IN THE SUPREME COURT OF FLORIDA

ALLEN LEE DAVIS,)

Appellant,)

vs.) CASE NO.: 63,374

STATE OF FLORIDA,)

Appellee.)

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

KATHRYN L. SANDS
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellant, Allen Lee Davis, was the defendant in the trial court. Appellee, the State of Florida, was the prosecution. In this brief the parties will be referred to as Appellant and Appellee. Following Appellant's designation, the symbols "R" and "T" will be used to indicate the record and the transcripts, respectively. Appellant's initial brief will be indicated as "AB".

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts as being a substantially true and correct account of the proceedings below. Appellee respectfully notes the following additions or areas of disagreement:

The trial court granted both the prosecution and the defense three extra peremptory challenges each (T 532), so each side had thirteen (13) challenges for the jury proper and one additional peremptory challenge for the alternate jurors. The prosecution exercised nine of its regular challenges and its alternate challenge. The defense exercised twelve of its thirteen regular challenges and did not challenge any of the possible alternates.

On the day after the jury was selected, defense counsel announced that he and Appellant had consulted with each other during the jury selection; that Appellant participated in the decisions regarding peremptory challenges; and that Appellant expressed his satisfaction with the jury selection process and with the jury itself, even considering he had one peremptory challenge left. (T 792).

The murders of Nancy Weiler and her daughters, Kristy and Kathy and the accompanying publicity occurred in May, 1982. Appellant was tried in February, 1983, approximately nine months after the crimes and most of the publicity.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

Appellant attacks the trial court's failure to grant a change of venue pursuant to Appellant's allegations of extensive pretrial publicity. Appellee submits that Appellant has not demonstrated error in the trial court's determination that a change of venue was not necessary in order to select an impartial jury.

A motion for change of venue is a matter addressed to the sound discretion of the trial court, and the trial court's decision will generally be upheld if there is no showing of a palpable abuse of discretion. Straight v. State, 397 So.2d 903, 906 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); Johnson v. State, 351 So.2d 10 (Fla. 1977); McNealy v. State, 17 Fla. 198 (1879). Moreover, the defendant has the burden of coming forward and showing that the setting of trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. Manning v. State, 378 So.2d 274 (Fla. 1979).

The timing of the trial court's determination regarding a change of venue may vary between the presentation of evidence prior to the commencement of the jury selection process, see Rideau v. Louisiana, 373 U.S. 723,

83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Manning, and the attempt to obtain impartial jurors to try the case. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Manning. Cf. Beckwith v. State, 386 So.2d 836, 839 (Fla. 1st DCA 1980) ("requires an actual attempt to seat a jury when the defendant resists a change of venue for trial").

> In some cases, it is not advisable for the trial judge to rule on a motion for change of venue until after the jury selection process actually begins. This is the "acid test" to determine if it is possible to obtain a fair and impartial jury. During the jury selection process, the trial judge is in the best position to make the final decision as to whether a fair and impartial jury can be obtained. He has the opportunity to observe firsthand the prospective jurors during the voir dire examination, to weigh the credibility of their answers, and to judge the state of their minds as well as the general atmosphere in the courtroom and the community.
>
> Judging of this type is an art, not a science. It is not possible to reduce all of the elements considered by a trial judge in such a situation to a computer card and obtain a mechanistic answer. In deciding a motion for change of venue, more is involved than the sterile application of legal principles. The trial judge must also function as the finder of facts.

Manning, 378 So.2d at 279 (Alderman, J., dissenting).

The granting of a change of view is a drastic measure, "a major step which involves considerable difficulty, more delay to the State and a continuation of

severe emotional trauma for the defendant as well as enormous expense ultimately to be borne in large part by the taxpayer." Miami Herald Publishing Company v. Lewis, 383 So.2d 236 (Fla. 4th DCA 1980). While the trial court may include these considerations in his decision, the real test as applied in this case is found in the following excerpt from Kelley v. State, 212 So.2d 27, 28 (Fla. 2d DCA 1968):

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presenting in the courtroom. Singer v. State, (Fla. 1959), 109 So.2d 7; Collins v. (State, Fla. App. 1967) 197 So.2d 571 and cases cited therein.

This test was adopted by the Supreme Court of Florida in McCaskill v. State, 344 So.2d 1276 (Fla. 1977), which added the following:

> The United States Supreme Court affirmed this principle in Murphy v. State of Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), holding that jury exposure to news accounts of the crime with which a defendant is charged does not presumptively deprive the defendant of due process. Further, it held the defendant must show inherent prejudice in the trial setting or facts which permit an inference of actual prejudice from the jury selection process in order to merit a change of venue. No such prejudice appears in this record.

344 So.2d at 1278.

There have been cases involving abuse of the trial court's discretion in venue matters. For example, in Oliver v. State, 250 So.2d 888, 890 (Fla. 1971), the Court announced "that as a general rule, when a 'confession' is featured in news media coverage of a prosecution, . . . a change of venue motion should be granted whenever requested." In that case, "the sole daily newspaper published in the general Tallahassee area featured a transcript of an alleged confession made by Oliver" in which he "implicated himself and others . . ., and he stated a motive for the crime and gave a description of it." 250 So.2d at 889, 890.

