IN THE SUPREME COURT OF FLORIDA

ROBERT LACY PARKER,)

Appellant,)

vs.) CASE NO.: 63,700

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

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This case involves
a capital sentence

TABLE OF CITATIONS

Other Authority:

TOPICAL INDEX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT OF FLORIDA

ROBERT LACY PARKER,	)	
Appellant,	)	
vs.	)	CASE NO.: 63,700
STATE OF FLORIDA,	)	
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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The State of Florida accepts the Preliminary Statement set forth in the initial brief and will use the designations set forth therein. Appellant's brief will be referred to as "AB" followed by the appropriate page number(s).

The State wishes to inform this Court that this case was the topic a recent magazine article. "Our Troubled Criminal Justice System: Plea bargaining - The Tough Choices Prosecutors Must Make" Life, Vol. 6 No. 10 October 1983, pp. 32-43. The author was present during the trial and photographs were taken with permission by all parties. (T 348-350)

STATEMENT OF THE CASE AND FACTS

The State of Florida accepts the Statement of the Case of the initial brief as a substantially accurate recitation of the events of this cause.

The Statement of Facts however is presented in narrative form from the defendant's perspective. The trier of fact has rejected Appellant's version of events. On appeal, the facts must be viewed, in light most favorable to support the conviction.[1]

Certain important factual representations, additions, and/or clarifications are contained in the argument section to which the specific facts best relate. This is not an attempt to circumvent the established rules of procedure, but is offered for brevity and clarity given the voluminous record, multiple issues presented, and the limitations imposed by this Court's Order of December 14, 1983. See, Rule 9.210(c), F.R.App.P.

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[1] First Atlantic National Bank of Daytona Beach v. Cobbett, 82 So.2d 870 (Fla. 1955); Arnold v. Taco Properties, Inc., 427 So.2d 216, 219, n. 13 (Fla. 1st DCA 1983).

POINT I

THE TRIAL JUDGE DID NOT ERRONEOUSLY INSTRUCT THE JURY UPON THE LAW OF THE INDEPENDENT ACT UNDER THE FELONY MURDER DOCTRINE.

ARGUMENT

Appellant submitted 40 proposed jury instruction to the trial judge for consideration. (R 325-361) In brief, Appellant challenges the trial judge's failure to give three defense requested jury instructions, nos. 36[2], 37[3], and 38[4]

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2 DEFENSE REQUESTED JURY INSTRUCTIONS NO. 36

For a conviction under felony murder, there must be direct causal connection between the homicide and the felony. Something more than mere coincidence of time and place between the two must be shown; otherwise, the felony-murder rule will not be applicable. There is therefore no criminal liability for murder on the part of a co-felon when the homicide was a fresh and independent product of the mind of one of the other co-felons, outside of, or foreign to, the common design.

Mumford v. State, 313 A.2d 563 (Md. App. 1974).

(R 361)

3 DEFENSE REQUESTED JURY INSTRUCTION NO. 37

Under the law of felony-murder, there is no criminal liability where the homicide was a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design, or where it did not result from something which was fairly within the common enterprise, and which might have been expected to happen if occasion should arise for anyone to cause it.

26. Am Jur. 205, Homicide §68

Bryant v. State, 412 So.2d 347 (Fla. 1982).

(R 362)

4 DEFENSE REQUESTED JURY INSTRUCTION NO. 38

In felony murder, there is no criminal responsibility for murder on the part of an accomplice if the homicide is a fresh and independent product of the Killer's mind, outside of, or foreign to, the common design.

The reason for the denial was the trial judge's belief that the proposed instruction were "covered in the standard jury instructions." (T 2090-2091) Trial counsel's entire argument in support of each proposed instruction[5] is as follows:

> Number thirty-seven.
>
> . . .
>
> MR. LINK: We feel this is a statement of independent interviewing act defense to felony murder and should be given.
> THE COURT: Number thirty-eight.
>
> . . .
>
> MR. LINK: This is a statement of the law in another matter similar to the previous two instructions. I think some instruction along these lines should be given.

(T 2090-2091)

The argument now advanced in brief was not presented to the trial judge. Appellant did not argue a deprivation or inability to argue certain defenses to the jury. An appellant may not raise distinctly different grounds on appeal. North v. State, 65 So.2d 77 (Fla. 1953); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Fla.R.Crim.P. 3.390(d). (T 2000-2012) Likewise, an appellate court will not review issues raised for the first time on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978); State v. Barber, 301 So.2d 7 (Fla. 1974); State v. Jones, 204 So.2d 515 (Fla. 1967). The State submits this point has not been properly preserved for appellate review.

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4 cont.

> Rex v. Plummer, Kel. 109, 84 Eug. Rep. 1103 (K.B.1700); Williams v. State, 81 Ala. 1, 1 So. 183 (S.Ct. 1887); People v. Kauffman, 152 Cal. 331, 92 P. 861 (S.Ct. 1907); State v. Keleher, 74 Kan. 631, 87 P. 738 (S.Ct. 1906); State v. Taylor, 173 La. 1010, 139 So. 463 (S.Ct. 1932); People v. Wood, 8 NY 2d 48, 201 NYS 2d 328, 167 NE 2d 736 (App. 1960); Mumford v. State, 19 Md. App. 640. 313 A.2d 563 (App. 1974); 1 Wharton, Criminal Law and Procedure §252 at 547 (Anderson ed. 1957); 40 Am. Jr. 2d, Homicide, § 36, at 327 (1968).
>
> (R 363)

5 Counsel did not advance an argument as to proposed instruction no. 36. (T 2090)

The trial judge gave the standard jury instruction on felony murder in the first degree. (T 2000-2012; 2287-2294) A trial judge is not required to repeat a charge substantially covered by charges already given. Askew v. State, 118 So.2d 21 (Fla. 1960); Mackiewicz v. State, 114 So.2d 684 (Fla. 1959); Sanders v. State, 73 So.2d 292 (Fla. 1954); Raker v. State, 284 So.2d 454 (Fla. 3d DCA 1973); Wells v. State, 270 So.2d 399 (Fla. 3d DCA 1972). This Court has previously stated that a refused jury instruction should be considered in connection with the charges given. Blackwell v. State, 86 So. 224 (Fla. 1920).

Appellant relies upon Bryant v. State, 412 So.2d 347 (Fla. 1982) in support of his argument that proposed instruction no. 37 was improperly denied. (R 362) In Bryant v. State, the deceased victim was found tied to the side of the bed in a kneeling position. He died of asphyxia by strangulation and had been sexually assaulted in a violent manner. The apartment had been burglarized and Bryant's fingerprints were found inside. Bryant admitted that he had agreed to burglarize a vacant apartment yet he stated he was surprized to find the victim tied to the bed upon his entry. Bryant insisted the victim had been alive when he departed the apartment leaving his accomplice inside. Bryant argued the jury could have decided the murder occurred not pursuant to the robbery, but in connection with the subsequent sexual assault which was an independent act by the accomplice.

Appellant submits a similar argument here, but the factual circumstances support a differing conclusion. Appellant did not leave the premises while the victim was alive. The murder did not result as the product of an independent and subsequent felony. Padgett's murder was committed pursuant to a kidnapping while Parker was present. (T 2000) Appellant acknowledges his participation in that criminal conspiracy. (T 1844, 1494) Hence he is

accountable for the murder committed in furtherance of that scheme regardless of whether he intended the separate act or not. This is because the felony murder rule and the law of principles combine to make a felon liable for the acts of his co-felons. Bryant v. State at 350; Adams v. State, 341 So.2d 765 (Fla. 1976) cert. denied 434 U.S. 878 (1977); Swan v. State, 322 So.2d 485 (Fla. 1975). Appellant's contention is clearly dispelled by this Court's opinion in Enmund v. State, 399 So.2d 1362, 1368-1371 (Fla. 1981). The evidence presented at trial supports the giving of the standard felony murder instruction. Parker knew death, he was present aiding and abetting the commission of the kidnapping; therefore he is guilty of first degree murder. Enmund at 1370. Section 782.04(1)(a), Florida Statutes.

The arguments Appellant maintains were impossible jury considerations were permissible under the instructions given. (T 2287-2294) The instructions as a whole clearly and adequately enabled the jury to consider the theory of the defense. Ortega v. State, No. 82-1562 (Fla. 3d DCA October 4, 1983) [8 FLW 2464] and caselaw cited therein. The record reflects that the arguments set forth in brief were presented to the jury panel during closing. (T 2191-2248) Appellant steadfastly maintained he was a non-active and unknowing participant in the murders.

A new trial is not required.

POINT II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT DURESS IS NOT A DEFENSE TO HOMICIDE.

ARGUMENT

Appellant argues that the trial court erred in giving the following jury instruction:

> Coercion or duress is not available as a defense in a case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or attempted murder of an innocent third party.
>
> Cawthon v. State, 382 So.2d 796.

(R 320)

In granting the State's requested instruction, the court relied upon Cawthon v. State, 382 So.2d 796, 797 (Fla. 1st DCA 1980); Hall v. State, 136 Fla. 644, 187 So. 392 (1932) and Wright v. State, 402 So.2d 493 (Fla. 3rd DCA 1981). Cawthon v. State involved a contract murder. Following arrest, the defendant admitted the murder was by agreement for which he would be paid $1,000. At trial the defendant testified that he agreed to commit the murder only because of threats of harm to his immediate family. In analyzing the threats, the First District Court of Appeal reasoned that only "possible future harm" was involved and the defendant had adequate time to warn his relatives of the threats and to contact the appropriate authorities. Id. at 797. These alternative possibilities are also present in the instant cause (even under Appellant's version of events). Therefore as a matter of law, the defense of duress was not applicable. The District Court opined:

> The coercion defense is not available in a case of homicide or attempted homicide.[2] The coercion defense has received recognition in two Florida cases.[2] Hall involved the use of the defense in a perjury trial. Koontz involved an attempted robbery. The defense has never been recognized in a Florida case involving homicide or attempted homicide. The general authority is that coercion does not excuse or justify the murder or attempted murder of an innocent third party.[3] We align ourselves with that general authority.
>
> [3]See, e.g., 22 C.J.X. Criminal Law § 44 and Perkins, Criminal Law, Compulsion, at 951.

Id. Thus the instruction is premised upon a truthful statement of the law. See, also, Wright v. State at 497.

In brief, Appellant advances three separate grounds as to why the court should not have granted the State's request. (AB 34-36) These specific arguments were not presented to the trial judge; instead counsel argued the instruction was "too general. Coercion is a defense to felony murder." (T 2119) The foreign authority cited herein was not presented.[6] The trial court invited additional comment but none was provided.

In Wright, the Third District unhesitatingly adopted the rule that duress is not a defense to intentional homicide either for a principle or an aider and abettor. Id. at 498, see also, note 8. Nevertheless the District Court reasoned that where duress is offered as a defense to first degree murder, duress may be viable as a defense to the underlying felony. Id. at n. 8. The trial judge found this comment to be equivocal and insufficient to change the law of the land.

The critical question under this theory is whether Appellant participated in the underlying felony. Goodwin v. State, 405 So.2d 170, 172 (Fla. 1981); Enmund v. State at 1370. Appellant claims he did nothing more to assist in the murder of Nancy Sheppard than to stand up so that she could get out of the car. (c.f. R 491-492) He insists that his chief culpability lay in his failure to prevent the killing which took place in his presence. (AB 33). This theory was contradicted at trial by Appellant's own testimony[7] in which he acknowledged that he: knew of Groover's plan; believed Long knew of the plan; was the person to whom Groover owed drug money (and Padgett in turn owed Groover); participated in the kidnapping and murder of Padgett. Sheppard was

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6 See, cases cited at AB 33-34.

7 The State is not accepting Appellant's version of the facts, but assuming arguendo, Appellant's participation in the murder and underlying felony is apparent.

killed to cover up that murder. Thus even under Appellant's theory, he is a perpetrator of the underlying felony and a principle of the homicide. Goodwin v. State at 172; Adams v. State at 768; Enmund v. State.

This is corroborated by other evidence. Billy Long testified that Appellant and Groover sent Elaine Parker into the Sheppard home under a pretext to get the young girl. (T 1253) Appellant ordered Long to kill Sheppard or he would be laying in the ditch with Padgett's body. (T 1257, 1404) Appellant's wife, Elaine, reinforced the threat while handing Long a .22 caliber pistol. (T 1260) Long shot the girl twice; Groover and Appellant urged him to shoot again. At their urging, Long fired until the firearm wouldn't shoot anymore. (T 1260-1261) Long testified that Appellant took Groover's knife and cut the girl's throat; Appellant also took her necklace and class ring and threw her in the ditch next to her boyfriend's body. (T 1261, 1410-1411, 1427-1429).

By the time of Sheppard's death, two murders had been committed in Appellant's presence. He knew death was imminent and could have removed himself from the continuing episode. Enmund v. State.

Appellant mistakenly relies upon Goodwin v. State. In Goodwin, the defendant requested and was given instruction on duress which was his defense. Parker maintained at trial that duress would not be argued as a defense. Instead he argued the instruction was improper and misleading. (T 2121) In closing, Appellant argued duress to the jury who obviously rejected the theory.

It is a well settled legal proposition that a defendant is entitled to have the jury instructed on the law applicable to the theory of his defense. Motley v. State, 20 So.2d 789 (Fla. 1945); Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976) cert. denied 339 So.2d 1172 (Fla. 1976); Smith v. State, 424 So.2d 726, 732 (Fla. 1982). However, this theory applies only when there is sufficient evidence introduced to support that theory. The testimony adduced

at trial in the instant cause clearly negates a defense of duress or coercion. Further Appellant's contention that he did not participate in the murder, but did nothing to prevent it out of fear for his own and his family's safety, is not supported by the record. (T 2121-2122, 2237) (AB 35)

Duress may appear viable under the facts alleged in Appellant's brief; however, when considered in light of the totality of the testimony and the record, such a defense is untenable. The evidence adduced at trial simply fails to establish a threat of imminent or impending harm to Appellant or to a member of his family. The possibility of fear or harm is unreasonable when viewed in conjunction with Appellant's actions prior to, during and after the three murders. Appellant had repeated and ample opportunity to remove himself from the circumstances and from Groover's presence. It is clear from the record that Appellant elected not to do so when opportunity arose.

