IN THE SUPREME COURT OF FLORIDA

DONALD WILLIAM DUFOUR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,694

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Before trial, evidence was presented on behalf of appellant in a motion to suppress statements made by appellant to fellow inmate, Richard Miller, a.k.a. Montgomery. (Throughout this brief, this witness will be referred to as Richard Miller or as indicated, supra.) The only witness to testify at this hearing was Captain Richard Penna. He testified that Richard Miller was in the next cell to appellant (R 1124). He met with Richard Miller, who told the jail personnel of an escape attempt being planned by appellant (R 1124-1125). Later on, Richard Miller told jail officials about statements made by appellant regarding the case at bar (R 1126-1127). The first meeting was at the request of Richard Miller, and the jail officials had not known that this inmate had been an informant on prior occasions (R 1127). No money or other goods were given Richard Miller in exchange for his information (R 1128). The inmate was not given any instructions and was not specifically encouraged to continue obtaining information from appellant (R 1129).

Ann Cole was the first witness to testify for the state at the trial. She lived across the street from where the murder occurred at the orange grove. The orange grove was very large, and although she heard some arguing, she could not see the participants because they were far back in the grove. The events occurred about 9:30 or 10:00 p.m. Ms. Cole's house was quite a distance back from the road (R 619-624).

Dr. Haggert, the medical examiner testifying for the state, told the jury that there were multiple gunshot wounds on the victim's body; one in the head and one in the chest (R 679). The shot in the chest entered from the back and was consistent with the muzzel of a gun being held very close (R 680). There was a gunshot wound to the right side of the head as well, and either gunshot would by itself would have been sufficient to kill the victim (R 682-

686).

Deputy Stephen Jones was dispatched to the orange grove late in the morning on September 6, 1982, where a witness had discovered the victim's body in the orange grove and summoned the police. The body had a blanket covering the victim's face (R 629-630).

Robert Taylor, a friend and cohort of the appellant, testified for the state. He told the jury he was presently in prison for a murder in Mississippi and had four (4) felony convictions (R 740). He met appellant in 1982 and associated with him on a daily basis (R 741). He also knew Stacy Sigler (appellant's former girlfriend) and Ray Ryan, another associate of both appellant and Taylor (R 742). He testified that he saw appellant cleaning out the trunk of his car shortly after the murder occurred (R 744). He noticed items of jewelry that appellant was wearing that he had not seen before and that had been identified as the victim's jewelry by other witnesses (R 745). He also pulled out an orange backpack from his trunk (R 746). [This backpack had been placed in the car by another witness, who testified on behalf of the state (R 790).] Taylor also told the jury that appellant admitted to the shooting in the orange grove of the victim. He told Taylor he drove the car away and left it one (1) mile from his apartment and that his girlfriend, Stacy Sigler, picked him up (R 747). He also admitted that he shot the victim with a .25 automatic firearm. Taylor said that he and appellant disassembled the gun. It was a Raven firearm, which appellant said he used in the shooting of the victim (R 748). Taylor admitted buying one (1) of the stolen jewelry pieces from appellant (R 748-749). The gun was disposed of in a junkyard (R 751-752). Taylor told the jury that no deals or promises were made for him to testify in the case at bar but that he was facing a murder charge in Georgia (R 752-753). He also testified that he did talk to Detective Hanson about the murder before the Georgia murder charges were filed (R 753-754). He did not know of, nor ever

heard of inmate Richard Miller, a.k.a. Montgomery (R 754).

Ray Ryan was another cohort of the appellant who testified on behalf of the state. As a friend of appellant's, he saw him on a regular basis before and during the time of the murder (R 805-806). He was also a friend of Robert Taylor's (R 806). He knew Stacy Sigler (R 807). He noted the jewelry that appellant was wearing right after the murder and explained that he had not seen this jewelry on the appellant before the murder (R 807-808). He told the jury that appellant admitted to him that the jewelry "cost somebody a life." Appellant admitted to Ryan that the victim was a homosexual. Appellant admitted that he shot and stabbed the victim and used a .25 Raven Arms gun (R 809-810). Ryan described the gun (R 810). He told Ryan, "anybody here's my voice or sees my face has got to die." (R 809). He heard Robert Taylor tell appellant to dismantle the barrel of the firearm used in the murder (R 810). Ryan admitted that he had been convicted of four (4) to six (6) felonies (R 810). He also admitted to making deals to testify for the state in return for the state dropping armed robbery charges (R 811-813).

