uncharacteristic of individuals with Mr. Parker's personality profile, types of defense mechanisms, controls, or in level of control. (R. 1269-1270).

Earlier the expert had testified that this opinion was based on the personal history (which included select instances of prior criminal conduct) related by appellant (R. 1247,1296, 1298), the appellant's social developmental history (R. 1241, 1248), and on certain psychological tests (R. 1242). Because the expert was relying on that personal and social developmental history in rendering his opinion, the State had the right to inquire into the expert's knowledge of that personal and social developmental history to test whether the opinion had its basis in all the facts (R. 1291,1292,1298). "It is a general rule that an opinion is worth no more than the reasons on which it is based." Kelly v. Kinsey, 362 So.2d 402 (Fla. 1st DCA 1978); LeFevre v. Bean, 113 So. 2d 390 (Fla. 2nd DCA 1950). Hence a wide range of cross-examination was properly permitted "in order to test the witness' means of knowledge, [and] the extent of his information, . . . [and] accuracy. . . ." Pensacola Electric Co. v. Bissett, 59 Fla. 360, 370 (Fla. 1910); Eggart v. State, 40 Fla. 527, 25 So. 144,147 (Fla. 1898) (Questions which test the value of an expert's testimony are permissible); Thurston v. State,

355 So. 2d 1224, 1227 (Fla. 1st DCA 1978) (The appellate court held that it was error to preclude cross-examination which would have revealed the psychologist's reasons for her opinions), S. Gard, FLORIDA EVIDENCE, Rule 238 Cross-Examination of Expert Witnesses 361 (5th ed. 1967).

Not only did the State have the right, but also an obligation to the justice system and particularly to the jury which otherwise would have been misled, to point out that if the opinion of such a witness was founded on incomplete or inaccurate data supplied by the appellant to the psychologist (R. 1289, 1292-1293) then that opinion would be invalid; that a different opinion would have been rendered had all the pertinent facts been evaluated. Hence, the trial court did not abuse its discretion; he properly permitted the State wide latitude on cross-examination. Therefore both the conviction and sentence must be upheld.

POINT VI

THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND THE AGGRAVATING FACTORS.

The evidence is sufficient from which the jury could find the aggravating factors recited, and which support the imposition of the death sentence. Consequently, this court must affirm the death sentence. (See Appendix A)

Contrary to the appellant's contention, the evidence supports the heinous, atrocious and cruel factor. This court has held that the "fear and emotional strain preceding a victim's death may be considered as contributing to the heinous nature of the capital felony." Adams v. State, 412 So.2d 850, 857 (Fla.); cert denied, ___ U.S. ___, 103 S.Ct. 182, 74 L.Ed2d148 (1982); Knight v. State, 338 So.2d 201 (Fla. 1976). The evidence in the case at bar demonstrates the fear and emotional strain which Frances underwent. Indeed, at the inception of the robbery and kidnapping, the appellant knew and Frances was told by the defendants that they would kill her so she could not identify them (R. 784, 790). Knowing her death was imminent during the thirteen (13) miles, twenty (20) minutes, death ride, while pinioned in the back of Bush's car between Cave and Johnson, Frances pleaded: "Just don't hurt me, just don't hurt me." (R. 790).

Frances then was forcibly removed from the car, yanked out by her hair, and stabbed in the stomach by a

codefendant while the appellant watched; then he shot her as she apparently sank to the ground in a kneeling posture still pleading for her life. (R. 663-664, 785, 867-869, 889). During the course of these events Frances' bladder "was completely and absolutely voided," a fact which according to the medical examiner was "consistent with her being in great fear prior to her death . . . ." (R. 669).

Moreover, in Smith v. State, 424 So.2d 726 (Fla.), cert denied, ___U.S. ___, 103 S.Ct. 3129, 79 L.Ed.2d 1379 (1983), an identical case to that at bar, a convenience store clerk was robbed, kidnapped, and ultimately taken to a wooded area where she was shot in the back of the head with a gun. This court held that based on these proven facts, the application of the heinous factor was proper. Likewise, its application is proper here.

The caselaw upon which the appellant relies is inapplicable because unlike here, those cases lacked "additional acts as to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed. 2d 295 (1974). Herzog v. State, ___ So.2d ___ (Fla. 1983) [8 FLW 383, 386, op. filed 9.22.83, case no. 61,513]. Hence, the evidence is sufficient from which the jury could find this aggravating factor and which supports the death penalty.

The evidence likewise is sufficient from which the jury could find the premeditated aggravating factor. The appellant himself has conceded that execution type murders fit within the cold, calculated and premeditated category. McCray v. State, 416 So.2d 804, 807 (Fla. 1982) ("That aggravating circumstance ordinarily applies in those murders which are characterized as executions . . . , although that description is not intended to be all-inclusive.") As already discussed, this court has characterized that type of murder involved in the case at bar as an "execution-style killing." Smith, 424 So.2d at 733.

