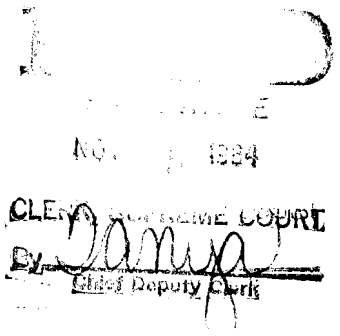
IN THE SUPREME COURT OF FLORIDA

DERRICK TYRONE SMITH Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 64,670



BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is an appeal by Derrick T. Smith from a judgment of guilt and sentence of death imposed on him by the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida.

Derrick T. Smith, defendant below, will be referred to herein as "Appellant". The State of Florida will be referred to herein as "Appellee". Appellee will use the symbol "R" in reference to the Record on Appeal.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL

Appellant argues herein that the trial court erred in denying Appellant's motion for mistrial made after Detective San Marco purportedly commented on Appellant's exercise of his right to remain silent. The trial court denied the motion, finding that Appellant did not exercise his right to remain silent. (R. 1799).

The record reflects that state witness, detective Charles San Marco, was re-called to the witness stand to testify regarding certain post-arrest and post-Miranda[1] warning statements made by Appellant. The state proffered this testimony outside the presence of the jury. (R. 1779-1785) San Marco testified as follows in response to questions by Assistant State Attorney McKeown.

> Q. The next question, did you ask him, having these rights in mind, do you wish to talk with us now?
>
> A. Yes.
>
> Q. And what was his response to that?
>
> A. No (R. 1784)

Appellant interposed no objection to this proffered testimony, although he objected to San Marco's testimony regarding Appellant's statements on other grounds. (R. 1788-1790). It was not until sub-

1/ Miranda v. Arizona, 384 U.S. 436 (1966)

stantially the same testimony was presented to the jury that Appellant chose to move for a mistrial. (R. 1798-1799).

Generally the failure to timely object to the admission of evidence precludes subsequent appellate review of the issue. Castor v. State, 365 So.2d 701 (Fla. 1978); Ray v. State, 403 So.2d 956 (Fla. 1981); Clark v. State, 363 So.2d 331 (Fla. 1978). Here, Appellant had every opportunity to object on the grounds he now raises before the testimony was presented to the jury. He should not now be permitted to benefit from error he himself invited. See Ray, supra at 961; Achin v. State, 387 So.2d 375 (Fla. 4th DCA 1980); McCrae v. State, 395 So.2d 1145 (Fla. 1980).

Even assuming the alleged error is preserved for review, Appellant's argument on this point must fail. This Court has long held that any comment on an accused's exercise of his right to remain silent, properly objected to, is reversible error without regard to the harmless error doctrine. See e.g. Bennett v. State, 316 So.2d 41 (Fla. 1975), Clark, supra. These cases do not apply, where, as here, a defendant does not exercise his right to remain silent. Cf. Donovan v. State, 417 So.2d 674 (Fla. 1982).

The record reflects that almost immediately following the exchange complained of by Appellant, during the same interview with San Marco, Appellant changed his mind about making a statement, and made one. (R. 1800-1805). In Williams v. State, 353 So.2d 588 (Fla. 3d DCA 1977) cert. discharged 372 So.2d 64 (Fla. 1979) the Third District Court of Appeal was confronted with a similar factual situation and noted:

> The crucial aspect of the challenged testimony is that it was not elicited to show that the defendant did not say anything at that time. The importance of the testimony is the fact that the defendant responded that she was willing to answer questions, and willing to waive her right to remain silent.
>
> Id. at 590

As in Williams, Id. the challenged testimony was offered by the State to establish that Appellant's statements were voluntary, not to create an inference of guilt based on his failure to make a statement. See also Donovan, supra, Hall v. State, 403 So.2d 1321, 1324 (Fla. 1981); Brown v. State, 367 So.2d 616 (Fla. 1979); United States v. Martinez, 577 F.2d 960 (5th Cir. 1978).