In Hoy v. State, 353 So.2d 826 (Fla. 1977), the trial court's refusal to allow a change of venue was upheld despite the defendant's allegation of extensive pre-trial publicity, including two instances of coverage of his alleged confession on the front page of the Clearwater Sun. Distinguishing Oliver, the Hoy court noted that the publication was based not on a verbatim version of the confession as in Oliver but rather on a detective's summary account of differing statements made by Hoy. Also, the area was serviced by more than one newspaper and apparently none of the jurors read the articles in question. Moreover, only six prospective jurors were excused by the trial court due to prior knowledge of the case and the defense exercised only twenty-five of its forty

available peremptory challenges, the latter factor being of similar significance in Dobbert v. State, 328 So.2d 443 (Fla. 1976), where the defense exercised twenty-seven of its thirty-two peremptory challenges. Accord Straight v. State, 397 So.2d 903 (Fla. 1981); Harnum v. State, 384 So.2d 1320 (Fla. 2d DCA 1980).

In further support of its decision, the Hoy court quoted the United States Supreme Court's opinion in Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 44 L.Ed.2d 589 (1975) which held the defendant was not denied a fair trial despite pervasive pre-trial publicity:

> To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.
>
> The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.' Irvin v. Dowd, 366 U.S. [717] at 722, 81 S.Ct. 1639, 6 L.Ed.2d 751. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.
>
> > To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish as impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Id., at 723, 81 S.Ct. 1639, 6 L.Ed.2d 751.

> At the same time, the juror's assurances that he is equal to the task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Ibid.
>
> "The voir dire in this case indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. Some of the jurors had a vague recollection of the robbery with which petitioner was charged and each had some knowledge of petitioner's past crimes, but none betrayed any belief in the relevance of petitioner's past to the present case. Indeed, four of the six jurors volunteered their views of its irrelevance, and one suggested that people who have been in trouble before are too often singled out for suspicion of each new crime - a predisposition that could only operate in petitioner's favor.

Murphy, 421 U.S. at 799-801, quoted in Hoy, 353 So.2d at 828, 829.

In a subsequent case involving abuse of discretion in venue, Manning v. State, 378 So.2d 274 (Fla. 1979), the murder of two sheriff's deputies became the "main topic of conversation" in a small rural community in Columbia County and "[c]overage of this crime by local news media was intense." 378 So.2d at 275. Information released to the press by the sheriff's department and state attorney's office included names of the primary witnesses and the substance of their initial testimony, as well as a discussion of evidence gathered during the investigation, and the Sheriff's and prosecutor's versions of the events. A

remarkable similarity to the instant case is found in defense counsel's attaching to the motion for change of venue "various newspaper articles to the motion, as well as affidavits of fifteen persons, including the defendant, stating that because of bad feelings and prejudice against the defendant and because of the adverse publicity concerning the case, the affiants were convinced by reason of personal observations and knowledge of the conduct and statements by various persons in Columbia County that the defendant could not receive a fair and impartial trial in that county." 378 So.2d at 275. Cf. Singer v. State, 109 So.2d 7 (Fla. 1959) ("many affidavits filed in support of the traverse asserted that the defendant could obtain a fair and impartial trial in the county"). However, one striking difference in Manning was that "[t]he voir dire inquiry established that every member of the jury panel had prior knowledge of the alleged crimes through news media accounts and community discussion. (Emphasis supplied)."

This Court discussed the circumstances of the community as they related to the decision to reverse the conviction:

> The motion for change of venue in this case was amply supported by evidence which established that the community was so pervasively exposed to the circumstances of this incident that the defendant could not secure a fair and impartial trial in Columbia County. Every member of this prospective jury had knowledge of exparte statements of the evidence against the accused. The record further reflects

> that hostility existed in the community against the accused to the extent that it would be difficult for any individual to take an independent stand adverse to this strong community sentiment. The fact that the victims were well-liked caucasian deputies of the local sheriff's department and the accused was a young black male from outside the community clearly magnified the problems involved in securing a fair trial in Columbia County. The facts in this case are clearly distinguishable from the factual circumstances existing in McCaskill v. State, Hoy v. State, Thomas v. State, Kelley v. State, Murphy v. Florida, and Dobbert v. Florida. These were different facts under different circumstances, not the least of which was the fact that this incident occurred in a rural community where it is apparent that the incident has received substantially more attention than if the same incident had occurred in a metropolitan area. Each case must be judged on its own merits as to whether, under the circumstances, the inhabitants of the community are so infected by knowledge of the incident and accompanying prejudice that jurors from the commmunity could not possibly try the case solely on the evidence presented in the courtroom. We have determined from the record in the instant case that the general atmosphere in this rural community was sufficiently inflammatory to require the trial court to grant a change of venue, and his failure to do so constituted an abuse of discretion. (Emphasis supplied).

Widespread publicity about a murder did not deprive Ronald Straight of a fair trial in Jacksonville even though "[f]our-fifths of the prospective jurors, and eight of the twelve jurors who served on the jury, had some prior knowledge of the case." Straight v. State, 397

So.2d 903 (Fla. 1981). Noting the juror's familiarity with the case, this court stated:

> The crucial consideration, however, is not knowledge, but whether such knowledge rendered the jurors prejudiced.

Id. The Court was influenced by the long voir dire proceeding and the fact that the court granted the defense extra peremptory challenges which were not all used. Oliver was distinguished as involving a period of racial unrest and a relatively small community, unlike the circumstances in Jacksonville at the time of Straight's trial.

In this case the venire panel consisted of at least forty-three (43) prospective jurors[1], of which only seven (7) initially acknowledge prior acquaintance with the facts and circumstances of this case. (T 542, 543). Two[2] of those seven served on the jury.[3] (T 543, 774), and both indicated they could serve with an open mind. (T 590, 601,

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[1] The trial judge instructed the clerk to call an initial panel of twenty-one (21) prospective jurors (T544), to which three additions of ten, ten, and two were made. (T 669, 724, 777).