Indeed, in Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed. 2d 1220 (1976), this court found an execution type slaying where the defendant had held up a restaurant, abducted the assistant manager, drove him to a remote area, and shot him in the back of the head. See also Combs v. State, 403 So.2d 418, 421 (Fla. 1981), cert denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed. 2d 836 (1982) ("The circumstances are factually very similar to the robbery-execution slaying of Sullivan . . . . [W]e agree it was appropriate for the trial judge to find upon the record that this [was a] premeditated murder . . . committed while the appellant was engaged in a robbery . . . .") Because the type of murder in the case at bar has been held by this court to be an execution-style killing, and the premeditated aggravating factor is applicable to execution slayings,

then the application of the premeditated aggravating factor is proper in the case at bar.

Moreover, unlike Harris v. State, 438 So.2d 787, 798 (Fla. 1983), the intent to murder in the case at bar was developed well before the actual commission of the crimes. Compare Hill v. State, 422 So.2d 816, 819 (Fla. 1982) cert denied, ___ U.S. ___, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983) (wherein the intent to commit murder was formulated prior to the commission of the crime).

The record demonstrates that at the inception of the first stake out of the store by appellant, he knew that it was Bush's intent "to take [Frances] out of the store and ride off and kill her." (R. 790). The evidence reveals that the assailants told Frances she was to be killed when she was forced into the car. (R. 784). Indeed, appellant waited until Bush first stabbed Frances in the stomach and she sank to her knees in a kneeling posture before he fired the fatal shot to the back of her head. (R. 663-664, 889). Hence, the State proved, and the evidence was sufficient from which the jury could find, beyond a reasonable doubt the elements of the premeditated aggravating factor. Jent v. State, 408 So.2d 1024 (Fla.), cert denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed. 2d 1322 (1982).

The aggravating circumstances set forth in section 921.141(5)(d) and (f) were likewise proper. Contrary to appellant's contention, there was no improper doubling-up.

The cases which appellant cites, Vaught v. State, 410 So.2d 147 (Fla. 1982) and Provence v. State, 337 So.2d 738 (Fla. 1976), cert denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed. 2d 1065 (1977), are not applicable because each of those cases involved only that the murder occurred in the commission of the robbery [subsection d] and was committed for pecuniary gain [subsection f]. Both subsections referred to the same aspect of the crime. Provence, 337 So.2d at 786. Not so in the case at bar. While the finding of the trial court refer to the commission of a robbery, the finding also speaks to the capital felony as committed in the commission of the kidnapping. Indeed, the record amply supports that the murder was committed during the course of the kidnapping. It reveals that Frances at gunpoint was taken from the store and forced into the car (R. 983) and driven to a remote area and murdered (R. 580-582, 663-664, 785, 984).

The kidnapping is an aspect of the crime totally separate and discrete from that of pecuniary gain which was likewise supported by the evidence (R. 782-784, 802-803). These factors are two separate analytical concepts which can validly be considered to constitute two circumstances. Provence, 337 So.2d at 786. Indeed, in Delap v. State, ___ So.2d ___ (Fla. 1983 [8 FLW 369, op. filed 9.15.83, case no. 56,235], there was a similar finding by the trial court that:

> (d) the capital felony was committed while the Defendant was engaged in the commission of a kidnapping, robbery, and rape.

(e) The capital felony was committed for pecuniary gain.

Delap, 8 FLW 374. While this issue was not discussed in the opinion, apparently this court in its independent review of the aggravating and mitigating factors determined there was no error because the judgment and sentence was affirmed. Following there from, there is no error here because these findings include two separate aspects of the crime.

Without conceding, if there were error it was harmless. Even if the two factors are to be merged into one, the statutory aggravating factors clearly outweigh the mitigating factors which are so insignificant as to be nonexistent. Zant v. Stephens, ___ U.S. ___, 33 Cr.L.Rptr. 3195 (1983) ("What is important is an individualized determination on the basis of the character of the individual and the circumstances of the crime."); Barclay v. Florida, ___U.S. ___, 33 Crim.L. Reptr. 3292 (1983); Meeks v. State, 339 So.2d cert denied, 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978) 186 (Fla. 1976); Hargrave v. State, 366 So.2d 1 (Fla.), cert denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). For example, on factor was that the victim was not sexually molested. The appellant never had a right to engage in such conduct; consequently, a finding that he did not do that act which he was never legally permitted to do should not even be considered as a mitigating circumstance. Similarly, appellant's age and that his trial behavior was acceptable are light-weight factors,

so insignificant as to be of virtually no consequence when weighed against the heinous nature of this crime committed in a cold, calculated, and premeditated manner for pecuniary gain for such a pitiful sum as twenty ($20) to ($30) dollars.

In sum, the evidence was sufficient from which the jury could find the aggravating factors which support the death sentence. This court must affirm.

POINT VII

THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION FOR MISTRIAL.