Assuming arguendo that the challenged testimony was improper comment on Appellant's exercise of his right to remain silent, Appellee would urge this Court to consider whether the "harmless error doctrine" rather than the "per se" reversal rule should be applied based on United States v. Hasting, ___ U.S.____, 103 S.Ct. 1974, 76 L.Ed 2d 96 (1983) and State v. Murray, 443 So.2d 955 (Fla. 1984). In Murray, this Court approved the analysis in Hasting and held:

> The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless, State v. Murray, supra at 956

In Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984), the Fifth District Court of Appeal noted the State's argument that this Court has in Murray, implicitly receded from Bennett v. State 316 So.2d 41 (Fla. 1975) and its progeny, seemingly concurred that a harmless error analysis would be appropriate and certified the question to this Court. See also Di Guilio v. State, 451 So.2d

487 (Fla. 5th DCA 1984).

Under the facts in the instant case it is clear that any error with respect to Detective San Marco's testimony on this point was clearly harmless beyond a reasonable doubt. Cf. Chapman v. California, 386 U.S. 18, S.Ct. 824, 17L Ed.2d 705 (1967). Should this Court determine that the trial court incorrectly concluded that Appellant had not exercised his right to remain silent, Appellee would ask this Court to recede from Bennett and apply the harmless error rationale of State v. Murray.

ISSUE II

THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENTS MADE AFTER APPELLANT RECEIVED FULL MIRANDA WARNINGS AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL.

Appellant argues herein that certain statement he made to Detective San Marco should have been suppressed because they were obtained in violation of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L. Ed.2d 378 (1981), and because they were involuntary. The record reflects that San Marco arrested Appellant for the murder of Jeffrey Songer and transported him to St. Petersburg Police Department Headquarters. (R 1777-1778) During the ride to St. Petersburg, Appellant expressed a desire to talk about Songer's murder and San Marco said that they could talk when they reached the police station. (R. 1780, 1793) San Marco read Appellant Miranda warnings and Appellant acknowledged his understanding of those rights (R. 1783, 1784) San Marco asked Appellant if he wanted to make a statement and Appellant said no. San Marco's testimony continued:

> I said to him, I says, what's the problem? When we talked in here, you indicated you were willing to talk with us. He says, I'm in a lot of trouble, and I want to talk to a lawyer. And I said, well, fine, that's up to you. I'm only here to get your side of the story established. And with that he changed his mind right away, and he said yes. So I said to him, I've already written no on that form. I'm going to put a dash right and yes, and put changed mind. And he agreed to that. (R. 1799)

Appellant's signed Miranda waiver form was introduced into evidence.

(R. 1801) The trial court heard substantially the same testimony on proffer (R.1779-1788), rejected defense counsel's Edwards argument, and ruled the statement to have been freely and voluntarily made (R. 1790).

The primary flaw in Appellant's argument is the fact that San Marco did not continue to question Appellant after Appellant asked for an attorney.[2] The statements made by San Marco simply do not equate with tacit questioning. Compare Brewer v. Williams, 430 U.S. 387, 392-93, 97 S.Ct. 1232, 51 L. Ed.2d 424, 432-33 (1977); Jennings v. State, 413 So.2d 24 (Fla. 1982). In Jennings this Court approved the admission of a defendant's post-Edwards confession, made after defendant made a request for an attorney and held:

> ... a suspect can waive the presence of counsel even though he has indicated a prior desire to have counsel if the waiver is not coerced, is freely given and is a continuation of the original dialogue. Id. at 27.

Sub judice Appellant changed his mind about counsel before he signed the rights waiver form and willingly signed the form indicating that he did not desire counsel. Appellant has not shown that he was subjected to Edwards violative interrogation.

Appellant also suggests that San Marco's statement that he was just there to get Appellant's side of the story rendered the statement involuntary, because it was misleading. This novel argument

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2/Appellant appears to recognize that San Marco's question "what's the problem?" (R 1799) was simply an attempt to clarify Appellant's assertion of his right to remain silent.

was not made to the trial court and cannot now be properly presented on appeal. Lucas v. State, 376 So.2d 1149 (Fla. 1979). Even if this argument were properly before this Court, it lacks merit. Appellant's cases are inapposite. For example, in M.D.B. v. State, 311 So.2d 399 (Fla. 4th DCA 1975) a juvenile was told he would face fewer charges if he confessed. In State v. Chorpenning, 294 So.2d 54 (Fla. 2d DCA 1974) the defendant was promised he could go home if he confessed and would lose an adoption case if he did not.