[2] Marilyn Jackson and Doris Arceneaux.

[3] The surnames of the jurors were Richardson, Jackson, Norton, Arceneaux, Griswold, Allison, Shanty, Torrescano, Parker, Creecy, Coleman, Cannon, Murray (alternate), and Gant (alternate).

602, 651, 661, 662). Two other jurors[4] replied affirmatively when asked if they could put aside previous knowledge of the case gained through publicity and could reach a verdict based on the law and evidence presented at trial. (T 600, 609).

The trial court received no positive response to its inquiry as to whether any venireman "could not sit as a fair and impartial juror and render a verdict based on the evidence and the law presented in [the] courtroom." (T 554). The prosecutor initially pointed out to the panel:

> At this stage of the proceedings, we have a duty to both sides, Mr. Tassone and the State, to inquire and what we're really doing is insuring that we get a fair and impartial jury to decide this case for both sides. . . . (Emphasis supplied).

(T 555). The prosecutor also received no response to his similar inquiry regarding "even a flicker of a doubt . . . as to whether or not [each venireman] could sit as a fair and impartial juror in this case." (T 556).

In the process of jury selection, the defense exercised only twelve of its thirteen peremptory challenges for the twelve main jurors and did not exercise its one additional challenge with regard to the alternate jurors. In fact, on the day after the jury was selected, defense counsel stated the following:

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[4] Richardson and Griswold.

> Mr. Davis, at this time let me state I think the record should reflect that the State through Mr. Austin and Mr. Kunz are present and that Mr. Davis is standing beside me and I would like to point out for the record that during the course of the jury selection, Mr. Davis and I had the opportunity to consult with each other and that Mr. Davis participated in the decisions that went to peremptory challenges and Mr. Davis advised me yesterday that he was satisfied with the jury selection, even though there was one peremptory challenge left and that he was satisfied with the jury selection process.

(T 792).

Appellant was tried in an atmosphere undisturbed by any wave of public passion. See Nebraska Press Association v. Stewart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); Irvin v. Dowd, 366 U.S. 717, 728, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Manning, 378 So.2d at 278. Unlike in Manning, the record does not reflect "a strong community sentiment" or "pervasive pretrial publicity." 378 So.2d at 278. In fact, Appellant was tried approximately nine months after the publicity to which he objects.

Returning to the standard enunciated in Kelly, adopted in McCaskill, and reaffirmed in Jackson v. State, 359 So.2d 1190 (Fla. 1978), and Straight, with regard to a motion for change of venue based on widespread prejudicial publicity, the trial court was required to determine

> whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors

> could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

After a somewhat lengthy voir dire in this case, the court established that the jury could fairly try the case, and Appellant, in approving the jury and the jury selection process, apparently agreed. Therefore, Appellant has not established abuse of the trial court's discretion in the matter of change of venue.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE, AND APPELLANT WAIVED ANY OBJECTION TO THIS RULING WHEN HE EXPRESSLY APPROVED THE JURY SELECTION PROCESS AND ACCEPTED THE JURY WITH THE ACKNOWLEDGEMENT THAT HE HAD NOT EXHAUSTED ALL OF HIS PEREMPTORY CHALLENGES.

In this case the prospective jurors were collectively examined by the trial judge as well as by the prosecutor and defense counsel. See Fla.R.Crim.P. 3.300. Appellant expressly accepted the jury and approved the jury selection process, acknowledging that he had not exhausted all of his peremptory challenges. (T 792). Cf. Kalinosky v. State, 414 So.2d 234 (Fla. 4th DCA 1982) [defense did not exercise remaining peremptory challenge to remove juror]; Essix v. State, 347 So.2d 664 (Fla. 3d DCA 1977) [counsel exhausted all peremptory challenges and expressed to the judge his satisfaction with the jury which was ultimately sworn]. Appellant for the first time urges error in the denial of his motion for individual and sequestered voir dire. Cf. Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981) [trial court's excusal of juror for cause could not be raised for first time on appeal].

The purpose of voir dire examination is to obtain a fair and impartial jury to try the issues in the cause. King v. State, 390 So.2d 315, 319 (Fla. 1980); Cross v. State, 89 Fla. 212, 103 So. 636 (1925). The trial judge's

determination of whether to allow voir dire examination individually and outside the presence of the remaining prospective jurors is a matter of the court's discretion. Jones v. State, 343 So.2d 921 (Fla. 3d DCA 1977). Branch v. State, 212 So.2d 29 (Fla. 2d DCA 1968). Cf. Christopher v. State, 407 So.2d 198 (Fla. 1981), cert. denied, 102 S.Ct. 1761 (1981) [manifest error must be demonstrated before trial judge's decision regarding competency of challenge juror will be disturbed]; Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978) [reversal based upon limitation in voir dire examination must be based upon abuse of trial judge's discretion and in absence of demonstrable prejudice, not grounded upon mere speculation, reversal is not proper]. The trial court's decision should "not be lightly overturned." United States v. Carroll, 582 F.2d 942, 946 (5th Cir. 1978).