The trial court correctly denied the appellant's motion for mistrial because he failed to take the proper procedural steps required before a motion for mistrial can be requested. Moreover, the comment was a proper comment on the evidence. Finally, even if there were error, it was harmless in light of the overwhelming evidence of guilt. Consequently, this court should affirm.

The case law is clear that prior to moving for mistrial because of an alleged improper prosecutorial comment, a defendant is required to make an objection stating with particularity his grounds, and additionally to request a curative instruction. Bolen v. State, 375 So.2d 891 (Fla. 4th DCA 1979); Mabery v. State, 303 So. 2d 369 (Fla. 3rd DCA 1974), cert. denied, 312 So.2d 756 (Fla. 1975); Davis v. State, 281 So. 2d 551 (Fla. 3rd DCA 1973), cert. denied, 289 So. 2d 734 (Fla. 1974).

A request for curative instruction from the court that the jury disregard the remarks is a mandatory step before a mistrial motion can be requested because the instruction could cure any alleged error. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982); Mancebo v. State, 350 So. 2d 1098 (Fla. 3rd DCA 1977), cert. denied, 359 So. 2d 1217 (Fla.

1978). Only when a curative instruction is denied or would be inadequate, should a mistrial be used to halt the proceedings. Where as here, the appellant failed to object and state his grounds with specificity, and further failed to request a curative instruction, the issue was not preserved for review. Ferguson, 417 So.2d at 641.

Furthermore, if the issue were preserved, there was no error in failing to grant the mistrial, because the comment of the prosecutor was proper for several reasons. First, the prosecutor's comment was a proper comment on the evidence. The record reflects that Bush told the appellant that he would implicate the appellant as the triggerman, (R. 788), and that indeed Bush made a statement to law enforcement officers (R. 704-705, 707, 812). The record also reflects that the same statement was made by the prosecutor in question form to the appellant on cross-examination--to which there was no objection--to demonstrate that the appellant made the exculpatory statement in response to Bush's statement to law enforcement officers about who actually shot Slater. (R. 1016). Thus the comment of the prosecutor, and any inferences therefrom, were proper because they were based on record testimony. Where there is a basis in the record for a statement made by a prosecutor in closing argument, there can be no error because it is a valid comment on the evidence. Blair v. State, 406 So.2d 1103, 1107 (Fla. 1977); Delaney v. State, 342 So.2d 1098 (Fla. 3rd DCA 1977). Wide latitude is permitted a prosecutor on

closing argument and he may draw all logical inferences and advance all legitimate arguments. Breedlove v. State, 413 So.2d 1 (Fla. 1982); Gosney v. State, 382 So.2d 838 (Fla. 5th DCA 1980); Frierson v. State, 339 So.2d 312 (Fla. 3DCA 1976).

Second, there is no error because the jury could conclude that one of the other co-defendants shot Frances Slater. For example, the record demonstrates that the appellant implicated Bush as the triggerman, (R. 784, 798), that Bush gave a statement to law enforcement officers, and that an officer stated that Bush admitted his involvement (R. 705). Hence, a jury could logically conclude that Bush confessed to the shooting to the police officers.

Finally, to the extent that there was error, it was not so prejudicial as to warrant a new trial because there was overwhelming other evidence of appellant's active participation in the murder. The record reflects that the appellant told Williams "I [the appellant] shot her [Slater] and John [Bush] stabbed her." (R. 883). Further, the appellant retraced for police officers the route that he and the co-defendants traversed. When he took the officers to the crime scene, he told them NOT that "This is where John Earl Bush took the victim out of the car," but rather "This is where 'they' [referring to himself and his co-defendants] took the victim out of the car." (R. 798). Appellant further pointed out

to Deputy Vaughn that "that's where WE put the body." (R. 848). (emphasis in the original transcript). See Statement of Facts herein to further demonstrate participation in the murder, robbery, and kidnapping. Consequently, there was no error so prejudicial and fundamental as to warrant a mistrial. Ferguson, 417 So.2d 639; Salvatore v. State, 366 So.2d 745, 750 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed. 2d 115 (1979); Johnsen v. State, 332 So.2d 69 (Fla. 1976).

The power to declare a mistrial and discharge a jury is addressed to the sound discretion of the trial court. There was no abuse of that discretion because there was no prejudicial, fundamental error; the appellant did not properly object and request a curative instruction; and in any event, the comments of the prosecutor were proper. Thus, reasonable persons could have taken the view of the trial court. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981); Matire v. State, 323 So.2d 209, 211-212 (Fla. 4th DCA 1970). Therefore, this court must affirm.

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Court AFFIRM the Judgment of Conviction and Sentence.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

Lydia M. Valenti

LYDIA M. VALENTI
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by United States mail to ROBERT G. UDELL, Esquire, 310 Denver Avenue, Stuart, Florida 33494 this 5th day of January, 1984.

Lydia M. Valenti

Of Counsel