> The voluntariness of the confession was a mixed question of fact and law which was decided first by the trial judge and then by the jury based on the evidence adduced. There was sufficient evidence to support the finding that the confession was freely and voluntarily made and this finding will not be disturbed.
>
> Paramore v. State, 229 So.2d 855, 858 (Fla. 1969)

As in Paramore, the record in the instant case supports the trial court's finding that Appellant's statements were voluntary.

It should perhaps be noted that Appellant's statement was not a confession to the murder of Jeffrey Songer. It did place Appellant with Derrick Johnson outside the Hogly-Wogly barbeque. Derrick Johnson and David McGruder also placed Appellant at the Hogly-Wogly, and Johnson and Melvin Jones identified Appellant as the perpetrator of the murder. (R 1345, 1480-1491, 1674-1687). Given this extensive testimony, any error in admitting Appellant's statements would have to be considered harmless. Both state and federal courts have applied the harmless error doctrine to the introduction of statements where the evidence adduced in the

statement is cumulative and the other evidence of guilt is overwhelming. Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23L. Ed.2d 284 (1969); Ashley v. State, 370 So. 2d 1191 (Fla. 3d DCA 1979); Harrington v. State, 386 So.2d 587 (Fla. 3d DCA 1980) Appellant's argument on this issue must fail.

ISSUE III

EVIDENCE THAT APPELLANT HAD COMMITTED ROBBERY JUST TWELVE HOURS AFTER THE INSTANT OFFENSE WAS RELEVANT AND PROPERLY ADMITTED BY THE TRIAL COURT.

Over defense objections the trial court permitted Marcelle Debulle to testify that he and his wife were robbed at gunpoint by Appellant in their St. Petersburg motel room just twelve hours after the instant offense. (R. 1110-1125) The trial court denied Appellant's motion in limine to exclude this evidence, apparently accepting the state's argument was probative both of motive and identity (R. 222).

It is not error to admit evidence which establishes the entire context in which an offense was committed. Ruffin v. State, 397 So.2d 277 (Fla. 1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Smith v. State, 365 So.2d 704 (Fla.1978); Ashley v. State, 265 So.2d 685 (Fla. 1972). Relevant evidence is admissable even though it may point to a separate crime, McCrae v. State, supra., or be prejudicial. Sireci v. State, 399 So.2d 964 (Fla. 1981).

This case is not comparable to Drake v. State, 400 So.2d 1217 (Fla. 1981) in which evidence of other crimes, dissimilar in method and remote from the charged offense in time were improperly admitted against the defendant. The Debulle robbery was part of an ongoing criminal episode which commenced with the events and plans leading up to the attempted robbery and murder of Jeffrey Songer and culminated when Appellant finally completed a successful robbery. Additionally the evidence established that Appellant was in possession of a gun, similar to that used in the

Songer homicide, (R. 845) a few hours after that crime occurred and contrary to exculpatory statements made by Appellant that he had sold his gun to Derrick Johnson. Compare Smith v. State, supra; Ruffin v. State, supra.

Finally, as in Ruffin, it cannot be said that the DeBulle testimony became a feature rather than an incident of Appellant's trial. Id. at 281.[3] Having demonstrated that the challenged evidence was clearly relevant for several reasons it is evident that the trial court did not err in denying the motion in limine and allowing DeBulle to testify at trial.

3/ Appellee would submit that given Appellant's contention that the DeBulle testimony was so prejudicial as to require a new trial, it would, perhaps, have been appropriate to move for a mistrial following the introduction of this testimony. This Appellant did not do. Clark v. State, supra. One should perhaps assume that the limiting instructions which Appellant requested and received (R. 1105-1110) were sufficient to cure any prejudice arising from this testimony.