POINT III

APPELLANT HAS FAILED TO ESTABLISH AN ABUSE OF JUDICIAL DISCRETION IN THE ADMISSION OF SIMILAR FACT EVIDENCE WHERE THE EVIDENCE WAS COMPETENT AND RELEVANT TO PROVE IDENTITY, MOTIVE, INTENT, AND GENERAL PATTERN OF CRIMINALITY.

ARGUMENT

Appellant suggests the trial court error in allowing "other crimes" evidence to be introduced at his murder trial. Appellant cites twenty six specific incidents. (AB 36-38) Of these twenty six examples of impropriety, two are defense questions. (T 1141, 1210-1212) In nineteen, an objection was not entered. (T 1141, 1133, 1165, 1177, 1221, 1210- 1212, 1184, 1185, 1186, 1269-1270, 1599-1601, 1735-1737, 1606-1608, 1885, 1885-1887, 1900, 1902, 1905-1906, 1907-1908, 1909-1911, 1915-1919, 1980, 1983, 1906-1907, 1908-1909,

1915, 1937, 1959, 1978, 1926, 1938-1939, 1941, 1943, 1946, 1988, 1947-1948). However counsel filed a pre-trial motion in limine and presumably had standing objections on grounds of relevance, prejudice and "no probative value in the trial of a triple homicide." (T 353-4, 1230-1232) It is important that when counsel elected to object, rather than rely upon a standing objection of relevancy, the trial court admonished the jury to disregard. (See, T 1930 concerning the State's inquiry into the broken arm of Appellant's mother). Certain other specific objections were noted on differing grounds: beyond the scope of direct (T 1885, 1890-1892); code of the defense or comment on the defendant's right to silence (T 1963-1966); and conjecture (T 1889).

Parker was indicted for the first degree murder of three individuals. (R 3-5, 133-135) Each murder occurred independently of the others; however, each is related in that the latter two (DALTON and SHEPPARD) were an attempt to cover up the first (PADGETT) and were a part of an ongoing criminal scheme. Id. Appellant did not deny his presence at, or involvement in the circumstances leading up to, the three murders. Yet he denied direct involvement in each killing. Appellant attributed his unwilling but minimal participation to fear that Tommy Groover might harm or kill him or his family.

It is a well-settled proposition that testimony of a collateral offense relevant to show bad character or propensity is inadmissible. Williams v. State, 110 So.2d 654 (Fla.) cert. denied 361 U.S. 847 (1959); Owens v. State, 361 So.2d 224, 225 (Fla. 1st DCA 1978). However, as the Florida Supreme Court stated in Ashley v. State, 265 So.2d 685, 694 (Fla. 1972) and re-emphasized in Ruffin v. State, 397 So.2d 277 (Fla. 1981) cert. denied, 454 U.S. 882 (1981):

> All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy.

Id. at 280. (T 466) Common examples of elements which similar fact evidence is relevant to prove include motive, intent, absence of mistake, common scheme or plan, identity, or a system or general pattern of criminality. Williams; Ruffin v. State; Ziegler v. State, 404 So.2d 861, 862-3 (Fla. 1st DCA 1981). Thus even if the similar fact evidence is prejudicial and tends to reveal the commission of a collateral crime, it is admissible if found to be relevant for any purpose save that of showing bad character or propensity. Randolph v. State, No. 54,869 (Fla. November 10, 1983) [8 FLW 446] The key test of admissibility is relevancy. Id.; Williams v. State. Relevancy is defined by statute as tending to prove or disprove a material fact at issue. Section 90.401, Florida Statutes.

The State submits that the instant collateral crime evidence was not given undue emphasis. Here as in the recent case of Washington v. State, 432 So.2d 44, 47 (Fla. 1983), the probative value of the admitted evidence was not outweighed by prejudice to the accused.

In Washington, the defendant and two friends were attempting to find buyers for stolen guns. A deputy sheriff was present at one such sales pitch and followed Washington's accomplice as he returned to the vehicle. Identifying himself, the deputy asked for a driver's license. The vehicle's driver was unable to comply and was asked to get out of the car. As he did so, Washington exited the backseat from the passenger side, walked around the rear of the vehicle, drew a .32 caliber chrome-plated pistol and ordered the deputy to freeze. As the deputy reached for his gun and a security officer reached for Washington, Washington fired four bullets into the deputy. Washington and his companions fled on foot leaving behind the car and the guns. Washington was apprehended a week later in North Carolina driving an

automobile stolen in Daytona Beach, Florida. He was subsequently convicted of first degree murder and sentenced to death. Id. at 46.

On appeal, Washington asserted claims identical to those advanced herein by Appellant. He maintained that evidence showing the guns were stolen was improper as was evidence indicating that after the murder he stole a car in Daytona Beach and that after his arrest he had escaped custody temporarily. Id. at 47. Upon review of the evidence in Washington's case, this Court deemed all challenged evidence relevant to the issues at trial:

> Evidence that the guns were stolen was relevant in showing appellant's motivation in shooting the deputy. . . . Evidence of the stolen automobile was relevant to show identity and flight. Flight from the vicinity of the crime is a fact from which guilt can be inferred. . . . Evidence of the escape was relevant to show a guilty conscience . . . . None of this collateral crime evidence was given undue emphasis. Since its probative value was not outweighed by any improper prejudicial effect, the Court did not err in admitting it.

Id. at 47 (citations omitted) (emphasis added).

In Appellant's case, evidence of his 1980 assault with a firearm upon Billy Long was relevant to prove state of mind, motive, intent, a common scheme or plan, and a general pattern of criminality. As stated, the argument advance in brief concerning collateral crimes by a third party was never raised below. Moreover in accordance with Hirsch v. State, 279 So.2d 866 (Fla. 1973) such evidence is not covered by the "Williams Rule."

Long testified to his participation in the Sheppard murder which he allegedly committed due to threats made to him by Parker. Long testified that Appellant got him out of the car and walked him over to the ditch where Richard Padgett "was laying face down, dead as a door nail". Parker told him to kill Sheppard or he would be laying in the ditch with them. (T 1257, 1260) To Long, the threats had special meaning due to the 1980 incident. (T 1257-1259) Long fired the shots into the back of the young woman's head. (T 1260) Parker and Groover cheered him on by yelling: "Shoot her again, shoot her

again. She's still breathin." (T 1260-1261) Appellant used a knife to cut Sheppard's throat and then took her jewelry. (T 1261)

Long testified to matters within his personal first-hand experience. In Hirsch v. State, the evidence deemed inadmissible in the defendant's perjury trial related to telephone communications by a party representing herself to be an unrelated third party. Also unlike the present case, the crime to which the evidence was directed in Hirsch was uncharged. Here, both Groover and Appellant were charged in the murders of Sheppard, Dalton, and Padgett; Long was charged in the Sheppard murder. Hence the facts of the murder as well as the reason for Long's participation, were highly relevant. Appellant readily admitted his lifestyle and his involvement in drug dealing (T 1892, 1898, 1895, 1907), collection of drug debts by intimidation (Id., 1887- 1888, 1889) and brandishing of a firearm. Yet Appellant attributed even his presence during the murders to fear of Groover.

Evidence of the challenged incidents was relevant to show identity, guilty conscience, pattern of criminal activity, motivation and intent. Likewise, the post-murder threats to Johns, Bradley and Denise Long were admissible for identical reasons. The evidence was geared toward proving a material fact at issue (identity) rather than demonstrating the bad character of the defendant. Id.; Ruffin v. State; Randolph v. State at 447. The evidence also established that the murders, committed one after another, were fully intentional and not due to lack of awareness, incapacity or duress. See Justus v. State, No. 58,912 (Fla. September 1, 1983) [8 FLW 318, 319-320]. The arguments submitted by Appellant under Points I and II, supra, demonstrate exactly why the collateral evidence was relevant.

The State submits the evidence admitted was highly probative and relevant to the elements of the offenses which the prosecution was required to prove at trial. As such, the evidence was properly admitted and Appellant has failed to establish to the contrary. As this Court is well aware, a trial court's evidentiary ruling will not be disturbed on appeal absent a clear showing of an abuse of discretion. McNamara v. State, 357 So.2d 410 (Fla. 1978); Carter v. State, 370 So.2d 1181 (Fla. 4th DCA 1979); Mikenas v. State, 367 So.2d 606 (Fla. 1978); Hoy v. State, 353 So.2d 826 (Fla. 1977) cert. denied 439 U.S. 920 (1978). An abuse has not been established here.

We note in conclusion that the final challenge to the alleged improper cross-examination of Appellant was not preserved for appeal under a "standing objection" rationale. Appellant conceeds in brief that objections were not noted to "some of the improper tactics." (AB 40) As previously emphasized a cautionary instruction was given to the one comment in which a proper objection was noted. (T 1930) Had other objections been voiced, it is likely that similar remedies would have been forthcoming if warranted. As it stands, Appellant received what he asked for. To claim otherwise is to speculate.

The State respectfully submits that the bulk of the challenges set forth in brief have not been properly preserved for appellate review. Florida law provides that an argument made for the first time on appeal cannot be considered unless it amounts to fundamental error. De La Cova v. State, 355 So.2d 1227, 1230 (Fla. 3d DCA 1978). An argument raised on appeal but not presented to the trial court has not properly preserved for appellate review. Pinder v. State, 396 So.2d 272 (Fla. 3d DCA 1981); Clark v. State, 363 So.2d 331 (Fla. 1978); State v. Cumbie, 380 So.2d 1031 (Fla. 1980). See also Williams v. State, 414 So.2d 509 (Fla. 1982).

POINT IV

THE VOIR DIRE PROCESS WAS NOT IMPROPER. APPELLANT WAS NOT DENIED A FAIR TRIAL BY AN IMPARTIAL JURY.

ARGUMENT

Appellant contends the manner in which voir dire was conducted deprived him of a fair trial as provided in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 and 16 of the Florida Constitution. Specifically Appellant challenges

1. Collective examination of prospective jurors rather than individual and sequestered voir dire; (T 508-509)

2. Rebukes and Reprimands to Defense Counsel in the presence of prospective jurors. (T 508-509; 518-519, 554-556, 584, 706-709, 718, 719, 724, 725, 729

3. Comments on the credibility of witnesses.

4. Explanation by the prosecution as to plea bargaining arrangements of state witnesses. (T 436-442, 443-447, 445, 659-663, 660, 763-766, 848-849, 729-731).

(AB 40-43)

The jury selection process began on February 28, 1983 and was concluded during the late evening of the next day, March 1, 1983, when the panel was sworn. (T 341-874). The record of the extensive selection process comprises nearly four volumes of this appellate record. Had Appellants request for individual and sequestered voir dire been granted considerable more time and expense would have followed. It was for this reason that the defense motion was denied initially. (T 344-347) Counsel was advised that the questioning of

jurors could be conducted at the bench should it become apparent that individual inquiry was required. (T 347) Defense counsel did not object and seemingly agreed with this procedure. Id.

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) cert. denied 450 U.S. 989 (1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); 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. (T 554-555) Jones v. State, 343 So.2d 921 (Fla. 3d DCA 1977). Branch v. State, 212 So.2d 29 (Fla. 2d DCA 1968). The trial court's procedural decision should not be lightly overturned. United States v. Carroll, 582 F.2d 942, 946 (5th Cir. 1978).

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. The aforementioned provison for individual examination was a seemingly accepted by all parties. Moody v. State 418 So.2d 989, 993 (Fla. 1982). Counsel later attempted to ask individual, rather than collective, questions. (T 508-509, 518-519) He claims the judge's comments amounted to rebuke before the panel. A review of the cited portions of the record does not support this contention. If rebuke occurred, it was delivered out of the presence of the jury where counsel was admonished to conduct collective questioning of the panel. (T554-555, 707-9) The "rebuke" delivered in the jury's presence does not resemble that demonstrated in the caselaw cited by Appellant. Counsel had repeatedly violated the trial court's directive. The action was necessary to maintain the dignity of the courtroom and the court's schedule. Paramore v. State, 229 So.2d 855, 860 (Fla. 1969); Baisden v. State, 203 So.2d

194 (Fla. 4th DCA 1967).

The latitude given the parties in examining prospective jurors is subject to the sound discretion of the trial judge. Peri v. State, 426 So.2d 1021, 1025 (Fla. 3d DCA 1983); Kalinosky v. State, 414 So.2d 234, 235, (Fla. 4th DCA 1982); Essix v. State, 347 So.2d 664 (Fla. 3d DCA 1977). Likewise the materiality and propriety of voir dire questions are also to be decided by the court. Peri v. State at 1025 and caselaw cited therein. The trial court controls the scope of examination. Underwood v. State, 388 So.2d 1333 (Fla. 2d DCA 1980), James v. State, 378 So.2d 797 (Fla. 1st DCA 1979).

Appellant vehemently objects to questions posited by the prosecution concerning plea bargaining agreements entered into by certain state witnesses (Billy Long, Elaine Parker, and Joan Bennett) (T 438) Prior to the initial objection, the prosecutor inquired of the panel whether the individuals could listen to the opinions of "expert" witnesses and evaluate the testimony and access "weight" on the basis of the judge's discretion. (T 436) The prosecutor continued this line with a similar question concerning the weight and evaluation of an accomplice turned state's evidence. Id. At the side bar, Appellant's objection centered on the prosecutor assuming a "testimonial capacity and telling the jury that this is the deal, whereas its not in evidence." (T 438) The objection was overruled on the following logic:

> THE COURT: The person about whom he making [sic] the comment is Long and Bennett and Elaine Parker, all of them have pled guilty, they are not on trial nor have they stood trial. And the Prosecution has a right to ask the jury if it comes out if these people testify and it comes out that they have negotiated a plea with the State to a lesser included crime, that they be able to receive their testimony and give it such weight as the Judge instructs them it is entitled to, or would they be prejudiced simply because they had negotiated a sentence, not be able to accept their testimony. They have the right to know that in order to -- if the jury would not automatically discount their testimony.