Stacy Sigler testified that she was the girlfriend of appellant (R 875). She saw him every day near the time of the murder. She knew Robert Taylor and Raymond Ryan as well (R 877). She testified she was driving through Eola Park in Orlando at 7:00 p.m. with the appellant in early September, when the appellant said he wanted to find a homosexual and kill him (R 879-880). He told her to drive him to a bar near Lake Eola Park and wait for him to call her (R 881). The appellant did indeed call the witness at his brother's house about thirty (30) minutes to one (1) hour later (R 881-882). The witness saw the appellant with a car trunk open. She saw the appellant taking things out of the car. She did not recognize the car as one owned or used by appellant on a regular basis (R 882). She did recall an orange backpack by this car (R 884).

She followed appellant to another orange grove, where appellant dropped this car off (R 885). She noted the jewelry worn by appellant for the first time that she had not noticed before (R 885). Appellant told her that he had killed the victim and left him in an orange grove (R 886). She described some of the jewelry for the jury (R 887). She admitted to lying to the police before, by stating that appellant had nothing to do with the murder but she had contacted her attorney and decided to tell the truth (R 890). She admitted that she was getting immunity in the case at bar in exchange for her testimony (R 891).

Richard Miller, a.k.a. Montgomery, was the cellmate of appellant's who was housed in the Orange County Jail, right next to where appellant was incarcerated (R 1258). He approached the jail personnel with information obtained from appellant while they were incarcerated (R 1259). The witness admitted that he was to have armed robbery charges dropped by the state in exchange for his testimony (R 1259-1260). The witness testified that appellant wanted him to call the news to get pretrial publicity so that appellant could get a change of venue and have a better chance to escape (R 1262-1263). Appellant told the witness that an associate had dropped him off at a store, that appellant met a person drinking beer, and he asked this person to give him a ride. Appellant was able to get this person to an orange grove and demanded three (3) gold bullions from this person and shot the victim (R 1264, 1266). Later the witness testified appellant gave him more specifics. Appellant stated that Stacy Sigler drove him to the place where he met the victim and that appellant drove the victim's car from one orange grove to another. Stacy Sigler picked up the appellant after the murder had occurred at this orange grove (R 1267). Appellant also admitted that the murder weapon was a .25 caliber automatic (R 1267). Appellant admitted obtaining jewelry from the victim (R 1268). The witness also disclosed a plot to kill Stacy Sigler, which appellant initiated and hired the witness to accomplish (R 1272). The witness was offered five

thousand ($5,000.00) dollars and obtained a picture of Stacy Sigler which was admitted into evidence (R 1273-1274). Another note with Stacy Sigler's address was admitted into evidence because the witness testified that this note was intended for the hired killers of Stacy Sigler when the witness was able to hire these killers (R 1277-1278). Thereafter, the witness contacted the jail authorities regarding the escape plan and gave them details later on on his own initiative of the facts admitted by appellant in the case at bar (R 1280-1281).

SUMMARY OF ARGUMENT

POINT I

The search warrant was sufficient because it can be presumed that when the appellant was observed with the stolen jewelry that the jewelry would be either on the person of appellant or at his residence. The affidavit in the case at bar also is not deficient because of the time element, because the affidavit alleges that the crime occurred on September 6, 1982, and the affidavit was dated October 11, 1982. Therefore, the warrant was not "stale." Furthermore, the warrant alleges a continuing violation.

Furthermore, since the effective date of the amended Florida constitutional article was applicable at the time of trial, the holding of United States v. Leon, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 677 (1984) would apply.

POINT II

The inmate was not obtaining information about the murder charge at the behest of government officials. Nor was the inmate a paid informant and specifically was not getting any remuneration for his services in the case at bar. The jail officials did not encourage the inmate to obtain information about the case from appellant in violation of United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

POINT III

Appellant was not entitled to a mistrial based upon comments from the witnesses and prosecutor. The evidence of the escape plot was relevent, even though it was not admitted at trial because it defined the relationship between appellant and the inmate. The opening remark was not error becuase it did not constitute evidence, the prosecutor made it in good faith, and the evidence that the prosecutor commented on should have been admitted. All other

comments by witnesses or the prosecutor could have been cured with a curative instruction and to the extent that these comments were not objected to by the defense, the appellant has failed to preserve those issues for review.

POINT IV

The particular facts of a murder charge regarding a prosecution witness, Robert Taylor, were not relevant to the impeachment. Appellant is, and was allowed to delve into the existence of the pending murder charge but the trial court was correct in excluding any examination into the facts because appellant demonstrated no relevancy or issues of credibility between the facts of the murder in Georgia and the impeachment in the case at bar.

POINT V

The prosecution should have been allowed to admit a prior consistent statement to rebut an implied charge of recent fabrication. Appellee submits the grounds urged on appeal were not the same grounds argued below, and as such, the point should fail for this reason alone. Furthermore, the cross-examination of the witness clearly implied that the witness was making recent fabrications; thus the prior consistent statement was admissable, pursuant to section 90.801(2)(b), Florida Statutes (1983).