In an attempt to establish abuse of the trial court's discretion in this case, Appellant speculates that three of the jurors may have hidden their prejudices and that the collective examination of the prospective jurors "virtually guaranteed that any prejudice created by the [pre-trial] publicity would not be discovered." (AB 44). However this position ignores the oath and duty of each venireman, see Loftin v. Wilson, 67 So.2d 185 (Fla. 1953); Story v. State, 53 So.2d 920 (Fla. 1951), cert. denied, 343 U.S. 958, 72 S.Ct. 920, 96 L.Ed.2d, 357, and the

careful examination and observation by the trial court, the prosecution, and defense counsel.

> The test for determining the competence of a juror is not whether he will be able to control any bias or prejudice but rather whether he may lay aside those considerations and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. Singer v. State, supra; McCullers v. State, 143 So.2d 909 (Fla. 1st DCA 1962), cert. dismissed, 155 So.2d 696 (Fla. 1963); § 913.03(10), Fla. Stat. (1979). Where there is any reasonable doubt as to a juror's possessing the requisite state of mind so as to render an impartial verdict, the juror should be excused, Singer v. State, supra, and the defendant given the benefit of the doubt, Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931); Walsingham v. State, 61 Fla. 67, 56 So. 195 (1911).

Leon v. State, 396 So.2d 203, 205 (Fla. 3d DCA 1981).

It should be noted that the cases cited in the defense motion for individual and sequestered voir dire are not factually similar to this case. For example, in United States ex rel. Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973), the jury was already sworn at the time they were questioned about reading newspaper accounts of the crime. Russ v. State, 95 So.2d 594 (Fla. 1957), concerned a petition for writ of coram nobis following a first degree murder trial in which one juror allegedly stated openly to the jury that he had personal knowledge of the defendant's threatening and beating the victim. In Moncur v. State, 262 So.2d 688 (Fla. 2d DCA 1972), the trial judge received a co-defendant's guilty plea in the

presence of the venire from which Moncur's jury was to be selected. The jurors in Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977), were drawn from the same jury venire which sat through the voir dire on the appellant's trial on other charges the previous day. Similarly, in Kelly v. State, 371 So.2d 162 (Fla. 1st DCA 1979), "several members of the jury venire from which the jury was chosen in this case had been present earlier in the week when a jury was chosen for an earlier trial of appellant on different charges."

Appellant did not at trial allege and has not on appeal established any reasonable doubt as to the impartiality of those jurors who were previously acquainted with the triple murder story. Appellant's speculation on appeal is further diluted by his previous expression of satisfaction with the jury selection process and his failure to request sequestered voir dire of those three jurors who now cause concern to him. See Kelly, 371 So.2d at 163. Under the circumstances Appellee submits Appellant has waived this issue or alternatively that Appellant has not demonstrated abuse of the trial court's discretion in the voir dire examination.

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE PROSPECTIVE JUROR LANE FOR CAUSE.

Bearing in mind once again that Appellant expressed approval of the jury selection process and accepted the jury without exhausting his peremptory challenges, we turn to Appellant's third appellate argument involving the trial court's denial of his motion to strike Mrs. Lane for cause. Appellee maintains that there was no error on this point and that even if there were error, it was waived or harmless under the circumstances.

Whether or not a prospective juror is dismissed for cause is a mixed question of law and fact within the discretion of the trial judge, and his ruling will not be set aside unless error is manifest. Singer v. State, 109 So.2d 7 (Fla. 1959); Hawthorne v. State, 399 So.2d 1088 (Fla. 1st DCA 1981). The defendant has a heavy burden of showing abuse of discretion in the denial of the challenge of a juror for cause. Williams v. State, 386 So.2d 538 (Fla. 1980); Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981).

The test for determining the competence of a juror in a criminal case is not whether he or she will be able to control any bias or prejudice, but whether the juror may lay aside those considerations and render a verdict solely

upon the evidence and instructions. Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981).

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. (Emphasis supplied; citations omitted).

Irvin, 366 U.S. at 723.

Whether the juror challenged for having opinion as to issues in a criminal case has such a fixed opinion as will bias his or her verdict is a question of mixed law and fact to be determined on the evidence. Hall v. State, 136 Fla. 644, 187 So. 392 (1939).

In this case, the trial judge, who observed the manner and demeanor of Mrs. Lane, and heard her statements, could properly have determined that no disqualification of this prospective juror was shown. Skipper. Here the trial court listened carefully to the words spoken by Mrs. Lane and how she spoke them, and concluded that despite early discussions of her emotions, Mrs. Lane expressed that she could "listen to the evidence and consider it" and could "give [Appellant] a fair trial."

Defense counsel did not object when the trial court denied his motion to strike Mrs. Lane for cause and he did not "attempt to clarify the juror's attitude as it related to his or her ability to decide the issues impartially."

Paramore, 229 So.2d at 858. Defense counsel could have requested further voir dire examination of Mrs. Lane, but instead defense counsel quickly exercised one of its first peremptory challenges on Mrs. Lane. At the time he accepted the final jury, Appellant had not exhausted all of his peremptory challenges. Appellant now maintains that pursuant to Missouri case law this Court should not consider whether or not he had exhausted his peremptory challenges. See State v. Morrison, 557 S.W.2d 445 (Mo. 1977). Yet this Court in Singer definitely considered that factor when it stated, "In view of the fact that the defendant used all of his peremptory challenges, denial of the challenge for cause directed to Mr. Shaw was reversible error." 109 So.2d at 25. See also Paramore, 229 So.2d 855, 858 (Fla. 1969) [in sustaining the triel judge's excusal of jurors for cause, the Court considered the fact that "the State had more than enough remaining peremptory challenges available to have removed those prospective jurors had the trial judge declined to do so"].