(T 438-439)

The concept of an impartial jury was emphasized in Moody v. State. Chief Justice Alderman, writing for this Court, stressed that "impartiality requires not only freedom from jury bias against the accused and for the prosecution, but also freedom from jury bias against the prosecution and for the accused." Id. at 993, See also, Downs v. State, 386 So.2d 788 (Fla.) cert. denied, 449 U.S. 1119 (1980); Lewis v. State; Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) cert. denied 440 U.S. 976 (1979).

We are mindful of the decision in Smith v. State, 253 So.2d 465 (Fla. 1st DCA 1971) wherein a conviction was reversed due to a prosecutor's voir dire question as to whether or not jurors would convict on the testimony of a person who had been granted immunity if the State proves its case beyond a reasonable doubt. The First District declared the question improper as it caused the juror to pre-decide his vote for conviction or acquittal. Id. at 741, 740. The comments in the instant case are also unlike those in Harmon v. State, 394 So.2d 121, 122-123 (Fla. 1st DCA 1980).

Although the State must exercise care in posing inquiries, all questions concerning plea agreements are not prejudicial. Leibold v. State, 386 So.2d 17, 18 (Fla. 3d DCA 1980). The questions and comments challenged herein do not impose a limitation on the function of the jury, rather the questions are aimed at detecting bias or prejudice against the State. Id.; Moody v. State at 993. Such bias may well affect the fairness of the trial.

In urging that reversible error did not occur in the selection of the jury, the State emphasizes that Appellant had one remaining peremptory challenge upon acceptance of the panel, as did the State. (T 871)

POINT V

APPELLANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL BY IMPROPER PROSECUTIONAL COMMENT MADE DURING ARGUMENT TO THE JURY.

ARGUMENT

Appellant maintains that he was denied his constitutional right to a fair trial by the repeated inflammatory, emotional and thoroughly improper arguments made by the prosecutor. (AB 44-48). He asserts five grounds:

1. Vitrolic name calling of the defendant. (T 2127-2128, 2131, 2135, 2142, 2183-2184.

2. Use of the term "smokescreen" to convey the impression of improper motives or tactics of defense counsel. (T 2249, 2140-2141, 2252, 2253).

3. Comment on the defendant being "set free" to infer future crimes. (T 2183-2184).

4. Expressions of personal belief concerning presence of more than 2 guns. (T 2150)

5. Comments upon the role or in an effort to cast doubt on the integrity of the defense. (T 2140-2141, 2253)

A review of the record reflects Appellant failed to enter an objection of some of the comments. Appellant acknowledges this omission in brief, but maintains the arguments are so prejudicial that a "mail order catalogue of prosecutional misconduct" has occurred and a new trial is required. (AB 48)

The failure of the defendant to object to the allegedly improper comments is fatal. Maggard v. State, 399 So.2d 973, 976 (Fla.) cert. denied, 454 U.S. 1059 (1981); Thomas v. State, 326 So.2d 413 (Fla. 1975); Ray v. State, 403 So.2d 956, 960 (Fla. 1981); Castor v. State at 703; Clark v. State at 333-34; State v. Cumbie; Peterson v. State, 376 So.2d 1230, 1235 (Fla. 4th DCA 1979); Herzog v. State, No. 61,513 (Fla. September 22, 1983) [8 FLW 383, 384] (rehearing denied, November 11, 1983). See also, Miller v. North Carolina, 583

F.2d 701 (4th Cir. 1978). This rule must prevail unless the remarks are "so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influences." Grant v. State, 194 So.2d 612, 613, n. 1 (Fla. 1967); Herzog v. State at 384. Accord, Wilson v. State, 436 So.2d 908 (Fla. 1983); Mason v. State, 438 So.2d 374 (Fla. 1983).

An example of prejudice requiring reversal can be found in the recent case of Teffeteller v. State, No. 60,337 (Fla. August 25, 1983) [8 FLW 306] (rehearing denied November 1, 1983) The State emphasizes however that in Teffeteller v. State, the defense objected, moved for mistrial and requested a cautionary instruction thereby preserving the point for appellate review. Id. at 307. Considering the tone of this Court's opinion in Teffeteller, the "inexcusable prosecutorial overkill" may have constituted fundamental error, however, the point was not addressed as review was properly preserved. Id. at 307.

The State submits the comments challenged herein are not sufficiently prejudicial to constitute fundamental error. Therefore, established procedural requirements should not be waived. The allegedly "vitrolic" characterizations" analogized Appellant to a "predator" (T 2127-2128), a "shark that feeds off human misery produced by this drug culture" (Id.), a "vicious animal" (T 2131) and a "devil" (T 2142) Objections were not noted. An objection was noted to the comparison of Appellant to a "wounded, wounded vicious animal" (T 2135-6) Counsel argued the comment was highly inflammatory and moved for a mistrial. (T 2136) The motion was denied and the prosecutor admonished to "temper" his remarks. The jury was instructed to disregard the comment. Id.

Comments of counsel during the course of a trial 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; Breedlove v. State, 413 So.2d 1 (Fla. 1982); Thomas v. State at 413; 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).

The final characterization challenged differs slightly from that presented in brief:

> I submit to you, ladies and gentlemen, the blood of those three people drips from his hands. And he says, "It wasn't me. They did it."
>
> Now, such a person cannot get away with such a murder because if he could, then any screaming evil person could intimidate a weak-minded or weak-willed individual into murdering another and he would go free. He would have a license to kill.
>
> MR. LINK: I object to those remarks as being totally improper. He's talking about other cases, nothing to do with this case.
>
> THE COURT: All right. Overrule the objection. Proceed, Counsel.

(T 2183-2184) As the foregoing indicates, the ground noted at trial and in brief are dissimilar.

Considerable latitude is allowed a prosecutor in closing argument and logical inferences based on the record are permissible.[8] Thomas v. State; Paramore v. State; Gosney v. State, 382 So.2d 413 (Fla. 5th DCA 1976). Moreover, closing argument must be viewed in its entirety under Florida law. Wingate v. State, 232 So.2d 44, 45 (Fla. 3d DCA 1974).

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[8] Interesting, Appellant's counsel referred to Tommy Groover as a "rabid dog" who could not be controlled. (T 2205).

In Darden v. State, 329 So.2d 287 (Fla. 1976), the prosecutor referred to the defendant as an animal. Refusing to reverse, this Court declared that each case of allegedly improper comment must be reviewed individually and on its own merit. When the Darden comments were viewed in their totality, this Court found ample evidence to support the comments. Accord, Collins v. State, 180 So.2d 340, 342-3 (Fla. 1965) (references to defendant accused of rape of 12 year girl as "cruel human vulture", "vile creature", "this beast just ripped her open" were affirmed as amply supported by the record).

In Breedlove v. State, this Court rejected arguments similar to those presented herein. Id. at 7-8. The prosecutor referred to other criminal acts (rape), called the defendant an animal and appealed to community prejudice with references to violence in Dade County, Florida. Unlike this cause, Breedlove objected and moved for a mistrial. The trial judge refused the request due to the context of the remarks. Upon review, this Court concluded that "some of the remarks may have been improper, but we do not find them so prejudicial that a new trial is required." Id. at 8.

Appellant did not object to the "smokescreen" reference. (T 2249)

Counsel did object to comments concerning defense counsel and tactics but these references were to defense counsel's comments in closing argument.[9] Defense counsel elaborated on "Saint Joan" Bennett's testimony and the "bribery" by the State for her testimony. (T 2210, 2217-8, 2210-2220) The State submits the prosecutor's comment was invited by the defense and was not error. Williams v. State, 69 So.2d 766, 768 (Fla. 1954); Gur v. State, 150 Fla. 65, 7 So.2d 590 (1942). Further, the comment did not cast dispersion upon the

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9 The challenged remarks were made by Mr. Austin in the State's final closing argument. (T 2140-2141, 2252, 2253) The remarks rebutted comments made in Appellant's closing argument to the jury. (T 2186-2248)

defense or to defense trial tactics. See Harich v. State, 437 So.2d 1082 (Fla. 1983); Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1972). Here as in Cochran, there is ample evidence of Appellant's guilt.

Appellant's argument that the prosecutor admonished the jury not to set Appellant free to commit future crimes stretches the record. In addition, the caselaw cited does not support Appellant's claim. In Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968), the jury was told that narcotics activity would continue if the defendant was acquitted.

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

Id. at 750; Compare, similar comments in Porter v. State, 347 So.2d 449 (Fla. 3d DCA 1977); McMillian v. State, 409 So.2d 197 (Fla. 3d DCA 1982)to those in this case.

In Russell v. State, 233 So.2d 154, (Fla. 4th DCA 1970), the jury was admonished that "another innocent party could possibly get killed" if the defendant was not convicted. The prosecutor also stated:

> . . .We are going to have a breakdown in society and we are going to have people getting stabbed all over Orange County.

Id. at 55. Similar remarks, unmistakably implying that the defendant would commit another murder if acquitted, were deemed prejudicial in Sims v. State, 371 So.2d 211, 212 (Fla. 3d DCA 1979). There are no such comments here.

Appellant contends the prosecutor ventured his personal belief as to the number of guns thereby placing himself in a testimonal capacity. (AB 46-47) We do not agree and submit the portion of the record relied upon does not support Appellant's argument. The State defers to the record. (T 2150) The comment was directed toward the contradictory nature of the testimony. The prosecutor was not attempting to testify, but to encourage the jury to recall

the testimony and to apply common sense. The prosecutor was questioning whether the witnesses or the defendant was to be believed.

In Hance v. Wainwright, 696 F.2d 940 (11th Cir. 1983), the egregious nature of the prosecutor's remarks was obvious. The prosecutor stated, inter alia:

> . . .[he] had the advantage of sincerely and objectively knowing the evidence, believing that we would be at this stage of the trial at some point this week. . . I've been with the District Attorney's Office for a little over eight years now and it's my recollection that we've had no more than a dozen times, no more than twelve times in those eight years, to request the [death penalty] out of the thousands of cases. . . that pass through our office. . . . I'm going to sleep well tonight, having [recommended Hance's electrocution] to you. As a matter of fact, I'm going to sleep better and safer in my house with my family if you come back with a sentence of death. . . .

Id. at 951-2. The Eleventh Circuit opinion continues at great length to quote from the closing argument before stating that such "gut emotion has no place in the courtroom. . . ." Id. at 952. In Arline v. State, 303 So.2d 37 (Fla. 1st DCA 1974), the prosecutor stated: And I would ask you to find in your heart as I have found in mine in the past months as I have prepared for this case . . . . that the defendant committed this heinous crime.

As stated, the factual circumstances and allegedly reversible comments in this cause differ greatly from those in the cases set forth by Appellant. Here the comments, when viewed in their entirety, are not so prejudicial to the rights of Appellant that neither rebuke nor retraction could eradicate the evil influence. Pait v. State, 112 So.2d 380 (Fla. 1959). Rebuke or retraction was not sought by Appellant or deemed warranted sua sponte by the trial court. The State submits this is a good indication that the remarks were not improper as now alleged by appellate counsel.

In Pait, this Court set forth a "safe" rule that ". . .unless this Court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the judgment should be reversed."

Id. at 385. A review of the record fails to reveal error which goes to the foundation of Appellant's case or deprived him of a fair trial. Clark v. State; Gordon v. State, 104 So.2d 524 (Fla. 1958); Thomas v. State. This Court has consistently presumed that jurors will not lead astray to wrongful verdict by impassioned eloquence. Id. citing to Paramore v. State at 855.

In conclusion the State submits that if error occurred, it was harmless and reversal is not required. Melton v. State, 402 So.2d 30 (Fla. 1st DCA 1981).

POINT VI

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT A NEW TRIAL WHEN A DISCOVERY VIOLATION WAS ALLEGED BY APPELLANT POST-TRIAL.

ARGUMENT

Appellant's motion for new trial alleged that Chief Assistant State Attorney Ralph Greene paid state witnesses Carl Barton, Spencer Hance and Joan Bennett twenty dollars each in cash as lunch money. (R 464) At the hearing, State Attorney Ed Austin acknowledged money was paid for "alot of lunches and breakfastes and dinners during the course of that trial. . . ." (T 2529) It appears each of the three was given $20, but this is unclear from the record. (T 2530) Mr. Austin further contended:

> These witnesses came down her during the course of this trial and preparatory for this trial eight, ten times, some of them are not employed, some of them losing minimum wage. And the State exercised its discretion and assisted them in their lunch because there was no other way to do it, no other way to do it. . . . the State has got a right to be humane and considerate of these poor victims and witnesses that are dragged down here time after time, that are at a loss of income or some of these people couldn't even eat, Judge. No way for them to afford to come down here and sit around for eight hours or ten hours, twelve hours in a day and not

have somebody feed them.

(T 2527-2528)

Appellant did not request an evidentiary hearing on the matter and did not allege undue influence had been exerted on any specific witness due to the payment. Counsel had not conducted an independent investigation (at least the record does not report one) or did counsel request that such an investigation be conducted. Counsel did not argue prejudice or inability to prepare a proper defense. Impropriety alone was advanced as ground for reversal. (T 2526-2530) The amended motion for new trial was denied:

> It has not been brought to my attention that there was any undue influence on any witness as a consequence of this.

(T 2530)

Appellant contends there was a specific pretrial request for disclosure of such information. (See, AB 47-49; R 464-5, Amendment to Motion for New Trial). Caselaw is clear that if a specific request is made - and the evidence is material - then a new trial is in order. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 102.Ed.2d 215 (1963), United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). If Appellant's pretrial motions[10] are carefully reviewed, such a specific request cannot be found. The March 2, 1982 motion contains a general demand which is no more specific than that set forth and rejected by this Court in Antone v. State, 382 So.2d 1205, 1215 (Fla. 1980) (Compare R45, paragraph 4) Likewise the motion filed August 18, 1982 and referred to in the amended motion for new trial is no more specific in its request) (R 156-158, note particularly R 157, paragraph 3).