ISSUE IV

THE TRIAL COURT PROPERLY ADMITTED PRIOR CONSISTENT STATEMENTS MADE BY STATE WITNESS DERRICK JOHNSON

At trial, witnesses Maxine Nelson and Octavia Jones testified that witness Derrick Johnson told them of his involvement in the Songer homicide the day after it occurred. Johnson's statements to Nelson and Jones were consistent with his trial testimony but inconsistent with statements which Johnson gave to the police during questioning. (R. 1513-1517). The trial court admitted the challenged Nelson and Jones testimony pursuant to Section 90.801 (2)(b), Florida Statutes (1983) which provides:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:...
> (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication...

Appellant now argues that this statute was inapplicable, since Johnson's statement was not made until after the homicide which provided his motive to testify falsely. At trial, Appellant argued that Johnson's statements were not admissable because they were made outside the scope of his conspiracy with Appellant (R. 1742-1743, 1760). Appellant's failure to object to the Nelson and Jones testimony on the ground he now argues, precludes him from raising this ground on appeal. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Assuming arguendo that this issue is properly perserved for Appellant review purposes, Appellee would submit that the testimony was properly admitted. A cursory examination of Derrick Johnson's testimony reveals that Appellant sought to impeach Johnson by suggesting that his testimony was fabricated to place the blame for the homicide on Appellant and obtain more lenient treatment for himself. (R. 1510-1536) Defense counsel emphasized the fact that Johnson had given an entirely different story to the police when he was first questioned shortly after the homicide. It was therefore entirely proper for the jury to hear that Johnson had confessed his involvement in the homicide to Maxine Nelson, his mother, and Octavia Jones, in a manner consistent with his trial testimony, before he gave false statements to the police, and before he was arrested and charged with the homicide. Wilson v. State, 434 So.2d 59 (Fla. 1st DCA 1983); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982); Kellam v. Thomas,287 So.2d 733 (Fla. 4th DCA 1974); Denny v. State, 404 So.2d 824 (Fla. 1st DCA 1981).

Contrary to Appellant's assertion, Johnson had no motive to attempt to exculpate himself for the Songer murder when he talked to Nelson and Jones. Johnson had not been arrested or even questioned about the murder at that time, and if he wished to avoid coming under suspicion, surely the more prudent course would have been to keep his own counsel. In McElveen, supra. a co-defendant's prior consistent statement was admitted to rebut a charge that he was testifying falsely against the defendant to obtain a more favorable sentence. In Wilson, supra. prior consistent statements were admitted to rebut charges that the co-defendant

had chosen to implicate the defendant as part of a plea bargain. Appellant's rationale that the motive to testify falsely arose with Johnson's involvement in the homicide, could conceivably apply to any instance in which prior consistent statements of a co-perpetrator are utilized to attempt to show that the witness is testifying truthfully and not in exchange for a promised benefit from the state, and should be rejected. The trial court properly ruled the challenged testimony admissable as an exception to the hearsay rule. Section 90.801 (2)(b), Florida Statutes (1983).

ISSUE V

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT APPELLANT'S EXAMINATION OF DERRICK JOHNSON.

The state called Derrick Johnson, a participant in the attempted robbery and murder of the victim Jeffrey Songer, to testify as an eye-witness to Appellant's killing of Songer. On direct examination, Johnson testified that he had plead guilty to second degree murder, carrying a penalty of twenty-five years to life, and had agreed to testify truthfully. (R 1506-1507) Johnson testified that his plea bargain could be cancelled and he could again face first degree murder charges if he failed to testify truthfully. (R. 1509). Defense counsel cross-examined Johnson exhaustively regarding his motives for testifying, the fact that Johnson was initially charged with first degree murder and could have received the death penalty and the fact that Johnson had given inconsistent statements to the police. (R. 1510-1536).

On redirect examination the state brought out the fact that Johnson made a complete confession of his involvement in the homicide on April 1, 1983 the day of his arrest for the murder. (R 1537) Johnson testified that he was not promised anything to elicit his confession on April 1. (R. 1537) On re-cross examination defense counsel asked:

> Are you telling us that you received no benefits whatsoever for testifying in this case? (R 1540)

The trial court sustained the State's objection that this question exceeded the scope of re-direct examination. The trial court's ruling was correct. Re-direct examination had dealt with

Johnson's statements to Detective San Marco. Appellant's question went to whether Johnson received any benefits for testifying in this case. This question was outside the scope of re-direct.