Based on the foregoing reasoning, Appellee submits that Appellant has not established abuse of the trial court's discretion in denying Appellant's motion to strike Mrs. Lane for cause. Inasmuch as Appellant voluntariy and expressly stated his satisfaction with the jury and the jury selection process, and considering the fact that Appellant did not exhaust his peremptory challenges,

Appellee submits that if this Court determines that Mrs. Lane should have been excused for cause, this Court should characterize any error in the trial court's failur to do so as either waived by Appellant or harmless. See § 924.33, Fla. Stat. (1981).

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN APPELLANT'S FATHER ON RE-DIRECT EXAMINATION REFERRED TO APPELLANT'S POLYGRAPH EXAMINATION.

Once again Appellant speculates or asserts a "strong likelihood" (AB 68) and a "mild implication" (AB 65) in this case. This time Appellant alleges that he was deprived of the presumption of innocence by his father's brief reference to Appellant's own statement to Detective Kessinger, "Let's go take a lie detector test and get it over with." (T 1271). Appellee submits that the general reference to such a possible event is not inadmissible evidence of a polygraph examination and that pursuant to defense counsel's request, the jury was properly admonished to disregard the apparently unintentional quip by Appellant's father.

Appellant's brief continually refers to results of polygraph tests and the premise that such results are regarded as "presumptively accurate." (E.g., AB 61). Appellant even notes that in Walsh v. State, 418 So.2d 1000 (Fla. 1982), the State was entitled to a mistrial where the jury heard that the defendant had passed a polygraph examination. (AB 62, n. 19). Walsh apparently knew that the polygraph results were inadmissible but improperly commented about his favorable results while he was on the witness stand. 418 So.2d at 1002.

In Kaminski v. State, 63 So.2d 339 (Fla. 1952), this Court disapproved the admissibility of lie detectors tests and stated:

> We find, without a single exception, that every court of last resort that has been called upon to decide the question has ruled that results obtained from the so-called lie detector test are not admissible as evidence.

To this the Second District Court added:

> The mere fact that a jury may be aware of defendant's having taken a lie detector test or may be apprised of facts from which they might infer such a fact is not error when the results of the test are not thus indirectly introduced. Moody v. State, 170 Tex.Cr.R. 637, 343 S.W.2d 698 (1961); People v. Sammons, 17 Ill.2d 316, 161 N.E.2d 322 (1959); People v. Flowers, 14 Ill.2d 406, 152 N.E.2d 838 (1958).
>
> The Flowers case is similar to the case sub judice in that statements obtained after a lie detector test were admitted into evidence and the examiners testified to the fact that the statement was given by the defendant. However, unlike the instant case where inference is urged as the basis for the jury's conclusion that the witness was a polygraph operator, the Flowers case involved a direct statement to that effect by the witness. The Illinois Court wrote:
>
> > "It is nowhere suggested in the evidence before the jury in this case that the defendant submitted to a lie-detector test, or that this statement was obtained in preparation for such a test. One of the examiners did testify that he is employed as chief polygraph examiner for the State Bureau of Identification. [But] * * *

> The evidence here does not suggest a lie-detector test to the jury to the prejudice of the defendant. The one witness volunteered that he was a polygraph examiner, but did not negate the fact that he was associated with the State Bureau of Identification and might do many other types of investigation. We have determined here that the evidence justified the verdict and judgment. Such a case will not be reversed for errors in the admission of evidence unless they are harmful. People v. Raymond, 296 Ill. 599, 130 N.E. 329. The error here, if any, is minor and certainly not reversible."
>
> On the basis of an analysis of the cases hereinbefore discussed we conclude that while neither the results of a lie detector examination nor testimony which indirectly or inferentially apprises a jury of the results of a lie detector examination is admissible into evidence, the mere fact that the jury is apprised that a lie detector test was taken is not necessarily prejudicial if no inference as to the result is raised or if any inferences that might be raised as to the result are not prejudicial.

Johnson v. State, 166 So.2d 798, 804-805 (Fla. 2d DCA 1964). Accord, Dean v. State, 325 So.2d 14 (Fla. 1st DCA 1975).

In this case there was no evidence that a polygraph examination was administered to Appellant and thus there was no evidence of any results. Still Appellant contends that the prejudicial inference as to the result is possible even from a reference in the future tense. (AB 63).

In support of this position, Appellant cites some cases in which the question or evidence was clearly intended to invoke such a prejudicial inference. See, e.g., Crawford v. State, 321 So.2d 559 (Fla. 4th DCA 1975); State v. Descoteaux, 614 P.2d 179 (Wash. 1980).

Yet in Sullivan v. State, 303 So.2d 632 (Fla. 1974), this Court affirmed a conviction even where the prosecutor deliberately elicited a reference to a polygraph examination of the witness McLaughlin, a state witness and co-perpetrator of the crime for which Sullivan was charged. In comparing Sullivan to the situation in Kaminski v. State, 63 So.2d 339 (Fla. 1952), the court stated:

> In Kaminski, the witness clearly informed the jury that he had taken a polygraph test, defense counsel carefully attempted to cure the error at the trial court level, and the State's case depended entirely upon the testimony of the witness, whose credibility had been seriously shaken both by cross-examination and by the testimony of other State witnesses. None of these factors is present in the instant cause, McLaughlin's testimony never having been seriously shaken, a large body of other evidence of appellant's guilty having been introduced, and, most importantly, McLaughlin never clearly stating that he had already taken the polygraph test. Indeed, the one ambiguous answer [That I would have to have taken a polygraph test and passed it] noted above is the sole reference to the polygraph.