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[10] Motion for Production of Favorable Evidence (R 44-45); Motion to Compel Discovery (R 156-158).

Moreover even if this Court should conclude the aforemention requests were specific, the information allegedly withheld is not material under the Agurs test:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

427 U.S. at 112-13, 96 S.Ct. at 2402 [footnotes omitted]. The evidence and argument set forth at the hearing on the amended motion for new trial fails to meet this requisite test. Appellant has not fulfilled his burden.

Here as in Antone v. State, the evidence in no way detracts from the testimony presented by the State which established Appellant's guilt beyond a reasonable doubt. As in Antone, the evidence may have been useful for impeachment, but was not germane to guilt or innocence. Accord, Johnson v. State, 427 So.2d 1029, 1031 (Fla. 1st DCA 1983); Tafero v. State, 403 So.2d 355, 360 (Fla. 1981). Appellant consistently attempted to impeached the state witnesses throughout their testimony and in argument to the jury. The additional factor of "lunch money" would have had little bearing on the outcome of trial. The ". . . omitted information [did not] create a reasonable doubt that did not otherwise exist . . ." United States v. Agurs; Smith v. State, 421 So.2d 146 (Fla. 1982). Appellant has not established otherwise. The information could in no way be "material" as defined by Agurs as there was no showing that the disclosure would probably have resulted in acquittal or would have affected the outcome of trial. Id. at 113. Reversal is not required.

POINT VII

APPELLANT'S RIGHT TO A FAIR TRIAL WAS NOT ABROGATED BY THE STATE'S FAILURE TO PRESENT ELAINE PARKER AS A WITNESS WHEN JURORS HAD BEEN QUESTIONED DURING VOIR DIRE CONCERNING THEIR ABILITY TO FAIRLY EVALUATE THE TESTIMONY OF ELAINE PARKER WHO HAD PLED GUILTY OF SECOND DEGREE MURDER.

ARGUMENT

The voir dire references to Elaine Parker and her plea of guilty to second degree murder were brief and were included with similar statements concerning Billy Long and Joan Bennett. (T 436-446, 659-663, 763-766, 848-849) Long and Bennett appeared at trial; Mrs. Parker did not. It is clear from the record that reference to the guilty plea was an attempt by the prosecution to select a fair and impartial jury. (See Point IV, supra.) Equally clear are the reasons Elaine Parker did not testify at trial. (T 2052-2058).

Admittedly case law exists which states that it is generally improper for the State to disclose during trial that another has been convicted or has pleaded guilty to the crime. Thomas v. State, 202 So.2d 883, 884 (Fla. 3d DCA 1967); Moore v. State, 186 So.2d 56 (Fla. 3d DCA 1966) However this general principle is not always controlling. Loudd v. State, 358 So.2d 188 (Fla. 4th DCA 1978); Grisette v. State, 152 So.2d 498 (Fla. 1st DCA 1963); Vitiello v. State, 167 So.2d 629 (Fla. 3rd DCA 1964); Bocanegra v. State, 303 So.2d 429 (Fla. 2d DCA 1974); Lowery v. State, 117 So.2d 855 (Fla. 1st DCA 1965); Walters v. State, 217 So.2d 615 (Fla. 2d DCA 1969).

In Thomas v. State, the prosecutor twice advised the jury (in voir dire and opening statement) that the defendant's accomplices had all been convicted. Id. at 883-4. This statement violated an agreement reached by the parties pre-trial. A further distinguishing factor is that in Thomas the accomplices did

not testify at trial nor were they anticipated witnesses. On appeal, the trial court's failure to grant the mistrial motion was held as reversible error. In Moore v. State, the trial court advised the jury that a co-defendant had pleaded guilty during trial. Moore was the remaining defendant and despite objection his trial continued.

In Loudd v. State, Judge Downey in a specially concurring opinion framed the question, analyzed the existing caselaw and reached the following conclusion:

> The bottom line of these Florida cases is that the State may not show that a co-defendant or an accomplice pleaded guilty or was convicted because it is not relevant and it may have a very prejudicial effect upon the determination of the guilt or innocence of the defendant. However, each case must be examined to determine whether the error has been preserved and, if preserved, whether the information was so prejudicial as to require reversal.

Id. at 190. The Fourth District Court of Appeal affirmed Loudd's conviction even though the three defendants were charged in the same information and tried jointly. The district court found the comment irrelevant and subject to objection, but harmless where evidence of guilt was so great. Id. A cautionary instruction was deemed appropriate. Such an instruction was given in Appellant's cause. (T 2058)

Under the unique circumstances of this case, the State submits reversible error did not occur. There was no attempt by the State to present prejudicial evidence or to argue guilt by implication. Instead the prosecution sought to select a fair and impartial jury and to present an overview of anticipated evidence. The State acted in good faith and fully intended to call Elaine Parker at trial. (T 2052) The fact that the State failed to introduce a promised witness was a factor for the jury's consideration and may have been detrimental to the State's presentation. (Id.)

POINT VIII

SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT APPELLANT'S CONVICTION FOR THE FIRST DEGREE MURDER OF RICHARD PADGETT.

ARGUMENT

Appellant argues that under the evidence presented in this case, he is only guilty of third degree murder. In setting forth the evidence, he relies almost exclusively upon his own testimony and argues that his version is (1) the only version presented and (2) is consistent with a reasonable hypothesis of innocence.

Whether evidence fails to counter all reasonable hypotheses of innocence is a question for the trier of fact. A judgment should not be reversed where there is substantial, competent evidence to support the jury verdict. Rose v. State, 425 So.2d 521, 523 (Fla. 1982); Welty v. State, 402 So.2d 1159 (Fla. 1981) Clark v. State, 379 So.2d 97 (Fla. 1979) cert. denied 450 U.S. 936 (101 S.Ct. 1042, 67 L.Ed. 2d 371 (1981) Here Parker admitted he was a drug dealer and supplied drugs to Groover, among others. (T 1811-1812, 1813-1814). Parker threatened Groover repeatedly after Groover fronted PCP to Padgett and Morris Johnson. Parker threatened Groover in a variety of ways including hanging if Groover didn't satisfy his drug debt. (T 1827) Parker maintains he "was not the least bit angry at Johnson or Padgett" (T 1141) yet it was to satisfy Parker that Groover sought payment from them. Logically Appellant could have prevented Padgett's murder by cancelling Groover's debt or withdrawing his threat to Groover. Parker did neither.

Appellant suggests that his version of events stands uncontroverted. Yet even if his testimony is accepted totally, guilt as to first degree murder is still firmly established. Appellant was charged under a felony murder theory. He admits that he and Elaine agreed to take Padgett into the woods to leave him

there. (T 1844; AB 53) According to Appellant, this constitutes "at best" false imprisonment. Yet willing and knowing participation in the underlying felony, incurs liability for the murder, even if unintended. See Point I, supra.

The jury is not required to accept the self serving testimony of the defendant as absolute truth even when the defendant is the only eyewitness. Darty v. State, 161 So.2d 864 (Fla. 1964). Rather the jury may accept or reject such testimony, in whole or in part, depending upon evaluation of credibility in light of attending circumstances established by other evidence. Id. at 872. Ridley v. State, 407 So.2d 1000, 1002 (Fla. 5th DCA 1981); Borghese v. State, 158 So.2d 785 (Fla. 3d DCA 1963).

Appellant argues that the evidence is insufficient to overcome the "reasonable hypothesis." However, the test is not simply whether, in the opinion of the trial judge or of the appellate court, the evidence fails to exclude every reasonable hypothesis except that of guilt, but rather whether the jury must reasonably so conclude. Ample evidence exists for the jury to reject Appellant's version of the facts as simply unbelievable. Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981); Rose v. State; Abella v. State, 429 So.2d 774 (Fla. 3d DCA 1983). The jury is the pivotable point at which the evidence is aimed, not the appellate court. Amato v. State, 296 So.2d 609, 610 (Fla. 3d DCA 1974). See also Vick v. United States, 216 F.2d 228 (5th Cir. 1954); Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976); Tillman v. State, 353 So.2d 948 (Fla. 1st DCA 1978); Robert v. United States, 416 F.2d 1216 (5th Cir. 1969); Holland v. United States, 348 U.S. 121,140 (1955); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2793 (1979); Hernandez v. State, 305 So.2d 211 (Fla 3d DCA 1974).

Florida law holds that where evidence is in conflict, it is within the province of the trier of fact to assess the credibility of witnesses, and upon

evaluating testimony, to rely upon the statement which it finds to be worthy of belief. The trier of fact may reject such testimony which it finds to be untrue. I. R. v. State, 385 So.2d 686 (Fla. 3d DCA 1980); Blackburn v. State, 314 So.2d 634 (Fla. 4th DCA 1975); Eizeman v. State, 132 So.2d 763 (Fla. 3d DCA 1961). It is the function of the trier of fact to weigh and assess the credibility of witnesses, Herman v. State, 396 So.2d 222, 231 (Fla. 4th DCA 1981), and the sufficiency of the evidence. Darty v. State at 873; Thomas v. State, 452 Fla. 756, 13 So.2d 148, 149 (Fla. 1943). Here there was no reasonable doubt in the mind of the jury. Glissen v. State, 96 So. 840 (Fla. 1923). The panel returned a verdict of guilty of first degree murder as charged. (T 2307)

The State submits there was ample evidence within the record to contradict Parker's testimony. Teague v. State, 390 So.2d 405 (Fla. 5th DCA 1980). His version may be reasonable and highly plausible (which it is not) and yet the jury is entitled to disbelieve every word. Glisson v. State at 841. Obviously, the jurors disregarded Appellant's account. This is not error.

POINT IX

THE IDENTITY OF REBUTTAL WITNESS PETE MITTLEMAN WAS TIMELY DISCLOSED BY THE PROSECUTION; A DISCOVERY VIOLATION DID NOT OCCUR.

ARGUMENT

Trial commenced in this cause on February 28, 1983 with jury selection. On February 15, 1983, the defense furnished notice of prospective witness Richard Ellwood. (R 261) Ellwood's deposition was taken by the State on February 24, 1983. (T 2013)

At trial, Ellwood testified that during his incarceration in the Duval

County Jail on criminal charges unrelated to these murders,[11] he shared a same cell with Tommy Groover. (T 1793) In June 1982 while awaiting a court appearance, Ellwood also shared a "court chute" cell with Billy Long; Appellant was confined in an adjoining cell. (T 1764, 1777) Ellwood testified that Long bragged that Parker did not kill Nancy Sheppard; Parker was "out of it" on quaaludes and in the car. According to Long, he and Groover were outside the car. (T 1766) Long admitted killing the girl and cutting her throat. Long was going to see that "Parker got the death penalty, was going to lie to it." (T 1765) Ellwood also testified that Groover made similar statements to him. T 1786) Ellwood's testimony was offered to rebut the trial testimony of Billy Long which directly implicated Appellant. (T 1235-1278)

The prosecution first learned of Det. Mittleman's value as apotential state witness following the evening recess of trial on Monday, March 7, 1983. (T 2013) Defense counsel was notified promptly the next morning. (T 2014) The issue was addressed immediately upon reconvening of court at 1:30 P.M. (T 2013-4)

Counsel argues in brief that the trial court committed reversible error in failing to conduct a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971). He maintains the State failed in its burden established non-prejudice.

First, the State submits a discovery violation did not occur. Appellant was promptly informed of the witness as soon as the State acquired the information. An unanticipated witness cannot be provided on discovery.

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[11] Ellwood had nine prior felony convictions. (T 1780) He also had pending charges at the time of his testimony in this case. (T 1781, 1779)

Secondly, this Court's opinion in Richardson v. State, states that not every failure to comply with the procedural discovery rule is reversible error. This reasoning is well supported in Florida case law. Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA 1980); Smith v. State, 372 So.2d 86 (Fla. 1979); Brey v. State, 382 So.2d 395 (Fla. 4th DCA 1980); Smith v. State, 319 So.2d 14 (Fla. 1979); Thompson v. State, 374 So.2d 91 (Fla. 2d DCA 1979); Boynton v. State, 378 So.2d 1309 (Fla. 1st DCA 1979); Miller v. State, 373 So.2d 377 (Fla. 2d DCA 1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979). Indeed, in Cooper v. State, 336 S.2d 1133 (Fla. 1976) cert. denied, 431 U.S. 925, this Court stated:

> Our [criminal discovery] rules were not designed to eliminate the onerous burdens of trial practice. Their purpose was to avail the defense of evidence known to the State so that convictions would not be obtained by the suppression of evidence favorable to a defendant, or by surprise tactics in the courtroom.

Id. at 1138. Neither factor is present in the instant cause.

The action of the trial court is correct under State v. Gillespie, 227 So.2d 550 (Fla. 2d DCA 1969). In Gillespie, the Second District Court of Appeal stated:

> We find, therefore, that the underlying principle supporting the whole idea of criminal pre-trial discovery, as gleaned from the cases and well-reasoned commentaries, is fairness.

Id. at 553. The Gillespie court denounced cases in which the prosecution takes unfair advantage of the accused by either knowingly presenting false or illegally obtained evidence against a defendant without disclosure thereof, or, by unfairly suppressing its exculpatory or favorable evidence. It is apparent from the record that Appellant seeks a tactical advantage in claiming a procedural violation without even intimating prejudice. See Ludwig v. State, 336 So.2d 701, 702 (Fla. 4th DCA 1976) (the purpose of the discovery rule is to help a defendant prepare his case, not to give him a procedural escape hatch for the avoidance of prosecution).