POINT VI

The prosecutor's comments in closing argument were invited by appellant's defense counsel's prior closing argument. Additionally, the prosecutor's comment was fair argument based upon the evidence presented at trial. In any event, the argument cannot be construed as one that was manifestly intended to comment on the appellant's right to remain silent.

POINT VII

Appellant, by his action, deliberately waived his presence from any hearings. Appellant's personal appearance at the hearings were not mandated under the Florida Rules of Criminal Procedure.

POINT VIII

The court did not abuse its discretion in refusing to grant a second motion to continue, where the appellant could show no specific prejudice. The trial itself, does not disclose that the defense was disabled or hampered because of the denial of a second motion for continuance. The fact that a witness took the Fifth Amendment during a deposition, is not grounds to grant a continuance, but in any event, this witness (Robert Taylor) did disclose much of his criminal history and was substantially impeached.

POINT IX

The statement of Stacy Sigler was taken voluntarily by the state attorney. Florida Rule of Criminal Procedure 3.220(b)(3) was not designed to effect the remedy that appellant requires.

POINT X

The record does not disclose that the jury saw the leg shackles on appellant. The state had a compelling reason to shackle appellant, who had two (2) capital murder convictions in Mississippi and was on death row in Mississippi. The error, if any, would be harmless under the circumstances.

POINT XI

In light of the very tenuous nature between the phone call and the jurror, and in light of the trial court's instructions to the jury, the trial court had the discretion to deny the motion for mistrial where a jurror reported that her husband received an anonymous phone call, in which the caller did not identify himself (or herself) during the trial.

POINT XII

The trial court had the discretion to deny the special jury instruction, which in effect would tell the jury to disregard the evidence and to recommend a life sentence at their whim. In light of all the other instructions given, the jury was adequately instructed.

POINT XIII

During the penalty phase, the trial court properly permitted details of a prior capital felony to be presented. Any analogy between similar fact evidence, and admission of this type of evidence at the penalty phase would be inapposite because section 921.141(1), Florida Statutes (1983), allows any evidence the court deems relevant to the character of the defendant in the penalty phase.

POINT XIV

Aggravating circumstances, pursuant to section 921.141(6), Florida Statutes (1983), are not substantive elements and should not be alleged in the indictment. The statutory scheme is such that the aggravating factors are part of a punishment scheme; not elements of a crime. If the aggravating factors were alleged in the indictment, the state would be required to prove those elements at trial.

POINT XV

Appellant was properly sentenced to death. A witness testified that appellant told him subsequent to the murder, "anybody here's my voice or sees my face has got to die." There was also testimony that appellant left the body in an orange grove and took the victim's automobile three (3) miles away to another orange grove. Along with the other evidence, there was substantial, competent evidence to find that the murder was committed for avoiding or preventing a lawful arrest.

Witnesses testified to the planning and the amount of time that appellant had prior to committing the crime. In addition, the medical examiner testified that the victim was shot in the head and in the back, either shot being fatal. As such, the trial court had the discretion to find that the murder was committed in a cold, calculated, and premeditated manner.

POINT XVI

The Florida capital sentencing statute is constitutional and the points that appellant urges to overturn that conclusion have been rejected.

ARGUMENT

POINT I

THE TRIAL COURT HAD THE DISCRETION TO DENY APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE BECAUSE THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT HAD SUFFICIENT PROBABLE CAUSE.

The affidavit which appellant attacks indicates that the victim was found in an orange grove on September 6, 1982. An autopsy was performed on September 7, 1982 at which time it was determined that a .25 caliber projectile was used to kill the victim. This bullet was from an automatic or semi-automatic firearm with the brand name of Raven Arms.

In the affidavit, one Raymond Ryan gave the specific address of where the appellant lived. He swore that appellant told him he killed the victim for the gold jewelry the victim was wearing and observed this same jewelry in the possession of the appellant. Raymond Ryan also swore that he saw one Robert Taylor in possession of a .25 caliber automatic firearm - Raven Arms make. Ryan's affidavit also disclosed the specific address of Robert Taylor, which was only one (1) apartment number from where appellant lived. Additionally, Ryan stated Robert Taylor was in possession of one (1) piece of the stolen jewelry. The affidavit also stated that Taylor and appellant were close friends and frequently visited each other's apartment and had committed other crimes together. Ryan saw Taylor with this jewelry within ten (10) days from the date of the affidavit which was October 11, 1982 (R 2818-2828).