A trial judge has broad discretion in regard to the admissability of evidence and his rulings should not be distrubed absent a clear abuse of that discretion. Booker v. State, 397 So.2d 910 (Fla. 1981); Maggard v. State, 399 So.2d 973 (Fla. 1981). This is not an instance in which an excessively narrow interpretation of the scope of re-direct is used to preclude a defendant from offering his theory of defense. Cf. Coxwell v. State, 361 So.2d 148 (Fla. 1978).

Sub judice Johnson had been extensively questioned on cross-examination regarding his motives for testifying as he had. The trial court has the authority to preclude the needless presentation of cumulative evidence. United States v. Tidwell, 559 F.2d 262 (5th Cir. 1977); United States v. Haynes, 554 F.2d 231 (5th Cir. 1977); Smith v. State, 404 So.2d 167 (Fla. 1st DCA 1981). Appellant has not suggested some novel response which his question would have elicited. On cross-examination Johnson had already testified that he did not think he had benefited from his decision to testify against Appellant. (R. 1511)

An Appellate court cannot consider the propriety of a trial court's ruling excluding testimony where the defense does not proffer to show what the excluded testimony would have been. Lowery v. State, 402 So.2d 1287 (Fla. 5th DCA 1981); Ketrow v. State, 414 So.2d 298 (Fla. 2d DCA 1982); Whitted v. State, 362

So.2d 688 (Fla. 1978). While this case does not present the classic proffer situation since it was the defense question itself which was ruled outside the scope of re-direct, it is impossible to ascertain how Appellant could have been harmed by the trial court's ruling on the present record. Compare Morrell v. State, 297 So.2d 597 (Fla. 1st DCA 1974); Scott v. State, 411 So.2d 866 (Fla. 1982).

In summary, Appellee would submit that the trial court's evidentiary ruling was correct. Further, in the absence of any proffer demonstrating that Johnson's answer to the question would have revealed an additional reason for his bias, any purported error must be deemed harmless since the witness' interest in the case had already been established before the jury. Mobley v. State, 409 So.2d 1031 (Fla. 1982).

ISSUE VI

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THIRD DEGREE FELONY MURDER

Appellant argues that the trial court erred in failing to give a requested instruction on third degree felony murder as defined in Section 782.04(4), Florida Statutes (1983), because under the facts of this case, third degree felony murder is the next lesser included offense of felony murder. This is not the argument Appellant made to the trial court. At trial Appellant simply stated that he was entitled to a jury instruction on all degrees of homicide. (R. 1893) This assertion is contrary to Rule 3.490, Florida Rules of Criminal Procedure and the standard jury instructions. See In the Matter of the Use by Trial Courts of the Standard Jury Instructions in Criminal Cases 431 So.2d 594 (Fla. 1981). Appellant never advanced his present argument, even in the face of argument by the prosecutor to the effect that there was no evidence to support third degree felony murder. (R. 1892-1893). In Lucas v. State, supra this Court held that it would not indulge in the presumption that ..."the trial judge would have made an erroneous ruling had an objection been made and authorities cited to the contrary of his understanding of the law." Appellant's failure to make this argument at trial should preclude its consideration on appeal. Steinhorst v. State, supra.

Assuming the issue is preserved for appeal, Appellee must submit that the trial court's ruling was correct.

This Court, in its order adopting the new standard jury

instructions in criminal cases, undertook substantial revisions in categories of lesser included offenses, establishing two catagories of lesser included offenses. Category I offenses are those offenses necessarily included in the offense charged. Category II offenses may or may not be included in the offense charged, depending on the allegata and probata. See In the Matter of the Use by Trial Courts of the Standard Jury Instructions in Criminal Cases (1981) Edition, page viii. Included in the standard jury instructions is a schedule of lesser included offenses for each criminal offense. According to that schedule, third degree felony murder is a category II lesser included offense of first degree felony murder. Florida Standard Jury Instructions in Criminal Cases, at 258.