Sullivan, 303 So.2d at 634, 635.

The Sullivan court pointed out the various interpretations possible by the jury and further stated:

> We cannot know how the jury construed his answer, or what weight was given to it; therefore to assert that it was construed as meaning he had already passed it would be pure speculation on our part. Reversible error cannot be predicated on conjecture. Singer v. State, 109 So.2d 7 (Fla. 1959).
>
> * * *
>
> We also note that the witness never referred to the actual results of the polygraph test in any manner, and that the only mention of a polygraph test was the one answer discussed above. It all becomes too tenuous to support harmful error that would likely have produced a different results if not present.

303 So.2d at 635, 636.

Appellee submits that the instant case is sufficiently similar to Sullivan to require the determination that Donald Davis' quip was not reversible error.

> In order to characterize the witness's reference to a polygraph examination as prejudicial and hence reversible error, it is necessary to indulge in both conjecture and the pyramiding of inferences. See Sullivan v. State, Fla. 1974, 303 So.2d 632; Johnson v. State, Fla. App. 1964, 166 So.2d 798.

Crawford v. State, 321 So.2d 559, 562 (Fla. 4th DCA 1975) (Mager, J., dissenting). Considering the substantial amount of other evidence of Appellant's guilt and the fact that the jury never was presented evidence that Appellant actually had taken a polygraph examination, Appellee submits that the admonishment to the jury requested by the

defense was sufficient to render Mr. Davis' statement harmless. Therefore, Appellant was not sufficiently prejudiced so as to be deprived of his presumption of innocence.

ISSUE V

APPELLANT WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR BIFURCATED TRIAL BY THE PROSECUTORIAL COMMENTS DURING THE PENALTY HEARING IN WHICH DEFENSE COUNSEL OBJECTED ONLY ONCE.

Appellant argues that the prosecutor's closing argument in the penalty phase was of constitutional magnitude requiring a new sentencing hearing despite the fact that defense counsel objected to only one comment. Appellee submits that, subject to the one noted exception, Appellant failed to preserve for appellate review the issue of other closing comments by the prosecutor and that Appellant has not demonstrated fundamental error in this matter.

The prosecutor's closing comments in the sentencing phase are located in pages 1805 through 1831 of the transcript and involved nearly forty-five minutes of argument. (T 1833). In his final arguments to the jury, the prosecutor commented on the evidence presented in the penalty hearing and reminded the jurors that their oaths included a statement that they agreed to decide the issue in this case on the law and the evidence. (T 1810, 1811, 1813, 1830).

Thereafter defense counsel presented his closing remarks and conceded that the murders of Nancy Weiler and her two young daughters was "the work of a man possessed . . ., in short, the work of a mad man." (T 1834). The

defense preceded to use this characterization to its benefit by noting that mad men and possessed individuals are not killed but rather provide a purpose for such facilities as the state hospitals at Chattahoochee and Marianna and the St. Johns River Hospital. (T 1835). Defense counsel characterized Appellant's perpetration of the murders as "actions of a human being beyond any rational explanation." (T 1835).

After the jury charge, defense counsel objected to only one portion of the prosecutor's closing argument, an alleged Golden Rule comment. (T 1847). The trial court overruled this objection, "finding the comment by counsel in the manner and context in which it was made could not have been interpreted as violation of the Golden Rule." (T 1848).

This Court has repeatedly held that an appellant is precluded from asserting the argument regarding allegedly improper prosecutorial comments when the appellant has failed to object to such comments at trial. Gibson v. State, 351 So.2d 948 (Fla. 1977); Songer v. State, 322 So.2d 481 (Fla. 1975); State v. Jones, 204 So.2d 515 (Fla. 1967); Tillman v. State, 44 So.2d 644 (Fla. 1950). Appellant did not contest prosecutorial arguments, other than the alleged Golden Rule statement, and therefore he should not be allowed to raise this issue for the first time on appeal.

Section 921.141(1), Florida Statutes (1981), provides the following with regard to bifurcated capital trials:

> In the proceeding [on the issue of penalty], evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence. (Emphasis supplied).

Just as the rules of evidence are somewhat relaxed for the advisory sentence hearing in a capital case, Appellee submits that the standard for reviewing prosecutorial arguments in this phase should also be less stringent. Section 921.141(1) allows the prosecutor to introduce evidence of the defendant's character at that stage, and the prosecutor should be able to discuss or comment on that character evidence.

As Justice Boyd noted in his dissent in Teffeteller:

> Under the current capital felony sentencing law, the trial proceeds in two stages, with a guilt phase followed by a sentencing proceeding. Thus the jury does not hear evidence and argument directed specifically at the question of sentencing until the defendant's guilty of a capital felony has already been determined. There is thus no danger that a prosecutor's inflammatory remarks on the question of sentence will improperly influence the jury on the question of guilty or innocence.
>
> Another major difference between the old and the new sentencing procedures is of course that under current

> law the jury's sentencing determination is advisory only. The trial judge imposes the sentence. Part of the judge's function is to guard against any improper emotional impact on the determination of the sentence and to assure that the sentence imposed is based upon objective evaluation of the crime and the offender.
>
> * * *
>
> Under the current sentencing law, we have rejected claims of improper comment at the sentencing phase where the comments did not appear to have prejudicially affected the final sentencing determination by the judge. Breedlove v. State, 412 So.2d 1 (Fla.), cert. denied, 103 S.Ct. 184 (1982).

(8 FLW at 308, 309).