Appellant claims the affidavit is deficient because it does not say that Ryan saw the appellant with the jewelry in his home. In Bastida v. Henderson, 487 F.2d 860 5th Cir. (1973), a search warrant affida-

vit was upheld where the affiant saw the defendant with guns used in a robbery on the day of the offense. Even though the affadavit did not say the guns were seen at the home of the defendant, the review court held that the guns would either be on the defendant's person or at his home. It was not arbitrary for the magistrate to make that determination. In State v. Malone, 288 So.2d 549 (Fla. 1st DCA 1974), a search warrant was upheld even though the supporting affidavit made no specific allegation that the stolen watch was at the defendant's house. What makes this case even stronger than the latter two (2) cases, are the facts that Ryan alleged that the co-defendant, Taylor and the appellant were close friends and frequently visited each other's apartment and had committed other crimes together. This information certainly would give probable cause to the fact that the items would likely be in appellant's apartment.

Next, appellant claims the warrant must fail because the affiant did not say when he saw appellant in possession of the jewelry. Appellant's reliance upon King v. State, 410 So.2d 586 (Fla. 2d DCA 1982), is misplaced because the confidential informant in that case never said when he saw the defendant possess the marijuana. In King, the affidavit was deficient because the confidential informant could have seen the offense years ago; the magistrate could not make a determination from the information in the affidavit as to any time limitation. In the case at bar, the affidavit discloses that the crime occurred on September 6, 1982 (or at least it was discovered) and an autopsy was performed on September 7, 1982. The affidavit was dated October 11, 1982. Therefore, it would be impossible for the police to get the information from Raymond Ryan prior to September 7, 1982. Ryan alleged he had seen Taylor in possession of the murder weapon within the past ten (10) days. Presumably he could have seen appellant in possession of

the stolen jewelry as early as September 6, 1982. But inasmuch as the affidavit details that the victim was alive on September 5, 1982 (i.e., the allegation of Mark Kite), Raymond Ryan would have had to have given this information pursuant to the affidavit between September 6, 1982, and October 11, 1982. This time period does not make the warrant "stale."

In Hess v. State, 309 So.2d 606 (Fla. 2d DCA 1975), the court distinguished an affidavit pertaining to a stolen television set and a warrant which sought fungible goods such as drugs. In United States v. Barfield, 507 F.2d 53, 58 5th Cir. (1977), cert. denied, 421 U.S. 950, 95 S.Ct. 1684, 44 L.Ed.2d at 105 (1975), it was held that a forty (40) day interval between the affiant saying the stolen property was seen on the defendant's premises and the execution of the search warrant would not be unreasonable.

Appellee submits that the affidavit uses the present tense and alleges a continuing violation and as such a specific date would not be necessary. See, Borras v. State, 229 So.2d 244 (Fla. 1969). The Fifth Circuit is Bastida, supra, explained that a protracted offense is more likely to sustain a longer period of time than an isolated case. The Fifth Circuit explained that although the possession of the gun in a robbery was not a continuing offense as such, the weapon would remain as a "continuing" article unlike illegal alcohol. Appellee submits the affidavit alleges a continuing offense, i.e., possession of stolen property, and as such the warrant should be upheld on this ground alone.

The cases appellant cites to support his contention deal with the veracity of the informant and not the issue of "staleness."

Appellant argues that the holding of United States v. Leon, 468 U.S. ___ 104 S.Ct. ___, 82 L.Ed.2d 677 (1984), cannot be applied to

the case at bar, because the crime occurred before article I, section XII of the Florida Constitution was amended. Appellant cites State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), and State v. Williams, 443 So.2d 952 (Fla. 1983), to support this contention. In these cases, not only did the offense occur before this Florida constitutional provision became effective, but the trials themselves were conducted prior to the effective date. See, State v. Willaims, 443 at 954.

In Calloway v. Wainwright, 409 F.2d 59, 62 (Fla. 1969), cert. denied 89 S.Ct. 752, a defendant challenged a Florida state conviction by way of habeaus corpus. It was held that retro application of Miranda was limited to trials which were begun after their respective dates. The decision also indicated that this point had been raised on direct appeal to the Florida Supreme Court. This decision was similar to the action taken by the United States Supreme Court in Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, ___L.Ed.2d _____ (1966). There, the Supreme Court held that the rules of Miranda were available only to persons whose trials began after the dates of the decisions and should not affect cases still on direct appeal when they were decided. This court recognized in State v. Statewright, 300 So.2d 674, 677 (Fla.1974), that Miranda was not retroactive but since the trial began after the date of Miranda, the Miranda rule would apply.

Certainly, if Miranda rights could not be applied retroactively for the benefit of a defendant (at least where the rights were not the law at the time of the trial), then in the case at bar, the contested Fourth Amendment rights should be the law at the time of the trial. Dufour went to trial in May of 1984. The effective date of the amended Florida constitutional article was January 4, 1983. Therefore, this article was in effect at the time of the appellant's trial. Although United States v. Leon, supra, was

promulgated in July of 1984, appellee submits that the law at the time of the appeal must decide the case. See, e.g., Joins v. State, 287 So.2d 742 (Fla. 2d DCA 1974). See also, Mills v. State, 10 F.L.W. 45, 46 (Fla., January 10, 1985),where it was held that a statute increasing the time that a trial court could retain jurisdiction over a defendant's sentence could be applied where the statute was in effect at the time of sentencing but not at the date of the commission of the crime.