Thus, the trial court was correct in assuming that it was not required to give the requested instruction on third degree felony murder, in the absence of evidence to suggest that third degree murder had been committed. See Williams v. State, 427 So.2d 775 (Fla. 2d DCA 1983); Rule 3.490, Fla. R. Crim. P.

Appellant acknowledges this but argues that the evidence in this cause supported the third degree felony murder charge. Appellant is incorrect. It is clear that grand theft is not a necessarily lesser included offense of robbery because grand theft requires proof of an element, value of property over one hundred dollars, that robbery does not, See Section 812.014, Florida Statute (1983); Section 812.13, Florida Statutes (1983), Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984). Thus, there would be no need to

instruct a jury on grand theft in the absence of evidence that a grand theft had been committed. Sub judice the record is absolutely devoid of any evidence that the attempted taking was not by force thus there is no evidence to suggest that only a grand theft occurred. Where the only evidence reflected an attempted armed robbery, the trial court could not properly instruct on third degree felony murder. The trial court's ruling was correct. Cf. Burney v. State, 402 So.2d 38 (Fla. 2d DCA 1981); Boston v. State, 411 So.2d 1345 (Fla. 1st DCA 1982); Gillespie v. State, 440 So.2d 9 (Fla. 1st DCA 1983).

It should be noted that the jury was instructed on all Category I, or necessarily lesser included offenses of first degree murder, to wit: second degree (depraved mind) murder, and manslaughter. (R 2081-2082) Manslaughter and third degree murder are both second degree felonies. Section 782.07 Fla. Stat. (1983); Section 782.04(4) Fla. Stat. (1983). The jury was given every proper opportunity to use its inherent pardon power to convict Appellant of a lesser included offense and instead returned a verdict of first degree murder. No error has been demonstrated.

ISSUE VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT A MAJORITY VOTE OF SEVEN OR MORE WAS REQUIRED TO RETURN A RECOMMENDATION OF LIFE IMPRISONMENT (as stated by Appellant).

Appellant urges this Court to consider this issue despite defense counsel's acquiescence in the instructions given at the penalty phase and total failure to raise an objection on this point. Appellant relies on State v. Rhoden, 488 So.2d 1013 (Fla. 1984) for the proposition that such a sentencing error is fundamental however, this Court has explicitly held that it is not fundamental error to give an instruction such as the one challenged here. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984); Rembert v. State, 445 So.2d 337 (Fla. 1984); Jackson v. State, 438 So.2d 4 (Fla. 1983).

The record provides little support for Appellant's argument that the result would have differed had the jury been instructed that only six votes were needed for a life recommendation. Compare Rose v. State, 425 So.2d 521 (Fla. 1983) in which an equally divided jury was reinstructed by the judge that it had to reach a majority verdict. Here, as in Harich v. State, 437 So.2d 1082 (Fla. 1984) there is no showing that the jury was confused by the instruction given.[4] Appellant has failed to established that the trial court committed fundamental error. His argument on this issue must be rejected. Ford v. Wainwright, supra.

4/ Appellee would note that the penalty phase jury deliberated approximately forty minutes before returning its recommendation. (R. 2186)

ISSUE VIII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON SEVERAL STATUTORY MITIGATING CIRCUMSTANCES. (As stated by Appellant).

Prior to taking testimony during the penalty phase of the trial, the trial judge and counsel for the defense and the state discussed jury instructions for the penalty phase. The trial judge, apparently attempting to follow the standard jury instructions, made it clear that he planned to give instructions on only those mitigating circumstances for which evidence had been or would in the penalty phase be presented. Appellant now argues that the trial court reversibly erred in failing to instruct the jury on four mitigating circumstances. These were:

1) defendant under extreme mental or emotional disturbance; Section 921.141(6)(b), Fla. Stat. (1983).

2) defendant an accomplice and minor participant in capital felony committed by another; Section 921.141 (6)(d). Fla. Stat. (1983).