Comments of counsel during the course of a trial, including a bifurcated trial such as this one, are controllable in the discretion of the trial court, and an appellate court will not overturn the exercise of such discretion unless a clear abuse has been made to appear. Teffeteller v. State, _____ So.2d _____ (Fla. 1983) [No. 60,337, 8 FLW 306, 307]; Breedlove v. State, 413 So.2d 1 (Fla. 1982); Thomas v. State, 326 So.2d 413 (Fla. 1975); Paramore v. State, 229 So.2d 855 (Fla. 1969), modified 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963).

In the recently decided Teffeteller case, this Court reversed the death sentence because of "inexcusable

prosecutorial overkill." In that case the prosecutor repeatedly predicted that Teffeteller would kill again if sentenced to life imprisonment:

> What you have to be concerned with is this, this Defendant, if you folks recommend mercy and that is the sentence that is imposed, will be eligible for parole in twenty-five years. He's 27 now. He's 52 when he gets out or when he is considered for parole. And you better believe that he will be considered for parole, given the condition of the parole releases in this State.
>
> You look at that. This Defendant released on parole. What do you think is going to happen? He's going to kill again. You better believe he's going to kill again.
>
> He will go after Donny Poteet. He will go after Rick Kuykendall. Does he have to kill again before you think it's the proper case? I don't think so.
>
> You must know that this Defendant will kill again and when he does it will be too late.
>
> * * *
>
> [T]his Defendant will kill again if he is given a chance. I don't see how you can find otherwise.
>
> Don't give him that chance. Don't have to realize after he is paroled and after he kills someone else, perhaps Donald Poteet, perhaps Rick Kuykendall or who knows who he will go after.
>
> * * *
>
> Know that your determination will have a deterring effect on this Defendant and know that it will keep him from being able to kill again. Don't let it happen. Don't let it happen.

> Don't let Robert Teffeteller kill again.

(8 FLW at 307).

This Court expressed its disapproval:

> The remarks of the prosecutor were patently and obviously made for the express purpose of influenceing the jury to recommend the death penalty. The intended message to the jury was clear: unless the jury recommended the death penalty, the defendant, in due course, will be released from prison and will kill again, this time two of the witnesses who testified against him and maybe others. There is no place in our system of jurisprudence for this argument.

(8 FLW at 307).

However in the present case, the prosecutor made no predictions. Rather he requested that the jury recommend the death penalty "for [Appellant's] killing Nancy, Kathy and Kristy Weiler and for no other reason." (T 1829).

In Darden v. State, 329 So.2d 287 (Fla. 1976), cert. dismissed, 430 U.S. 704 (1977), this Court stated the following:

> The law required a new trial only in those cases in which it is reasonable evidence that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done or in which the comment is unfair.

329 So.2d at 289. In that case the judgments and sentences, including a death penalty, were affirmed. The disputed comments during trial included the prosecutor's reference to the defendant as an animal. When prosecutorial arguments at trial are challenged, "each case must

be considered upon its own merits and within the circumstances pertaining when the questionable statements are made, and, if there is ample basis in the record to support the remarks, a conviction will be affirmed." Darden, 329 So.2d at 291.

In Stewart v. State, 51 So.2d 494 (Fla. 1951), a new trial was awarded because the prosecuting attorney made a remark that was characterized by this Court as "a pure gratuity without any basis in the record for it." It is not difficult to understand that reversible error was committed by the prosecutor's statement: "The time to stop a sexual fiend and maniac is in the beginning and not to wait until after some poor little child or some little girl lost her life * * * or [was] mutilated."

In McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982), the objectionable comment at trial was "Ladies and gentlemen, after hearing the facts, if you want to let Larry McMillian walk out of here, if you want to let this kind of horrible crime go on in Dade County, Florida -." The Third District Court quoted this Court's opinion in the capital case of Pait v. State, 112 So.2d 380 (Fla. 1959), for the standard for reversal predicated upon improper argument:

> [W]hen an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as grounds for reversal. . . .

409 So.2d at 198. The remark in McMillian clearly suggested that an acquittal of the defendant would lead to his committing more crime.

The prejudicial comments in Sims v. State, 371 So.2d 211 (Fla. 3d DCA 1979), were two remarks of "Go get another one," which "in the context in which [they were] made, created the unmistakable impression that appellant would commit another murder should he be acquitted." 371 So.2d at 212. These remarks were found to be sufficiently prejudicial and inflammatory to the jury so as to deprive the defendant of a fair trial.

Similarly in Porter v. State, 347 So.2d 449 (Fla. 3d DCA 1977), the prosecutor repeatedly implied that the defendant if acquitted, would return to the streets to sell more heroin. And in Russell v. State, 233 So.2d 154 (Fla. 4th DCA 1970), the prosecutor projected that if the defendant were acquitted, "another innocent party could possibly get killed" and "we are going to have a breakdown in society and we are going to have people getting stabbed all over Orange County" 233 So.2d at 155.

Likewise in Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968), the prosecutor suggested new crime would occur upon the defendant's acquittal:

> This is your community. If you believe that Deputy Booth is lying on that witness stand, if you think that he's mistaken then you come in with a verdict of an acquittal and let him get back out in your community and handle more morphine.

In the case of Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976), trial evidence disclosed a single drug transaction between the defendant and a police officer but the prosecutor described in detail the spread of drug trafficking and drug abuse in this country in the previous ten years. The prosecutor also commented on the defense counsel's role and injected his own personal belief about prosecutions.