POINT II

THE TRIAL COURT, BASED UPON THE EVIDENCE, DID NOT ABUSE ITS DISCRETION IN FINDING THAT AN INMATE, ONE RICHARD MONTGOMERY, WAS NOT A GOVERNMENT INFORMANT FOR PURPOSES OF SOLICITING INFORMATION REGARDING THE MURDER CHARGE IN THE CASE AT BAR.

Appellant argues that the trial court was in error in not excluding the testimony of an inmate, one Richard Montgomery, who testified on behalf of the state regarding admissions which he heard from appellant while the two were housed together in the Orange County Jail. Appellant asserts that the evidence heard by the trial court in the motion and at the trial was analagous to the facts in United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed. 2d 115 (1980).

At the pretrial motion to suppress the statements made by appellant to this inmate, Captain John Penn of the Orange County Sheriff's Office testified (R. 1122-1123). Captain Penn told the court that Richard Montgomery was indeed housed in the cell next to appellant. He met with Montgomery because Montgomery wanted to disclose an escape attempt which involved appellant (R. 1124-1125). The first meeting was at the request of Richard Montgomery. Captain Penn did not know that Montgomery had been a government informer prior to meeting with him (R. 1127). Montgomery was granted some trivial requests,[1] but when Montgomery asked for money, the relationship was halted and the jail officials contacted the state attorney (R. 1128). Montgomery, regarding the present murder case, was given no instructions, and

[1] During the trial, Montgomery explained that one of the requests granted was to allow him to play his electric guitar. He explained that this was not so much of a privilege but was done in lieu of granting him recreation time outside (R. 1307-1308).

was not encouraged nor discouraged to solicit any information from appellant. The jail officials were primarily interested in the escape (R. 1129).

In United States v. Van Scoy, 654 F.2d 257 (3d Cir. 1981), cert. denied, 454 U.S. 1126, 102 S.Ct. 977, 71 L.Ed. 2d 114 (1981), a prisoner obtained admissions against a defendant while both were incarcerated. Although the defendant claimed the prisoner was acting as a government informant, the Third Circuit noted that this prisoner served as an informant for a different prison murder, not the murder under review. The inmate was given no instructions, nor money for his information. The court held that although the inmate was willing to furnish certain information to the government, without any instructions from the government, he could not be deemed a government agent. The Third Circuit noted that Henry, supra, was acting under government instructions, and was paid on a contingent fee basis. In the case at bar, the evidence certainly can be interpreted to show that these two (2) latter conditions did not exist. Thomas v. Cox, 708 F.2d, 132 4th Cir. (1983), likewise, made these same distinctions in rejecting the same claim that appellant seeks herein. The Fourth Circuit noted that in Henry, supra, the prisoner was contacted by the government, but in the case at bar, Montgomery contacted the jail officials. The Fourth Circuit also distinguished Henry, because there was a prearranged contingent fee basis, but in Thomas, the inmates actions were self-initiated, and not under government direction. The fact that the inmate hoped to obtain a future benefit, would not make him a government agent. Likewise, in the case at bar, although the inmate could be impeached for "currying favor" with the government, such actions by him do not convert him into a government agent. See also, United States v. Franklin, 704 F.2d 1183, 1189-1190 (10th Cir. 1983), where a wiretap "informant" was held not to be a Henry agent when she was not paid nor

instructed by the government.

This court has likewise rejected similar claims under the Henry, supra, case. In Bottoson v. State, 443 So.2d 962, 965 (Fla. 1983), an inmate gave information of a defendant's admissions to the state attorney. The state attorney told the inmate not to question the suspect any more, but the inmate did, and that testimony was held admissible. In the case at bar, although the inmate was told not to illicit information, he was likewise not encouraged to get information, nor given any payment, nor instructions thereto.

In Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982), this court rejected a claim that because an inmate acts as a government agent in one capacity, he is for all purposes a government agent. So, even though the inmate was an informant for the government regarding a drug case, his testimony regarding admissions pursuant to a murder case would not place him the status of a government informant. The trial court, in the case at bar, found that the information sought by the corrections officers was to uncover an escape plot; not to gather information regarding the murder charge (R. 1251-53).

In Van Scoy, supra, the Third Circuit declared that the standard of review for this type of a motion was the "clearly erroneous" standard. Given the testimony at the motion to suppress, as well as the trial testimony, it certainly cannot be argued that the trial court was clearly erroneous in denying the motion. Appellant is only re-arguing what was argued below, but this court cannot substitute its judgment for the trial court's.