3) defendant's capacity to appreciate the criminality of his conduct or conform conduct to the requirements of law was substantially impaired. Section 921.141 (6)(f) Fla. Stat. (1983).

4) defendant's age at the time of the offense. Section 921.141(6)(g), Fla. Stat. (1983)

Appellee must first question whether this issue has been properly preserved for appellate review. It is well settled that the failure to request a jury instruction or to object to the instructions as given precludes review of those instructions on

appeal in the absence of fundamental error. Ray v. State, 403 So.2d 956 (Fla. 1981); Castor v. State, 365 So.2d 701 (Fla. 1978). Sub judice Appellant made no objection to the instructions after they were read to the jury. (R. 2185) After the instructions were typed but before they were read to the jury, defense counsel indicated he had no problems with them.[5] (R 2129) During the instruction conference defense counsel did argue Appellant was under the influence of marijuana at the time the felony was committed, and the trial court indicated that it would not give either of the diminished capacity instructions, 921.141(6)(b) or 921.141 (6)(f) without some evidence that Appellant's faculties were in fact impaired. (R. 2117-2121). Although Appellant's requests for the other two instructions were somewhat clearer, Appellee would suggest that trial counsel's failure to renew his requests or object to the instructions given resulted in his apparent acquiescence to the instructions as given and must preclude review. Demps v. State, 395 So.2d 501 (Fla. 1981); McCaskill v. State, 344 So.2d 1276 (Fla. 1977), Ray v. State, supra.

It should be noted that the trial court did not in any manner restrict the defendant's presentation of mitigating

5/ While this exchange between the trial judge and defense counsel is not a model of clarity, it is clear, defense counsel made no specific objection to the jury instructions.

evidence or argument to the jury. Compare Simmons v. State, 419 So.2d 316 (Fla. 1982); Hitchcock v. State, 413 So.2d 741 (Fla. 1982). The trial court instructed the jury that it could consider "any other aspect of the defendant's character or record or any circumstances of the offense" in mitigation. (R. 2183). Appellee would argue that this instruction coupled with the fact that the defense was not restricted in its presentation of evidence were sufficient to enable the jury to fully evaluate all mitigating evidence in this cause, and that the sentencing proceeding was therefore in full compliance with Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed 2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed 2d 1 (1982).

It must also be noted that the record does not provide any support for the aggravating circumstances defined by Section 921.141(6)(b) and 921.141(6)(f). Although Dina Watkins testified she smoked marijuana with Appellant[6] the night of the murder, she did not indicate that he was affected by the drug in any way. (R. 1960-1965). In fact, the thrust of Ms. Watkins testimony was to suggest that Appellant could not have committed the homicide because he was with her at the time. The record does not support these two factors. Compare Simmons, supra; Stone v. State, 378 So.2d 765 (Fla. 1979) Hitchcock, supra. The trial

6/ Ms. Watkins never plainly said that Appellant smoked marijuana also.

judge also noted that the record provides no support for the conclusion that Smith was a minor participant in the homicide. The jury had before it conflicting evidence that Appellant shot Jeffrey Songer and that he was not at the crime scene. No construction of the testimony supports the conclusion that Appellant was a minor participant. Since the record does not support the foregoing mitigating factors, Bryant v. State, 412 So. 2d 347 (Fla. 1982) should not apply.

Lastly, Appellee would note that the fact that Appellant was twenty years old at the time of the crime need not be considered a mitigating factor. Peek v. State, 395 So.2d 492 (Fla. 1981); Mason v. State, 438 So.2d 374 (Fla. 1983). Appellant does not challenge the trial court's failure to find this mitigating circumstance, nor does he challenge any of the court's findings in aggravation or mitigation. The jury had before it evidence regarding Appellant's age (R. 2145, 2152) and an instruction that it could consider anything about the defendant's character or record in mitigation. Appellant has not demonstrated that he is entitled to a new sentencing hearing before a jury in light of the totality of the circumstances surrounding the penalty phase proceedings.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests that the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to W. C. McClain, Esquire, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830-3798 this 2d day of November, 1984.

Ann Garrison Paschall
Of Counsel for Appellee