Thirdly, Appellee submits that Appellant's alleged "objection" was insufficient to preserve the issue raised herein for appellate review. A review of the instant record reveals that Appellant's counsel objected on grounds of (1) failure to comply with the discovery rules and (2) the impropriety of Mittleman's testimony. (T 2014-2015, 2037, 2025, 2015) (This second argument appears infra under Point X). Following argument, review of the caselaw and the proffered testimony of Det. Mittleman, Appellant appears to have abandoned the first argument. The trial court's reasoning and conclusions are directed toward the second argument. (T 2038-2040) Counsel neither renewed nor restated his original argument nor did he take exception to the trial court's failure to conduct an "adequate" Richardson hearing or prejudice to his cause. In brief, Appellant argues prejudice in his inability to depose Mittleman or obtain witnesses or friends of Ellwood who could counter his reputation for truth and veracity. Appellant neither advanced these arguments below nor requested additional time for these purposes. Moreover a deposition or interview of Mittleman would have afforded no more information than Appellant's cross-examination on proffer. (T 2038-2036)

Fourth, the State submits adequate inquiry was conducted by the trial court as to the reasons the prosecution "failed" to provide the name of the witness. In Richardson, this Court held it was within the discretion of the trial court to determine whether non-compliance would result in prejudice or harm to the defendant, but that discretion could be properly exercised only after an adequate inquiry into all of the surrounding circumstances. Id. at 775. The record offers ample evidence of the sufficienty of the inquiry. We suggest that the trial court's inquiry comports with Richardson.

The failure to observe and/or comply with the rules of discovery should be remedied in a manner consistent with the seriousness of the breach. Cooper

v. State, Ziegler v. State, 402 So.2d 365, 372 (Fla. 1981). Here, the trial judge determined that there was insufficient prejudice to warrant a exclusion of the witness. Appellant did not challenge the sufficiency of the inquiry into the alleged violation at the trial level. Thus the instant issue has not been properly preserved for appellate review. Kujuwa v. State, 405 So.2d 251 (Fla. 3d DCA 1981); State v. Cumbie; Clark v. State; Nevels v. State, 364 So.2d 517 (Fla. 1st DCA 1976), cert. denied, 372 So.2d 470 (Fla. 1979).

In conclusion, the State submits that the sanctions to be invoked for failure to comply with discovery are within the sound judicial discretion of the trial court. It is only with the utmost reluctance that an appellate should interfere with the exercise of this discretion. State v. Lowe, 398 So.2d 962 (Fla. 4th DCA 1981). We respectfully submit that Appellant has failed to show an abuse of discretion, or to show substantial prejudice to his cause. Therefore, reversal is not required. Error, if it occurred, was harmless. Melton v. State.

POINT X

DETECTIVE MITTLEMAN WAS A PROPER WITNESS TO REBUT DEFENSE WITNESS ELLWOOD'S REPUTATION FOR TRUTH AND VERACITY IN THE COMMUNITY.

ARGUMENT

The facts and argument previously advanced under Point IX supra, are relevant to this appellates issue and are incorporated herein.

At trial, counsel objected to Detective Mittleman's testimony as inappropriate and relied solely upon Stripling v. State, 349 So.2d 187 (Fla. 3rd

DCA 1977). In Stripling v. State, the District Court stated that as a general rule reputation testimony for truth and veracity must be bottomed upon the reputation in the person's community of residence and neighborhood. Stanley v. State, 93 Fla. 372, 112 So. 73 (1927); Florida East Coast Railway Company v. Hunt, 322 So.2d 68 (Fla. 3d DCA 1975). Evidence was presented by the prosecution which established Ellwood's "community" to be the criminal justice system. (T 2038) Ellwood himself admitted residing at the Duval County Jail for "a year now". (T 1763)

Mittleman proffered that he met Ellwood in November, 1981 when he arrested him for burglary. (T 2028) Following this arrest Ellwood posted bond, fled to Ft. Lauderdale, was ultimately arrested and returned to Duval County. (T 2029-2030) Elwood was from Miami and stayed with different people while in Jacksonville. He also lived in Ft. Lauderdale. (T 2030) With Ellwood's arrest, the Detective was able to solve 99 burglaries throughout the State of Florida. (T 2031-2032) Mittleman testified that his investigation revealed Ellwood had not lived for a long period as an adult outside the criminal justice system. (T 2034) He did not have an established residence. (T 2035-6) The showing of unavailability here is as thorough as that presented in Hamilton v. State, 129 Fla. 219, 176 So. 89 (1937); accord, Hawthorne v. State, 377 So.2d 780, 786 (Fla. 1st DCA 1979).

Appellant's authority is unpersuasive. In Bowles v. State, 381 So.2d 326 (Fla. 5th DCA 1980), four police officers testified on rebuttal that they knew the reputation of the defendant in the community for truth and varacity and it was bad. Each testified that he would not believe the defendant under oath. The District Court held four such witnesses invaded the province of the jury which is the sole judge of a witness' credibility. Id. at 327. Such egregious conduct did not occur here.

In Baxter v. State, 294 So.2d 392 (Fla. 4th DCA 1974), the Fourth District permitted rebuttal testimony from several police officers concerning Baxter's reputation in the community for truth and veracity. (Baxter had testified that someone else committed the first degree murder). The court held character and reputation had been placed in issue. The officers testified to reputation and stated that they would not believe the defendant under oath. (See, dissenting opinion of J. Walden) The conviction was affirmed.

In the instant case, the trial judge found Ellwood's residence to be the criminal justice system and distinguished Stripling v. State, on this basis. (T 2038-2040) The court further held that Detective Mittleman did not set out with the purpose to gather information as to Ellwood's reputation. However having acquired such information, he was the "most qualified" person to testify as to this issue. (T 2040)

In the absence of an abuse of discretion a trial court's evidentiary ruling will not be disturbed. McNamara v. State; Carter v. State. Appellant has failed to meet this burden.

POINT XI

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO ASK QUESTIONS OF DEFENSE WITNESS ELLWOOD WHICH WERE DIRECTED TOWARD DETECTING BIAS AND MOTIVATION.

ARGUMENT

Richard Ellwood testified that he overheard Billy Long in June, 1982, state he would falsely implicate Parker.[12] (T 1764) Ellwood spoke with Appellant's

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12 The trial was conducted in February 1983.

attorney "a short time later, about two weeks later." (T 1766) Long felt the State was "trying to go after an innocent man", yet he would not permit his information to be relayed to the authorities. (T 1777-8) In fact, Ellwood specifically told Appellant's attorney not to inform the State of Florida about his testimony. (T 1778-1779) Ellwood explained this as fear the State Attorney's Office would hurt him on his pending cases. (T 1777-1779) Ellwood stated he would come forward only after his "trial was done with." (T 1779) Notice of Ellwood's appearance as a defense witness was served on February 15, 1983. (R 261) This was thirteen days before jury selection commenced.

Ellwood was confined in the Duval County Jail on multiple charges. At the time of Parker's trial, Ellwood still had pending charges although he had been to trial on some cases. When impeaching Ellwood as to the reason for his failure to come forth promptly with his information on Appellant's innocence, the prosecutor questioned Ellwood on his contradictory testimony. (T 1779-1781)

Importantly, an objection was not noted initially by Appellant. Id. Ellwood had provided the answers and "taken the Fifth on that" twice before an objection was voiced. (T 1781) The objection was sustained at the bench and the prosecutor was told to "move along". (T 1781-1783) Appellant requested neither a curative instruction nor moved to strike. Id. Appellant's action are contrary to Florida's contemporaneous objection rule. The State submits this point has not been preserved for appellate review. Clark v. State; Kujuawa v. State; State v. Cumbie; Nevels v. State.

In order to fault a trial judge and overturn a judgment, it must be shown that a specific and proper objection to the alleged inadmissible evidence was made and ruled upon, unless the error is fundamental. Thomas v. State, 424 So.2d 193, 194 (Fla. 5th DCA 1983); Castor v. State; Hufhan v. State,

400 So.2d 133 (Fla. 5th DCA 1981). There is no allegation that this issue is fundamental.

Secondly, we submit the initial questions were proper cross-examination. A full and fair cross-examination on subjects opened up on direct examination is always afforded. Coco v. State, 62 So.2d 892 (Fla. 1953); Frost v. State, 104 So.2d 77 (Fla. 2nd DCA 1958) The trial court may permit inquiry into all the facts and circumstances connected with the matters of the foregoing examination. Cook v. State, 35 So. 665, 668 (Fla. 1903).

Bias is always relevant. Thus a witness is always subject to cross-examination into matters which might tend to impeach credibility. Payne v. State, 356 So.2d 1213 (Fla. 4th DCA 1974) rehearing denied; Baxter v. State. Ellwood was subject to cross-examination by the State for purposes of discrediting by bias, prejudice or a showing of interest. D. C. v. State, 400 So.2d 825 (Fla. 3d DCA 1981); Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980); Webb v. State, 336 So.2d 416 (Fla. 2d DCA 1974); Wallace v. State, 41 Fla. 547, 26 So. 713 (Fla. 1899); Section 90.608 (1) (b), Florida Statutes. Appellant's argument to the trial judge to the contrary was in error. (T 1782) The trial court acknowledged this discrepancy, but obviously felt the prosecutor had elicited sufficient testimony concerning the contradiction in Ellwood's testimony. (T 1782-3)

The right of cross-examination includes the right to examine a witness as to matters affecting credibility. This certainly includes a possible motive for testifying. Kelly v. State, 425 So.2d 81, 83-84 (Fla. 2d DCA 1983); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) Under the facts of this cause, no other evidence could substitute for a full cross-examination of Ellwood's motive for testifying and motive for delaying the announcement of his "information". Accord, Garey v. State, 432 So.2d 796 (Fla. 4th DCA 1983).

The State submits that if error occurred, it was harmless. Goodman v. State, 418 So.2d 308, 310 (Fla. 1st DCA 1982).

The caselaw cited by Appellant in brief is not controlling. Appellant has failed to establish an abuse of judicial discretion.

POINT XII

QUESTIONS PRESENTED TO DEFENSE WITNESS ELLWOOD DID NOT IMPROPERLY ALLUDE TO APPELLANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT.

ARGUMENT

Appellant argues that certain questions posed by the State to defense witness Ellwood called attention to the fact that Appellant said nothing regarding his case thereby violating his right to remain silent. In order to assess the challenge, the record must be carefully reviewed:

> [On cross-examination]
> Q Did Billy Long say he [Parker] was an innocent man?
>
> A He didn't come right out and say he's innocent, but he told me he was going to lie and get him the death penalty.
>
> Q Oh, I see. Mr. Parker, he didn't speak up at all?
>
> A Mr. Parker hasn't discussed his case or anything dealing with himself at all.

[T 1786] No objection was noted.

> Billy Long said exactly?
>
> A The exact words?
>
> Q Yeah.
>
> A I can quote pretty well to the exact words what he said.

Q Okay.

A He said that -- he said that Robert Parker had shot him the year before, that he was going to -- it was his way of getting back and he was going to get him the death penalty.

Q Now, what did Mr. Parker tell you?

A Mr. Parker didn't discuss the case.

Mr. LINK: I am going to have to object at this point and I'd like to move for a mistrial as to any further inquiry along those lines.

THE COURT: Overrule the objection. Proceed.

(T 1786-1787) The ground for the objection was not presented to the court.

Q And did Tinker Parker tell you, "I didn't do it, I was passed out"?

A Mr. Parker doesn't go into his case at all.

Q Why not?

A Why not?

Q Don't you think if he was an innocent man he'd say, "I didn't do it"?

A That's his lawyer's job.

MR. LINK: Objection.

THE COURT: What's the objection?

MR. LINK: It's argumentative. It's improper comment, improper cross examination.

(T 1787-1788) An objection was noted and a ground stated. However, the argument presented herein is premised upon an entirely different foundation.

On redirect, Appellant's counsel asked substantially the same question of Ellwood:

[MR. LINK:] Did you ask Robert Parker why he didn't say anything to Billy Long when Billy Long was ranting and raving back there in the chute about lying and putting him in the electric chair?

A Yes, I did.

Q What did Robert tell you?

A He said that's all the State wanted him to do was to say something to Billy Long or do something to Billy Long so they could put something more on him.

(T 1792)

First, the foregoing is not comment upon the defendant's right to remain silent as afforded by the Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution and by Article I, Section 9, of the Florida Constitution. These constitutional provisions are a part of the exclusionary rule protections designed to preserve the integrity of the judicial system and deter official misconduct. This case involves impeaching the credibility of a defense witness. It is not an attempt to impeach Appellant; it is not an attempt to deter unconstitutional police or governmental action(s). Further unlike United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) and Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the instant comments were not the product of government involvement, custodial interrogation or silence of the accused following advisement. Hence the constitutional protections cited by Appellant in brief do not apply to the comments challenged.

This is particularly evident when these comments are viewed in conjunction with the authority cited. In Torrence v. State, 430 So.2d 489 (Fla. 1st DCA 1983), the prosecutor asked the defendant if he ever told anybody else the story told at trial as to how he obtained the stolen jewelry. An immediate objection was noted. In Flynn v. State, 351 So.2d 377 (Fla. 4th DCA 1977), the prosecutor's questions to the defendant centered on his not having told anyone "officially" (other than his lawyer) of his entrapment. The Fourth District found "a possible oblique reference to a prior invocation of the privilege to refuse to vocally incriminate oneself. Id. at 379. In Willinsky v. State,

360 So.2d 760 (Fla. 1978), reversal was predicated upon impeachment by disclosure of the legitimate exercise of the right to silence as violative due process safeguards. The facts involved disclosure of the accused's silence at an earlier preliminary hearing.

As previously stated, the instant "silence" was not conducted by, or made pursuant to, governmental involvement. Constitutional protections are not applicable. Further, the testimony was elicited from a defense witness, not from the defendant. The State was impeaching the credibility of the witness, not the defendant. Moreover, the question, was not properly objected to and was later restated by the defense. Error did not occur. This is particularly apparent when the testimony is considered in its original context. Harris v. State, 438 So.2d 787 (Fla. 1983).

POINT XIII

THE PROSECUTOR'S QUESTIONS TO APPELLANT CONCERNING HIS "COACHED" TESTIMONY WERE PROPER IMPEACHMENT.