In Lewis v. State, 377 So.2d 640 (Fla. 1979), the appellant objected that the following remark constitued a "golden rule" argument:

> Now, it you just shot a man in an alleged self defense, wouldn't you tell that to the deputy? Instead of, "He's been bugging me a long time and I'm tired of it and I shot him."

This Court found the disputed statement constituted a proper comment upon the credibility of appellant's defense, which was within the bounds of the evidence presented in the case. Distinguished, however, were those cases where prejudicial error was found in the prosecutor's irrelevant request that the jury consider whether they, or others, would be the defendant's next victims if they failed to convict him. See McMillian; Sims; Porter; Reed; Chavez; Russell; Grant v. State, 194 So.2d 612 (Fla. 1967); Stewart.

In Johnson v. State, 140 Fla. 443, 191 So. 847 (1939), the following prosecutorial comments were not

approved by this Court but were not found so improper as to warrant reversal of a conviction of manslaughter:

> No wonder we have more murders in the little State of Florida than there are in the whole of England . . . . We are going to continue to have life treated as a scrap of paper in the State of Florida until juries with backbones rise up and say we are going to stop it.

In Harris v. State, 414 So.2d 557 (Fla. 3d DCA 1982), the judgments and sentences were reversed because of prosecutorial misconduct:

> [T]he prosecutor in closing argument to the jury (1) expressed thanks to the jury on behalf of the victim, (2) referred to the crime on the rampage in the community, (3) referred to the victim's tearful breakdown on the witness stand and implied that such was due to tactics of defense counsel, and (4) expressed his personal belief in the guilt of appellant as to both robberies.

414 So.2d at 558.

Appellee also submits that the prosecutorial remarks in this case cannot be compared to those which "plumbed depths never before presented" as in Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), cert. denied, 386 So.2d 642 (Fla. 1980). In that case, despite the defense that Peterson had not sold narcotics, the prosecutor referred to "pushers" and the "slime" in which they dwell, and stated the jury was to decide whether pushers "should continue . . . to go out and do it." The following

excerpt from the prosecutorial address in Peterson further illustrates why the case was reversed:

> This is America. That's how America gets abused. That's why it's in the shape it is in today, because we have to put up with stuff like that, guys like that.
>
> He told you about it. You heard America. All we have is 17 hits of heroin. "Go ahead and sell it, sell it to whoever you want to sell it to, 17 injections of heroin."
>
> Yes, this is America. Let's attack the cops some more. Let's talk about that. Let's talk about the defendant's defense here in America.
>
> You know what we're going to do? At the end of the trial I'm going to take two jurors and go back in the jury room, okay, and I'm going to take a gun, and I'm going to kill one of the jurors, okay, and then when the second juror comes out and takes me to trial ---
>
> * * *
>
> --I'm going to get on the stand and say I didn't to (sic) it, I deny it.

376 So.2d at 1232, 1233. Even though the trial court at that point reminded the prosecutor that "argument should be confined to the testimony as it has been in the record and reasonable comment thereon," the prosecutor continued to abuse his wide latitude by making tasteless personal references as to the defendant and his attorney as well as other improper comments.

Appellee submits Peterson and most of the other cases cited by Appellant are beyond the realm of the prosecu-

torial address in this case. The State Attorney fairly restricted his comments to the evidence in the record and reasonable comments thereon. He did not "wave the flag" or suggest imaginary horrible scenes to the jury, nor did he project that a life sentence would results in Appellant's freedom to rampage and stalk the community. The prosecutor certainly did not attempt to pervert or misstate the evidence or to influence the jury by the statement of facts or conditions not supported by the evidence. See Washington v. State, 86 Fla. 533, 98 So. 605 (1923). Nor did the prosecutor appeal to the jury for sympathy as in Harper v. State, 411 So.2d 235 (Fla. 3d DCA 1982) ("all [Harper] did was kill a wino and he is sorry and so is [the victim's] wife and three children. They are sorry, too."), or in Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983) ("I ask you for justice both on behalf of myself and the people of the State of Florida, also on behalf of [victim's] wife and children"). As the Edwards court noted, in both Harper and Edwards, "there was no record evidence that the victim had a wife and children." 428 So.2d at 359. Rather the prosecutor pointed to specific testimony about Appellant's prior criminal history, and the triple murders, factors properly considered by the jury in the penalty hearing. In other words the prosecutor discussed past events proven on the record, not future possible consequences.

Appellee submits that the prosecutor's closing

comments, when examined in the context of the facts and circumstances of the murders as shown by the evidence, see Teffeteller, 8 FLW at 308 7(Boyd, J., dissenting); Gibson; Darden v. State, 329 So.2d 287 (Fla. 1976), cert. dismissed, 430 U.S. 704 (1977), were not so prejudicial as to require a new trial. The evidence of the three murders was shocking, and the prosecutor's remarks were permissibly fair comments on the evidence. See Darden. Appellant has not established fundamental error nor has he demonstrated that the prosecutor's comments substantially harmed or materially prejudiced Appellant so as to warrant a new sentencing hearing. Even if Appellant had objected to the prosecutorial comments in the sentencing phase, and this Court determined the closing comment were error, Appellee submits that the overwhelming evidence of Appellant's guilt would render the harmless error doctine applicable in this case. Darden; Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977); Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973).

CONCLUSION

Based on the foregoing reasons and citations of authority, Appellee respectfully submits that the judgments and sentences of the trial court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Kathryn L Sands

KATHRYN L. SANDS
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 13th day of September, 1983.

Kathryn L. Sands

Kathryn L. Sands
Assistant Attorney General

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