POINT III

THE TRIAL COURT HAD THE DISCRETION TO DENY THE MOTIONS FOR MISTRIAL WHERE THERE WAS NO ABSOLUTE LEGAL NECESSITY TO GRANT SUCH MOTIONS AND ANY ALLEGED ERRORS WERE OR COULD BE CURED BY A CURATIVE INSTRUCTION OR WOULD BE HARMLESS ERROR OR BOTH.

Appellant's first contention deals with the prosecutor's detailing of an escape plot during opening argument (R 609). Appellant contends a motion for mistrial should have been granted. Richard Montgomery, the inmate and appellant became acquainted as fellow inmates and, according to Montgomery, became involved in an escape plan on behalf of appellant (where Montgomery became an informant regarding the plan). Appellee submits under Yesbick v. State, 408 So.2d 1083, 1085 (Fla. 1982), this evidence should have been admissible. In Yesbick, the defendant complained that evidence of a previous drug transaction with a state's witness for which he was not on trial, violated the holding in Williams v. State, 110 So.2d 654 (Fla. 1959). This court rejected that argument holding that evidence which had a tendency to establish the crime charged, is admissible, even though it could point to another crime committed. The evidence of the other drug transaction in Yesbick was relevent because it explained the continuing relationship with the state's witness and the defendant. Likewise, in the case at bar, the evidence regarding the escape defines the relationship between appellant and inmate, Montgomery. Appellee submits that flight is a relevant issue in this case, and would be another reason to allow this evidence. See, Coney v. State, 348 So.2d 672 (Fla. 3d DCA 1977), where evidence by a state's witness that the defendant asked to leave town with this witness subsequent to the crime, was held admissible.

Opening remarks do not constitute evidence. See, Witted v. State, 362 So.2d 668, 678 (Fla. 1978). In United States v. Cappo, 595 F.2d 1086, 1094, n.8, (5th Cir. 1979), cert. denied, 444 U.S. 1012, 100 S.Ct. 660, 62 L.Ed.2d 641, where the prosecutor made opening remarks regarding Williams rule of evidence, which he in good faith believed was admissible, it was held that no error occurred even though this evidence was subsequently ruled inadmissible. This court in Rutledge v. State, 374 So.2d 975, 979 (Fla. 1979), made a similar holding. A tape recording was mentioned by the prosecutor in his opening argument. The tape was subsequently ruled inadmissible, although the judge at the time of the opening argument had deferred ruling. This court noted that the state attorney qualified his opening remarks by indicating that nothing he said would be evidence. Again, no error was found. The case at bar is similar. At the time of the opening argument, the evidence was ruled admissible. In addition, just before the state commenced its opening remarks, the court explained to the jury that opening statements were not evidence, and that the jury was only to rely on the testimony from the stand and the physical evidence (R. 592-93). The court explained that the defense could also take advantage of this opening remark in its closing, by pointing out that no evidence was adduced regarding the escape plan. In De La Cova v. State, 355 So.2d 1227 (Fla. 3d DCA 1978), a mistrial motion was denied and affirmed on appeal because the state did not obey any rule of procedure or fundamental fairness. The present case is in the same posture, and as such, the drastic measure of a mistrial was properly not invoked.

Next, appellant notes the following in the transcript:

> Q. (By the prosecutor) . . .
> Did he tell you any of the facts, or just
> what the charge was?
> (emphasis supplied)

> A. Just what he was in there for murders, and he run four (4) or five (5) other guys out of the cell, so I was apprehensive.
>
> Mr. Dvorak (the defense attorney): Your Honor, I'm going to object to that and move for a mistrial. That last comment by the weight.
>
> The court: The objection will be sustained. The motion will be denied. Members of the jury, the last comment about four (4) or five (5) other guys out of there is to be disregarded by you in the consideration of this case.

(R. 1261-62). No other objections to that comment were interposed. The state then requested the witness to confine his answers to the questions. The state then asked the following question:

> Q. . . .After he told you that he was charged with murders, did he tell, at that time, did he tell you any of the facts of the case or the charge against him?
>
> A. No, Sir.

(R. 1262). No objection was interposed to this question at all. The transcript reveals that the defense counsel never objected to the reference of "murders", but only to the comment regarding to the appellant running "four (4) or five (5) other guys out of that cell." In Ferguson v. State, 417 So. 2d 639 (Fla. 1982), this court held that a motion for mistrial must be made even if the comment is objectionable on obvious grounds, or else the objection would not be preserved pursuant to Castor v. State, 365 So.2d 701 (Fla. 1978). See also, State v. Prieto, 439 So.2d 288 (Fla. 3d DCA 1983), which had the same holding. In Wilson v. State, 436 So.2d 908, 910-11 (Fla. 1983), a witness was asked by the state what charges the defendant was arrested for in connection with the case. The defendant objected and moved for a mistrial because the answer would have included charges not the subject of the

present information. The court affirmed the conviction and noted that the record did not disclose that the state attorney intentionally tried to show the jury that the defendant was arrested for other crimes. Likewise, in this case, the initial question of the state attorney did not illicit information to show that the defendant was arrested for other crimes. The answer was nonresponsive. Although a subsequent question by the state contains the statement, "After he told you that he was charged with murders," this question merely repeats what was stated by the witness before, to which no objection was interposed.