ARGUMENT

During Appellant's trial testimony, the court ordered a brief recess so that the jurors could eat their evening meal. (T 1956) It was 6:55 P.M. and Appellant had been on the witness stand for approximately two hours and thirty five minutes (direct examination for 1½ hours; cross exam for 1 hour and five minutes.) (T 1955-1956). Prior to recess, argument was conducted and the parties were ordered to provide case law as to whether it was permissible for Appellant to confer with counsel. (T 1956) Presumably Bova v. State, 410 So.2d 1343 (Fla. 1982), which holds the access to counsel is absolute no matter

how brief the recess, was cited for Appellant was permitted to consult with counsel. (T 1957, 1963)

Afterwards upon resuming cross-examination of Appellant, the prosecutor commented upon the fact that Appellant had conferred with counsel repeatedly even during the recess. (T 1963) In brief, Appellant claims asserts such comment is improper and attempts to persuade this Court that an impermissible comment on the right to remain silent occurred. This argument is not supported by the record.

The Fifth Amendment precludes compelling an individual to testify or become a witness against himself. However if a defendant voluntarily elects to become a witness, he or she waives immunity and becomes a witness subject to examination as any other witness. Rule 3.250, F.R. Crim. P.; United States v. Ramirez, 441 F.2d 950 (5th Cir. 1971); Lebowitz v. State, 343 So.2d 666 (Fla. 2d DCA 1977). Such a defendant is subject to the full truth testing process. (T 1963-1966)

Appellant attempts to impress this Court with the many ways a defendant in a criminal prosecution is unlike an "ordinary" witness. The State acknowledges that there are distinctions, but submits that this particular circumstance is not one.

POINT XIV

APPELLANT'S SPONTANEOUS STATEMENT TO THE ARRESTING OFFICER THAT HE DID NOT, NOR HAD HE EVER OWNED A GUN, WAS VOLUNTEERED BY APPELLANT, WAS NOT IN RESPONSE TO INTERROGATION AND WAS PROPERLY ADMITTED AT TRIAL, EVEN THOUGH APPELLANT HAD NOT BEEN ADVISED OF HIS CONSTITUTIONAL RIGHTS.

ARGUMENT

The Fifth Amendment guarantees the privilege against compulsatory self incrimination and is applicable to the states through the Fourteenth Amendment. Mallory v. Hogan, 378 U.S. 1, 6 (1964). In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court established procedural safeguards to protect the exercise of this privilege from the coercive effects of custodial interrogation. The Supreme Court's primary concern in Miranda was that the coercive atmosphere created by police custody and interrogation would "subjugate the individual to the will of his examiner", thereby undermining the privilege against self-incrimination. Id. at 457-458; 467.

Miranda requires that prior to custodial interrogation, law enforcement officers advise a suspect that he has the right to consult with an attorney and one will be provided if he cannot afford one. Further the suspect is advised that statements, if made, will be used against him. Id. at 444, 478-479, Miranda safeguards are required only when a suspect is interrogated in a custodial setting. In the instant case, the State acknowledges that Parker was in custody at the time of his statement. He was under arrest pursuant to a valid arrest warrant and was handcuffed in the back of a police vehicle. (T 202, 204, 208-209) The State further acknowledges that Parker had not been advised of his rights. (T 201, 210)

It is the State's position that Parker's statement was volunteered spontaneously without question or prompting by the arresting officer(s). (T 201-202, 203-205) Statements which are not the results of interrogation, but are spontaneous and volunteered by the accused, are admissible despite a failure to comply with Miranda safeguards. United States v. Baldwin, 644 F.2d 381, 384 (5th Cir. 1981). Here the detective was sitting in the front seat of the car with the affidavit in his hand. (T 203) The detective advised Appellant that he was under arrest:

> I advised him that he was under arrest for the aggravated assault on Lewis Bradley which occurred on the Sunday prior where Lewis Bradley had alleged that he had been threatened by Mr. Parker with a gun and that their car had been shot up.

Id. Appellant interrupted without letting the detective complete the explanation, and blurted out:

> At this point he told me he didn't have a gun, didn't own a gun, didn't know anything about guns.
>
> Q Would you say he just blurted this out?
>
> A Yes sir, I hadn't even finished giving him all of the details of the arrest.

(T 203-204)

Appellant argues that he was in custody (this the State does not dispute) and was interrogated under the definition set forth in Rhode Island v. Innis, 446 U.S. 291 (1980) We do not agree. Interrogation as defined by the United States Supreme Court in Rhode Island v. Innis includes either "express questioning or its functional equivalent. . . words or actions. . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 300-301.

In Innis, the functional equivalent was police conversation, overhead by the accused, concerning the safety of children playing in the area where the

murder weapon had been discarded. Here Appellant argues the functional equivalent is the detective informing him of the charges against him. Appellant submits this recitation of fact is "precisely the sort of statement that is 'reasonably likely' to elicit an incriminating response." (AB 65)

Appellant supports his argument with Jones v. State, 346 So.2d 639 (Fla. 2d DCA 1977). However the factual circumstances of Jones differ remarkably and thus do not require a similar holding. In Jones, the defendant gave an incriminating in custody statement after advisement and after asserting that he wished to remain silent. The police continued interrogation despite the request. Not so here; hence, Jones does not apply.

The ruling of a trial court on a motion to suppress is clothed with a presumption of correctness. The reviewing court should interpret the evidence and every reasonable inference in a manner most favorable to sustain the lower court's ruling. Mikenas v. State; Hoy v. State; Maggard v. State. Appellee respectfully submits that Appellant has failed to establish an abuse of discretion. Accordingly, this Court should affirm the conviction.

POINT XV

APPELLANT'S STATEMENT THAT HE DID NOT OWN GUNS, MADE AT THE TIME OF HIS ARREST FOR THE AGGRAVATED ASSAULT OF LEWIS BRADLEY WAS PROVEN FALSE, AND WAS PROPER EVIDENCE OF GUILTY CONSCIOUSNESS.

ARGUMENT

Appellant's argument under this point is confusing. He maintains the testimony of Detective Bradley concerning the false exculpatory statement was improperly admitted as it related to the collateral crime of aggravated assault

against Bradley instead of the three murders for which Appellant was on trial. (AB 66-67)

Admissibility of the statements themselves was never objected to on the grounds of relevancy, i.e. that they pertained only to the collateral crime of aggravated assault against Lewis Bradley. (See, the argument and portion of the record referred to in Point XIV, supra) The motion to Suppress Statements filed May 18, 1982 challenged voluntariness. (R 125-126) At the June 25, 1982 hearing on the motion, Appellant maintained the arrest affidavit was insufficient and he had not been advised pursuant to Miranda v. Arizona before giving the statement. (T 194-196, 213-217) On those grounds Appellant's motion, was denied. (T 217; R 152) The argument advanced in brief concerning error "in permitting the state to use the defendant's statements made at his arrest for an unrelated offense as evidence of guilt" was never presented to the trial court and is not proper on appeal. One may not tender a position to the trial court on one ground and successfully offer a different basis for that position on appeal. Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979) cert. denied 378 So.2d 342 (Fla. 1979); Sapp v. State, 411 So.2d 363, 364 (Fla. 4th DCA 1982).

Appellant did object to the State's Proposed Jury Instruction No. 7 on the grounds of relevancy:

> MR. LINK: I have to object on several grounds. One of the main grounds is that the time the defendant was arrested, he was arrested for aggravated assault which not [sic] unrelated offense, it was for aggravated assault on the Bradleys. It had nothing to do with the murder charges. Any statements he made in response to the aggravated assault, should have no bearing at all on the murder charge.

(T 2099) The State's theory has always been that the series of criminal acts were not isolated instances but were a part of a continuing criminal transaction. (T 351)

Following argument in which Appellant failed to present authority for his position, the proposed instruction was taken under judicial advisement. (T 2102) The trial judge reviewed the caselaw submitted and decided the proposed instruction comported with existing Florida law and was applicable to this case. (T 2123- 2122)

In accepting the State's instruction, the trial judge relied upon of State v. Frazier, 407 So.2d 1087 (Fla. 3d DCA 1981) which states:

> Moreover, even if, arguendo, one of Frazier's versions of the stabbing were to warrant a dismissal of the charge, a separate inconsistent, but not thoroughly exculpatory, version of the event is evidence of the falsity of the completely exculpatory statement, which not only justifies the rejection of the completely exculpatory statement, but can be used to affirmatively show consciousness of guilt and unlawful intent. United States v. Pistante, 453 F.2d 412 (9th Cir. 1971). See Brown v. State, 391 So.2d 729 (Fla. 3d DCA 1980).

Id. at 1089.

Also pertinent was Douglas v. State, 80 So.2d 659 (Fla. 1956) in which this Court reversed a murder conviction, but stated:

> This is quite different from a case in which one accused of crime might deny guilt and then offer a false alibi, a false denial that he owned a weapon of the type employed in committing the crime or a similar statement that could be disproved independently of the proof of the commission of the crime by the defendant. Under such circumstances evidentiary value could be given proof of the false statement and proof of its falsity as a separate circumstance tending to show defendant's guilt.

Id. at 661. These are precisely the circumstances of the instant cause. Thus the instruction is premised upon a truthful statement of the law. See also, Smith v. State, 424 So2d at 730.

POINT XVI

APPELLANT'S CROSS EXAMINATION OF STATE WITNESS DENISE LONG WAS NOT IMPROPERLY LIMITED BY THE TRIAL COURT'S FAILURE TO PERMIT QUESTIONS CONCERNING HER PROBATIONARY STATUS WHICH WERE POSED ON RE-CROSS AND EXCEEDED THE SCOPE OF RE-DIRECT.

ARGUMENT

Admittedly parties are permitted great latitude in cross-examining adverse witnesses. Harmon v. State. This is particularly true when seeking to establish bias and motive to fabricate. However the instant record reveals Appellant was afforded full opportunity to cross-examine State witness Denise Long and to delve into areas of bias, interest prejudice or corruption. (T 1610-1623) Appellant attacked Denise Long's credibility through questions concerning her place and type of employment, her unemployment, her living with the Hal Johns (Groover's step-brother) while married to Billy Long, her drug use, contradictions in her earlier deposition, and her prior police record. (T 1610, 1613, 1614, 1615-1616, 1616-1617, 1619-1620, 1623) The State submits Appellant was afforded ample opportunity to expose the possibility of improper motives.

Appellant did not inquire whether Denise Long was on probation until re-cross examination. (T 1626) The State objected on grounds that the question exceeded the scope of re-direct. Id; Section 90.612(2), Florida Statutes. Redirect examination had been brief and focused on Long's fear of Appellant. (T 1623- 1625) The State argued that Long's probationary status was irrelevant to her redirect testimony. The trial court agreed and instructed the jury to disregard. (T 1627) Appellant does not address the basis for the court's ruling.

Exposure of a witness' motivation in testifying is a constitutionally protected right for the accused. However this right is subject to the trial court's discretion in limiting and controlling cross-examination. Bailey v. State, 411 So.2d 1377 (Fla. 4th DCA 1982). The extent of cross-examination on an appropriate subject is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. Appellant has failed to establish such an abuse here.

Assuming arguendo this Court should that error occurred, the State submits such error was harmless given the overwhelming evidence of Appellant's guilt and the many attacks to Long's credibility afforded on cross-examination.

POINT XVII

APPELLANT WAS NOT DEPRIVED OF A FAIR TRIAL BY THE PROSECUTOR'S ATTEMPT TO INTRODUCE PRIOR CONSISTENT STATEMENTS OF A WITNESS PRIOR TO AN ATTACK OF THE WITNESS' CREDIBILITY.

ARGUMENT

Appellant did not initially challenge Long's testimony on the ground raised herein. (T 1236-1237) Appellant's counsel objected to the second reference to prior consistent statements. (T 1238) [The transcript appears to be incorrect as the reference is to "prior inconsistent statement." (T 1238-1239) This objection was overruled. Upon the third reference, counsel again objected and the prosecutor was told to "move along." (T 1239- 1240) Subsequently the prosecutor asked Billy Long whether he told the police what he told the court today. (T 1274) Counsel objected and a side bar conference ensued. (T 1274-1277) The State withdrew the question. (T 1277) Appellant moved

for mistrial on the ground that the State had already introduced statements. Id. The trial judge denied the motion. Id. Appellant did not move to strike the testimony or request a curative instruction.

The State submits that the comment did not warrant a mistrial. A mistrial is appropriate only when the error committed is so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So.2d 230, 232 (Fla. 1979); Perry v. State, 146 Fla. 187, 200 So. 525 (1941). A motion for mistrial is addressed to the sound discretion of the trial judge. Salvatore v. State, 366 So.2d 745, 750 (Fla. 1979) cert. denied 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115, rehearing denied 444 U.S. 975, 100 S.Ct. 474, 62 L.Ed.2d 393. Florida law holds that the power to declare a mistrial and discharge a jury should be exercised with great care and caution and should occur only in cases of absolute necessity. Id. at 750. Flowers v. State, 351 So.2d 764 (Fla. 3d DCA 1977). Fundamental or prejudicial error to a defendant's right to a fair trial must be clearly evident to warrant declaration of a new trial. Sykes v. State, 329 So.2d 356, 359 (Fla. 1st DCA 1976), Preston v. State, 342 So.2d 852 (Fla. 2d DCA 1977). Here neither concept as argued to the court nor evident from the record.

Secondly, the State respectfully submits that if error occurred, it was harmless. The instant "error" is simply not of the magnitude to warrant reversal of Parker's conviction. Wingate v. State. In Straight v. State, 397 So.2d 903 (Fla. 1981) rehearing denied, this Court affirmed a capital murder conviction in which the prosecutor posed a question concerning the source of drugs. The defense maintained that the question constituted a suggestion of unrelated criminal activity which would prejudice the jury against the defendant. This Court determined the question was "calculated to elicit irrelevant testimony and suggesting to the jury the existence of such prejudicial

evidence, was highly improper, is without question." Id. at 909. However, the question did not warrant a mistrial. In light of the overwhelming evidence against Straight, it was held "inconceivable that the prosecutor's improper question might have affected the verdict." (Id.) Appellee submits that evidence of Parker's guilt is overwhelming.