In Williams v. State, 354 So.2d 112 (Fla. 3d DCA 1978), it was held that an inadvertent statement of a witness would not be sufficient grounds for a mistrial, but that a curative instruction would be sufficient. The witness in Williams, stated the defendant had been in prison before, clearly implying that the defendant had been convicted of other crimes. See also, Warren v. State, 443 So.2d 381 (Fla. 1st DCA 1983), for the same facts and holding as in Williams, supra, and De La Cova, supra.

Finally, in regarding these comments, it has been held that reference in the testimony of a state's witness to other charges was harmless error, in view of a curative instruction and no error occurred when the trial court refused to grant a mistrial motion. See, Riley v. State, 367 So.2d 1091 (Fla. 3d DCA 1979), and Flowers v. State, 351 So.2d 764 (Fla. 3d DCA 1977). In view of the lack of objection (and ipso facto, the lack of a request for a curative instruction), these comments certainly should be deemed harmless error.

The prosecutor asked Montgomery what kind of a person did appellant admit killing, to which the witness replied that it had come from "the single homicide." (R. 1268). Again, a mistrial should not have been

granted (even though there was an objection), because the answer was not solicited by the prosecutor. See, Wilson, supra, and De La Cova, supra. A curative instruction would have been sufficient. In Morales v. State, 431 So.2d 648 (Fla. 3d DCA 1983), a victim testifying for the state of direct, made a number of inflamatory and prejudicial remarks. It was held not an abusive discretion to deny a motion for mistrial where a proper curative instruction was given. See also, United States v. Bain, 736 F.2d 1480, 1488-1489 (11th Cir. 1984), which had the same holding regarding a state's witness mentioning collateral marijuana charges in violation of a previous order in limine, but where a curative instruction was deemed sufficient in lieu of a mistrial. In the case at bar, appellant was offered a curative instruction, but specifically waived that (R 1269). Although a witness has mentioned other crimes for which the defendant is not on trial, or mentions that the defendant has been in custody, which would imply he has committed a collateral crime, these references are generally incurred by a curative instruction, and it is not error to deny a mistrial motion. See, Riley, supra, and Dunn v. State, 341 So.2d 806 (Fla. 3d DCA 1977). The court, in denying the motion in the case at bar, noted not only that the question was not responsive to the answer, but commented, "There is no reference to anything in this case up to this point." (R 1269). Indeed, this answer would appear very unclear to a jury, and would not necessarily imply that appellant had been convicted, or was charged with other murders. Taken in context to what the jury had previously heard, this answer is confusing at best. As such, to imply that the jury would infer that appellant had other murder convictions or charges from this comment, would be speculation.

Richard Montgomery, testifying on behalf of the state, made two (2) references that he was in danger in staying at the Orange County

Jail (R. 1308, 1316). None of these comments referred to appellant specifically. Later on in the proceedings, appellant's counsel moved for a mistrial based upon these comments (R. 1320-21). Although the trial court denied the motion for mistrial, he gave the following curative instruction:

> I want to instruct you that his testimony concerning any alleged threats or fears that he may have, have nothing to do with this case, or with the defendant in this case, and that testimony therefore, is not to be considered by you in connection with this case.

(R. 1334-35). The curative instruction was adequate to negate any putative error. In addition, the instruction included the words "alleged threats or fears", so that any intention that the trial court was "bolstering" the witnesses credibility would be negated by the word "alleged." Additionally, the state attorney noted that some of these threats did come from the appellant and in light of the extensive cross-examination undergone by the inmate-witness, (i.e., regarding the witnesses' motives to "curry favor" with the state and to obtain "deals"), such evidence would be proper to rebut the cross-examination (R. 1323-24). As such, the curative instruction was more than adequate to negate any alleged error.

POINT IV

THE TRIAL COURT HAD THE DISCRETION TO LIMIT THE CROSS-EXAMINATION OF ROBERT TAYLOR.

Appellant takes issue with the trial court's granting a motion not allowing the defense to delve into the facts of a pending murder charge in Georgia regarding the prosecution witness, Robert Taylor (R 2564). The court, in granting the motion, did not prohibit the defense from impeaching the witness regarding the murder charge but merely prohibited the defense from delving into the facts (R 1212). Even on direct examination it was brought up that Mr. Taylor was facing a pending murder charge in Georgia (R 752-753). On re-cross-examination it was brought out that the witness hoped to have the state attorney speak up on his behalf at the upcoming Georgia murder trial (R 783-784). The motion in limine was brought up again by defense counsel but the state attorney and defense counsel agreed to the following question which was asked on cross-examination:

> Q. Mr. Taylor, you testified that the Georgia murder charge had not been filed at the time you first started your co-operation, but in fact in the charge in Georgia, that murder had already occurred, had it not, at that time?
>
> A. It's my understanding.