Third, the State acknowledges Florida caselaw which holds that the prior consistent statement of a witness may not be introduced to "bolster" or shoreup a witness' direct testimony until an effort is made to impeach his testimony. Trainer v. State, 346 So.2d 1081 (Fla. 1st DCA 1977); Perez v. State, 371 So.2d 714 (Fla. 2nd DCA 1971); Van Gallon v. State, 50 So.2d 882 (Fla. 1951). Billy Long was cross-examined and impeached on the statements given to the authorities. (T 1381-1382; 1388-1389, 1412-1422, 1424, 1431-1433) On re-direct, the prosecutor rehabilitated Long with his prior consistent statement. (T 1448) Inasmuch as the testimony was ultimately presented to jury, the premature admission of the evidence was harmless.

In Jacobson v. State, 375 So.2d 1133 (Fla. 3d DCA 1979) rehearing denied, the prosecutor's case was comprised largely of former associates and members of the defendant's criminal organization. The prosecutor anticipated an attack on the credibility of state witnesses and elicited facts and details of their past as well as their motives for cooperating with State and federal authorities. The Third District held that the jury is entitled to have information concerning bias or self-interest Id. at 1135; Crespo v. State, 344 So.2d 598 (Fla. 3d DCA 1977) The court held admission of such evidence to be valid no matter if brought out on direct or cross-examination. Jacobson v. State at 1134-1135, see also n. 2.

POINT XVIII

THE TRIAL COURT'S ACTIONS WERE NOT IMPROPER WHEN APPELLANT PURPOSEFULLY VIOLATED THE RECIPROCAL DISCOVERY PROVISIONS OF RULE 3.220, F.R.CRIM.P.

ARGUMENT

During cross-examination of Billy Long, Appellant inquired into Long's memory ability, head injuries due to automobile accidents which affected his memory, how long he had been a "drinker" and whether he would lie in an official proceeding to help his own court case. (T 1281-1282) Appellant then attempted to impeach Long with a 1979 deposition in a civil case arising from an automobile accident in which Long allegedly suffered temporary memory loss and sought damages. (T 1282 et. seq.) The State objected (T 1282) on grounds of failure to disclose pursuant to Rules 3.220(a)(1)(ii), (x) and (xi), and (4), F.R.Crim.P. (T 1285-1305) A Richardson inquiry was conducted. (T 1306-1307, 1288, 1291, 1294) Afterwards, the trial court stated:

> This is what I believe to be the case: I believe that this deposition does come within the rules, obviously it's my interpretation that it does. I think it's only fair, I think any interpretation places an enormous burden upon the State, which it does under these rules, to disclose, and also to the Defense, that it would be unfair for me to allow either the State or the Defense to proceed with such a deposition for impeachment of the Defense witness or the State's witness without disclosing the same to the State -- to either side. And I think also there is an obligation to disclose any witness names and addresses of any witness that the defense intends to call to prove up any portions of that deposition that Mr. Link has.
>
> That being the case, and although we haven't made a great deal of progress in this trial, nontheless it's a case of murder in the first degree where the death penalty could possibly be imposed if he were found guilty, it's of such significance that I think that the only thing I can do under the Richardson -- after making this determination under the Richardson case -- Richardson hearing, I have no recourse but to grant a continuance and order the Defense to disclose -- to give the deposition to the State to copy so that they can read it over and provide them with any names and addresses of witnesses they

> intend to prove up any portion of that deposition. And then we will start tomorrow morning . . . And at that time after the State has had an opportunity to examine the deposition, whether or not the State -- undoubtedly if they find those matters in there that they have never had an opportunity to examine, whether or not I would grant a motion for them to recall a witness for further direct is a matter I will deal with at that time.
>
> . . .
>
> For the ruling I have just made, I have relied upon Richardson versus State, 246 So.2d 771, I have relied on Angelo versus State, 362 So.2d 412, and Roberts versus State, 370 So.2d 800. And, of course, Florida Rules of Criminal Procedure, specifically 3.220, Subsections 1, 2, 3, 4, iii, c-1, d-2, -- 2-. . . f, excuse me, and f.

(T 1311-1312, 1317)

Appellant argues the trial court's decision was improper as Billy Long was not a potential defense witness; therefore, the defense was not under an obligation to provide notice of the prior statement of a non-witness. Appellant offered nothing in support of his position other than his interpretation of the rule. He advances the same argument now. The State submits that if Appellant's interpretation were correct, the rule would include a statement similar to that found in subsection (b)(4)(i).

The trial court has broad discretion in determining sanctions and remedies for discovery violations. Wright v. State, 428 So.2d 746, 748 (Fla.1st DCA 1983). Ziegler v. State, at 372. The discretion is properly exercised only after adequate inquiry into circumstances so that a proper balance may be achieved. Reciprocal rules of discovery should be followed so long as the defendant is not denied his fundamental right to defend himself. Woody v. State, 423 So.2d 971 (Fla. 4th DCA 1983); Morgan v. State, 405 So.2d 1005 (Fla. 2d DCA 1981). After such a careful evaluation of the circumstances, an abuse of discretion must be shown in order to reverse. More is required than a mere alternative interpretation of the governing rule of criminal procedure.

The failure to observe and/or comply with the rules of discovery should be remedied in a manner consistent with the seriousness of the breach. Cooper v. State; Zeigler v. State, at 372. Here the court provided Long's deposition to the State and recessed for the evening. (T 1311-1312) Upon request, the State was permitted to reopen direct testimony to ask additional questions would have been posed if discovery had been provided timely. (T 1318-1322, 1323-1325)

The sanctions to be imposed for failure to comply with discovery are within the sound judicial discretion of the trial court. It is only with the utmost reluctance that an appellate court should interfere with the exercise of this discretion. State v. Lowe. We respectfully submit that Appellant has failed to show an abuse of discretion, or to show substantial prejudice to their cause. Therefore, reversal is not required.

POINT XIX

EXCUSAL FOR CAUSE OF POTENTIAL JURORS WHO COULD NOT RECOMMEND A SENTENCE OF DEATH UNDER ANY CIRCUMSTANCES DID NOT DEPRIVE APPELLANT OF TRIAL BY A FAIR AND IMPARTIAL JURY CONSISTING OF A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

ARGUMENT

Appellant maintains that the trial judge permitted voir dire examination of prospective jurors in a manner which systematically excluded individuals opposed to capital punishment[13] (those who could not recommend a sentence of

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[13] Appellant does not content the inquiry conducted violated the principles of Witherspoon v. Illinois, infra, but that exclusion pursuant to Witherspoon was improper.

death under any circumstances) and thereby deprived him of a random selection of a cross section of the community. Appellant argues that he was entitled to a jury which represents a definable cross section of the community. He submits that a jury panel which excludes those who are unalterably opposed to the death penalty, i.e. a death qualified jury, could be more conviction-prone and thus not impartial. Appellant relies upon the Sixth and Fourteenth Amendments to the U.S. Constitution, Article I, Sections 16 and 22 of the Florida Constitution and Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980).

Initially, the State notes that the holding of the Eight Circuit in Grigsby v. Mabry conflicts with opinions from this, as well as other, jurisdictions. State and federal courts have repeatedly upheld exclusion for cause of those jurors who state they could never vote to impose the death penalty under any circumstances. Courts have held the exclusion of prospective jurors who evidenced their inability to follow the law was proper. Spinkellink v. Wainwright, 578 F.2d, 582, 597-598 (5th Cir. 1978) cert. denied 440 U.S. 979 (1979); Downs v. State at 790-791; Martin v. State, 420 So.2d 583, 585 (Fla. 1982); Scott v. State, 411 So.2d 866, 869 (Fla. 1982); Darden v. Wainwright, 699 F.2d 1031, 1037- 1040 (11th Cir. 1983) affirmed on rehearing en banc. 708 F.2d 646 (1983); Corn v. Zant, 708 F.2d 549 564-565 (11th Cir. 1983); McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983) on rehearing en banc; Arango v. Wainwright, 563 F.Supp. 1181, 1187-1188 (S.D. Fla. 1983); Mitchell v. Hopper, 538 F.Supp. 77, 91-94 (S.D. Ga. 1982); Ross v. Hopper, 538 F.Supp. 105, 106 (S.D. Ga. 1983).

Appellant requested that "there be no questioning of prospective jurors in this cause as to their beliefs about the death penalty, about capital punishment." (T 44) Alternatively, Appellant requested that such questions be reserved until after a conviction, if any. Id. Such bifurcated proceedings have previously

been rejected. Nettles v. State, 409 So.2d 85, 86-87 (Fla. 1st DCA 1982); Jackson v. State, 366 So.2d 752 (Fla. 1978); Gafford v. State, 387 So.2d 333 (Fla. 1980); Maggard v. State.

Appellant advanced maintained a two pronged argument in support of his motion. (T 44-51) First, he submitted the aforementioned "representative cross section of the community" argument. (T 44) This premise has been repeatedly rejected. (See caselaw cited on preceding page).

Second, Appellant argued that disqualification pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968) created a "death qualified jury [which] is more prone to convict . . . ." (T 48) This lack of impartiality argument was rejected flatly by the Fifth Circuit in Spinkellink v. Wainwright. The Fifth Circuit concluded the state's interest in evenhanded application of its laws and in providing an impartial jury was too fundamental to risk a defendant-prone jury by allowing inclusion of those adamantly opposed to the death penalty, even at the guilt phase of trial.[14] Id. at 596.

> [I]mpartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution.

Id. (The trial judge reached a similar finding. T 44-48) The Eleventh Circuit has held Spinkellink binding. Mitchell v. Hopper at 93-94. Courts have refused to accept the notion that the jurors remaining after exclusion of veniremen opposed to capital punishment, are possessed with a prosecutorial bent and are not impartial. Corn v. Zant at 565 and caselaw cited therein.

In brief, Appellant maintains reversible error was committed by the trial court's failure to conduct an evidentiary hearing on his motion in limine,

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[14] A jury from which certain groups of people are excluded does not violate Eighth Amendment considerations where a significant state interest is manifestly and primarily advanced in support of those aspects of the jury selection process. United States v. Cabrera-Sarmiento, 533 F.Supp. 799, 806-807 (S.D. Fla. 1982) (T 44-48)

Counsel argues that he intended to submit proof that a death qualified jury was more prone to convict. (AB 7). Respectfully Appellant's written motion is void of any such allegation or expression of intent. (R 57-60). At the hearing, counsel indicated his position could be proven by "expert witnesses whose studies will be uncontradicted . . . ." (T 48) Specifics were not supplied. Counsel requested an evidentiary hearing but did not attempt to identify the experts, their affiliations, credentials, legitimacy. Likewise there was no proffer of the results of the studies or the basis of the sampling.

Appellant relies upon Grigsby in arguing that the trial court erred in denying an evidentiary hearing upon requested. However in Grigsby counsel indicated at oral argument that given a continuance for a "full evidentiary hearing", "there exists additional information which will be produced to supplement the record." Id. at 528. (emphasis added) Thus it appears that Grigsby provided legitimate and identifiable evidence at the time of his request. There was no such representation here. (T 44-52) Accord, Spinkellink v. Wainwright (petitioner proffered evidence).

The United States Supreme Court recently held that an abuse of discretion did not occur in the denial of an evidentiary hearing on a claim identical to that offered by Appellant. Maggio v. Williams, 104 S.Ct. 311, 313-314 (1983). Thus it appears that Grigsby has been overruled. The evidence proffered by Williams on the question of whether the jury was less than neutral with respect to guilt was found by the district court to be "tentative and fragmentary". Maggio v. Williams at 314. The Supreme Court held:

> Williams claims that he is entitled to a hearing on the question whether the jury selection procedures followed here had these effects. But he has not alleged that veniremen were excluded for cause on any broader basis than authorized in Witherspoon. The District Court characterized the evidence proffered by Williams on the question whether the jury was less than neutral with respect to guilt as tentative and fragmentary, and we cannot conclude that it abused its discretion in refusing to hold an evidentiary hearing on this issue. Further review is not warranted.

Id. Here the evidence presented to the trial court in support of Appellant's request for an evidentiary hearing was substantially less than proffered in Maggio v. Williams.

The State submits Grigsby v. Mabry is not controlling, and further, that error did not occur.

POINT XX

SECTION 921.141, FLORIDA STATUTE IS NOT UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED; THEREFORE, APPELLANT'S SENTENCE OF DEATH IS PROPER.

ARGUMENT

The arguments raised in Appellant's Motion to Declare Florida Statute 921.141, Unconstitutional have been ruled upon repeatedly. The Eleventh Circuit Court of Appeals has recently dismissed the same constitutional arguments presented herein. Sullivan v. Wainwright No. 83-5763, (11th Cir. November 28, 1983) The federal panel found that this Court had satisfied its responsibility toward proportionality review of the capital sentence contrary to the claims in Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982) cert. granted 102 S.Ct. 1425 (1983) and Autry v. Estelle, 52 U.S.L.W. 3341 (1983); See also, Spinkellink v. Wainwright; Adams v. Wainwright, 709 F.2d 1443, 1449-50 (11th Cir. 1983). The Supreme Court of the United States affirmed the holding of the Eleventh Circuit. Sullivan v. Wainwright, No. A-409 (November 29, 1983).

POINT XXI

DEATH BY ELECTROCUTION IS NOT CRUEL AND UNUSUAL PUNISHMENT.

ARGUMENT

Appellant argues that death by electrocution is cruel and unusual punishment in violation of the Eight and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. (AB 73; R 68-70; T 77-78) This Court has recently answered an identical argument adversely to Appellant's position. Sullivan v. Wainwright, No. 64,573 (Fla. November 30, 1983) [8 FLW 469]. See also, Booker v. State, 397 So.2d 910 (Fla. 1981); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947); In re Kemmler, 136 U.S. 436 (1890), Spinkellink v. Wainwright.

POINT XXII

THE TRIAL JUDGE DID NOT ERR IN OVERRIDING THE JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSING A SENTENCE OF DEATH FOR THE FIRST DEGREE MURDER OF NANCY SHEPPARD.

ARGUMENT

During the penalty phase of the bifurcated trial the jury recommended that Parker be sentenced to life imprisonment for the murder of Nancy Sheppard. (T 2516-2517; R 472) After consideration of the testimony and argument presented at the hearing and following review of the pre-sentence investigation report, the trial court, on March 14, 1983, announced six (6) aggravating and no mitigating circumstances and imposed a sentence of death. The sentencing court found:

1. Appellant has been previously convicted of another capital felony. Section 921.141 (5)(6), Florida Statutes. (R 497-498)

2. The murders of Richard Padgett and Nancy Sheppard were committed while engaged in the commission of felonies, to wit kidnapping and robbery. Section 921.141(5)(d), Florida Statutes (R 499-500)

3. The murder of Nancy Sheppard was committed for the purpose of preventing lawful arrest or effecting an escape from custody Section 921.141(5)(e), Florida Statutes. (R 500-501)

4. The murder of Nancy Sheppard was committed for pecuniary gain, Section 921.141(5)(f), Florida Statutes. (R 501)

5. The murders of both Richard Padgett and Nancy Sheppard, were especially heinous, atrocious, or cruel. Section 921.141(5)(h), Florida Statutes. (R 501-504)

6. The murders of Richard Padgett and Nancy Sheppard were committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. Sections 921.141(5)(i), Florida Statutes. (R 504-505)

(R 496-505)

Appellant presents a triple attack on his sentence. He argues the sentencing court improperly overrode the advisory jury sentence of life imprisonment. Second, the aggravating circumstances were erroneously found as the findings of fact are unsupported by, if not contrary to, the evidence introduced at trial and at the sentencing phase. Lastly, Appellant claims the capital sentence evidences a total disregard for mitigating circumstances.

A. Jury Recommendation

The importance of the jury recommendation cannot be overstressed. Its significance was explained in Tedder v. State, 322 So.2d 908 (Fla. 1975) and quoted in Appellant's brief. (AB 83). The jury's advisory sentencing verdict carries great weight, but is not controlling. Gardner v. State, 313 So.2d 675 (Fla. 1975); Sawyer v. State, 313 So.2d 680 (Fla. 1975); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Barkley v. State, 343 So.2d 1266 (Fla. 1977); Hoy v. State; Ross v. State, 386

So.2d 1191 (Fla. 1980); McCrae v. State, 395 So.2d 1145 (Fla. 1981). The trial judge may decline to follow a jury recommendation where the facts indicate a sentence of death is appropriate. Stevens v. State, 419 So.2d 1058, 1065. (Fla. 1982) cert. denied 103 S.Ct. 1236 (1983). Such action does not constitute double jeopardy. Douglas v. State, 373 So.2d 895 (Fla. 1979); Phippen v. State, 389 So.2d 991 (Fla. 1980); Engle v. State, No. 57,708 (Fla. September 15, 1983) [8 FLW, 357, 360].

This Court has always afforded great weight to a advisory sentence, but upon thorough review and careful consideration of the individual facts of a case, has approved death as an appropriate penalty even where jurors have recommended life imprisonment. Routly v. State, No. 60, 066 (Fla. September 22, 1983 [8 FLW 388, 389-391]; Stevens v. State at 1065; Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979) cert. denied 447 U.S. 912 (1980). Such action has been affirmed. Dobbert v. Strickland No. 82-5121 (11th Cir. October 19, 1983) (as yet unreported) The State submits that the facts of this cause are so compelling that a judicial override was indeed proper.

B. Propriety of Death Sentence Under these facts

The circumstances of this cause are so clear and convincing that virtually no reasonable person could differ with the sentence imposed by the trial judge[15]. Tedder v. State at 910. The State submits that the judicial override was proper and urges this Court to affirm the sentence imposed.

Appellant briefly challenges three of the aforementioned six aggravating factors. (See, initial brief, pp. 74-77) The main thrust of his argument is the trial court failed to find mitigating factors from the evidence presented which could have accounted for the jury recommendation of life. Appellant contends

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[15] The trial judge specifically considered the Tedder standard. (R 506).

evidence was presented whereby the statutory mitigating factors of age[16], extreme duress[17], extreme mental or emotional disturbance[18] capacity to appreciate criminality of conduct substantially impaired[19] and accomplice only in the capital felony committed by another[20] could have been found. Likewise Appellant submits non-statutory mitigating evidence was introduced showing that he was a father of two small children for whom he cared, saved the lives of several people in the Bradley house by taking the gun from Tommy Goover[21] and the lesser sentences of the co-defendants.

1. Mitigating factors

Evidence directed at all of the foregoing was carefully considered by the trial court. (T 2576; R 488) Based on all the evidence presented, the sentencing judge concluded that the facts were insufficient to establish that Appellant acted under extreme duress or substantial domination of another person. Section 921.141(6)(g), Florida Statute. The trial judge refused to find Appellant acted under the domination and control of Groover. Accord, Stevens v. State at 1064-5. This conclusion is sufficiently supported by the record. (R 493)

The sentencing court also rejected Parker's claim that he was under the influence of extreme mental or emotional disturbance at the time the murders were committed. Section 921.141(6)(b) (R 489) This factor is close linked with "substantial impairment to appreciate the criminality of conduct" as set forth under subsection (6)(f). Section 6(f) was also deemed unwarranted by the trial court. (R 494) Although the absence of psychiatric (or expert)

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16 Section 921.141(6)(g), Florida Statutes.
17 Section 921.141(6)(e), Florida Statutes.
18 Section 921.141(6)(b), Florida Statutes.
19 Section 921.141(6)(f), Florida Statutes.
20 Section 921.141(6)(d), Florida Statutes.
21 The State notes the inconsistency of this position when juxtaposed with Appellant's argument that he acted under the dominion and control of Groover.

testimony is cited, the trial judge also emphasized Appellant's failure to claim mental or emotional disturbance at the time of the criminal episode. Appellant testified and maintained that others committed the murders. (R 489) He did not contend that he was insane, incompetent, incapacitated, or did he testify to lack of ability to appreciate the criminality of his actions. In addition, there was no expert testimony as to mental health, alcohol and/or drug dependency. Under such circumstances, the sentencing court cannot be faulted for its failure to find either subsection (b) or (f). Appellant's own testimony is unpersuasive. The other "evidence" cited in brief consists of observations and personal opinion which might have been viewed differently by the court had Parker not testified or had he confirmed the opinions. He did not. This alone is contradictory despite Appellant's claim to the contrary.

Based on the evidence cited, the court was not compelled to find the factors submitted. Smith v. State, 407 So.2d 894 902 (Fla. 1981) citing Hargrave v. State, 366 So.2d 1 (Fla. 1978) cert. denied 444 U.S. 919 (1979) This is not a case in which the jury entered a life recommendation based on evidence of mental incapacity and the trial judge has rejected their conclusion. Quince v. State, 414 So.2d 185, 187 (Fla. 1982) and caselaw cited therein.

As to age, the sentencing court found Appellant's maturity and experience to be far beyond his chronological age of twenty-eight (28) years. (R 495-6) The court relied upon factors such as: Appellant had been self-supporting and on his own since age sixteen (16); had been married, divorced, remarried and divorced again; fathered two children; had prior involvement with the law; and had worked in an assortment of occupations. Id. The trial court expressly considered but rejected this factor. Peek v. State, 395 So.2d 492, 498 (Fla. 1980). Appellant's plea that he would be 78 before eligible for parole if given life sentences is of no moment.

In disregarding Appellant's claim that he was a minor participant in the capital felony committed by another, the court listed 18 specific factual findings to support its determination that Parker was the ringleader in the drug operation and the homicidal events started when Appellant made threats of death to enforce payment of drug debts. (R 491-492) (Appellant admitted both these facts at trial.) In brief, Appellant quarrels with three of these factual findings: ownership of the car, gun and operation of the car. (AB 81) Assuming arguendo these factors are incorrectly listed by the court, the remaining 15 are unchallenged and effectively counter a finding of this factor in mitigation. Accord, Stevens v. State.

The evidence concerning Appellant's background, paternal duties and affection were considered and found insufficient to mitigate Appellant's involvement in the three murders. The State submits this was not erroneous. Although only the statutory mitigation factors are disavowed in the written sentencing order, this does not mean the non-statutory factors were not weighed in arriving at the appropriate sentence. (R 488-496) The court considered all the other evidence presented in mitigation and found no factors applicable. Contrary to Appellant's claim, the sentencing order specifically indicated that "all evidence and testimony at trial and at advisory sentence proceeding, the Presentence Investigation Report, the applicable Florida Statutes, the case law and all other factors touching upon this case." (R 488) Appellant's sentence fully comports with the principles of Lockett v. Ohio, 438 .S. 586 (1978). Lockett does not require that the non-statutory factors be found. The mandate of the United States Supreme Court is that factors in mitigation not be unduly restricted to those provided by state statute. The record indicates that these constitutional requirements were followed. Appellant quarrels with the weight given the mitigating evidence by the trial court. Such

disagreement is an insufficient basis by which to challenge a sentence. Hargrave v. State.

The State finds Appellant's attack upon Judge R. Hudson Olliff to be nothing more than a blind accusation. It is an incorrect restatement of dissenting opinion of Mr. Justice Marshall in Barclay v. Florida, 77 L.Ed.2d 1134, 1163 (1983). As this Court is well aware, the judgment in Barclay v. State, 411 So.2d 1310 (Fla. 1983), was affirmed by the Supreme Court.

2. Aggravating Factors

Appellant argues the finding of aggravating factor (5)(d)[22] was erroneous as robbery was not the primary motive behind Sheppard's murder, but was an incidental afterthought. Clearly each of the three murders was committed for a variety of reasons all connected to Parker's desire for payment of drug debts. Billy Long testified that Parker took Sheppard's necklace and class ring from her neck after her murder. (T 1261) However by this act, Appellant finally received some compensation for the money owed to him by Padgett. Appellant's reliance upon Moody v. State and Hall v. State, 403 So.2d 1319 (Fla. 1981) offer little support to his "incidental" argument.

In Provence, 337 So.2d 783 (Fla. 1976), this Court held a robbery is always committed for pecuniary gain. These murders differ from that of Provence v. State, in a remarkable way: each was committed in furtherance of a conspiracy to sell drugs. Sheppard was killed in furtherance of these pecuniary motives, but also in an effort to conceal Padgett's kidnapping and murder. We submit that the trial court did not err in concluding that both aggravating circumstances are applicable. Provence is distinguishable in that only robbery

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22 Section 921.141(5)(d), Florida Statute.

and murder of the victim occurred. See, Quince v. State. Thus the factual circumstances support the separate findings of pecuniary gain (Section 921.141(5)(f)) and robbery (Section 921.141(5)(d)).

The State submits the factors were not improperly doubled. Should this court find merit in Appellant's argument, the death penalty is proper inasmuch as there were no mitigating factors found in this cause.[23] Hargrave v. State; Jent v. State, 408 So.2d 1024 (Fla. 1981); Brown v. State, 381 So.2d 690 (Fla. 1981); Jackson v. State, 359 So.2d 1190 (Fla. 1978); Gibson v. State, 351 So.2d 948 (Fla. 1977). Under such circumstances, the death penalty is presumed correct. Foster v. State, 369 So.2d 928 (Fla. 1979) cert. denied 444 U.S. 885; Alford v. State, 307 So.2d 433 (Fla. 1975). There has been no interference with the weighing process. Vaught v. State 410 So.2d 147, 150-151 (Fla. 1982); Hargrave v. State.

Appellant challenges the finding of heinous, atrocious and cruel. Section 921.141(5)(h), Florida Statutes. Appellant argues that Sheppard's execution style murder is insufficient to demonstrate awareness of impending death. This argument overlooks the girl's young age, her shock and instant realization of betrayal by Long, Groover and the Parkers at being told Richard wanted to see her, and discovering him dead in a ditch, as well as her own impending death. (R 501-4) Under the definition provided in State v. Dixon, 283 So.2d 1 (Fla. 1973), Nancy Sheppard's murder was consciousless, pitiless and unnecessarily tortuous to the young victim. These factors cannot be compared to a "routine" execution style murder. There are additional factors to set the crime apart from the norm. c.f. Lewis v. State, 398 So.2d 434 (Fla. 1981) (victim killed instantly by a single shotgun blast through window while watching television in his bedroom at night); Maggard v. State at 977 (victim died quickly of a single shotgun blast fired through a window; victim unaware); Menendez v. State, 368

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23 See, the recent case of Maxwell v. State, No. 60, 754 (Fla. December 15, 1983)[8 FLW 506, 508]

So.2d 1278, 1281-1283 (Fla. 1979) (shopkeeper shot twice during a robbery and died; no witnesses to shooting); Cooper v. State, (State trooper stopped defendant's car immediately after grocery store robbery. Defendant walked to Trooper's car and fired two shots into his head killing him instantly). Here the mental anguish, although brief, justifies the finding of this aggravating factor. Vaught v. State at 151. The factor has been approved the basis that the killing was inflicted in a cold and calculated fashion. Id. and caselaw cited therein.

The trial court's charge conference comment (to the effect that Sheppard had no knowledge of her impending death), taken out of context, is an insufficient basis upon which to conclude the instant factor is inappropriate. This is especially so when the comment is viewed in conjunction with the court's formal finding.

The State submits the instant record supports the judicial override and imposition of the death penalty. The jury's recommendation of life imprisonment was not based on valid mitigating factors discernible from the record. Stevens v. State at 1065; Hoy v. State.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Robert J. Link, Esquire, GREENSPAN, GOODSTEIN and LINK, 305 Washington Street, Jacksonville, Florida 32202 this 28th day of December, 1983.

Barbara Ann Butler
Assistant Attorney General

BAB/rh
#5 J/K