(R 785-786). Nothing further was proffered by the defense and no further objections were entertained.

Appellant cites Perez v. State, 453 So.2d 173 (Fla. 2d DCA 1984), to support his cause. In Perez the facts of the particular charge were relevant to impeach the witness because the witness allegedly made a knife while in prison to assault the defendant. Obviously, the facts of the upcoming charge were relevant to the defense in Perez. In the case at bar,

appellant proffers no facts to tie in the Georgia case with the present case. If the Georgia case involved Mr. Dufour, then Perez could possibly be applicable. But there was no such proffer and unlikely no such connection.[2]

Hernandez v. State, 360 So.2d 39 (Fla. 3d DCA 1978), involved impeachment where the defense counsel maintained an assault victim had reason to fabricate the charges because he was pro-Castro while the defendant was anti-Castro. This impeachment was rebuked because it was not relevant and the Third District held that the "prospect of bias on the part of a prosecution witness (does) not open the door to every question that might possibly develop the subject." Id. at 41. See also, Nelson v. State, 395 So.2d 176, 177-178 (Fla. 1st DCA 1981), where it was held that cross-examination must be shown to be relevant in attempting to ask a store security witness what the civil liability policies were for arresting a shoplifter was held not to fit this criteria. It must be remembered that the defense counsel could not conduct a general character attack under the guides of impeachment regarding the facts of the Georgia murder. See, Steinhorst v. State, 412 So.2d 337 (Fla. 1982).

The proffer was inadequate to show the relevancy of the Georgia murder facts regarding Taylor's impeachment (R 769). As such, appellant has failed to show any harm to his case for impeaching Taylor. In United States v. Finkelstein, 526 F.2d 517, 529 (2d Cir. 1975), the court distinguished Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In Davis, the court noted the witness's denial appeared to be of questionable truthfulness, but in Finkelstein the defendant failed to show how the pro-

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[2]Appellant asserts that Taylor should have testified on the facts of the Georgia case because he would receive use ammunity pursuant to § 914.04, Fla. Stat. (1983). Aside from the facts not being relevant to the case, appellee notes that this statute may not apply to a Georgia trial.

fered evidence would harm his impeachment. Furthermore, in United States v. Brown, 546 F.2d 166, 177-182 (5th Cir. 1977), it was held that the trial court erred not to allow an answer on cross-examination which went to the witness's bias. But it was held harmless error because the essence of the witness's bias had already been brought forth. In the case at bar, the defense counsel was able to demonstrate to the jury that the witness knew that the Georgia murder had occurred and that he would help the state because he could possibly need the state's assistance if the charges were filed (R 785). So the error, if any, would be at most harmless. In any event, the record discloses that the appellant waived any objection because his counsel below abandon his quest to delve into the facts and agreed to ask the pertinent question regarding the witness's knowledge that the Georgia murder had occurred when he talked to the Florida authorities (R 785).

Initially the trial court also granted the state's motion in limine to prohibit the defense from impeaching Robert Taylor regarding information given to Detective Bourden in late 1982 (R 2565). The motion, which is uncontradicted, explained that Detective Bourden has unsolved crimes which had little evidence regarding the identity of the perpetrator. Detective Bourden asked Taylor if he had committed these crimes but in doing so promised not to file the charges if Taylor "confessed." The detective would "clear" these cases in an effort to apparently save police work and not investigate other suspects for these crimes. None of these charges could be filed against Taylor and the court made such a finding (R 1224). It was also not contested that these "confessions" to Detective Bourden related in any way to the testimony in the present case (R 1223-1224).

It must be remembered that the jury heard that Taylor had four (4) previous felony convictions (R 740). On cross-examination,

appellant was able to divulge from Taylor that he had negotiated a "deal" with the state in which armed robbery convictions would have sentences concurrent with a sentence that the witness was presently serving in Mississippi (R 755-757). The defense attorney was allowed to ask Taylor, "When you committed these various offenses for which you have been previously convicted and for which you have made deals with the state of Florida -- " (R 758-759).[3] Additionally, appellant asked Taylor if he was aware of the Georgia murder at the time he first gave his statement to Detective Hansen in October of 1982 implicating appellant (R 786). It was revealed in cross-examination that Taylor hoped to have the Florida authorities act on his behalf with the upcoming Georgia murder charge (R 783-784). In United States v. Tracey, 675 F.2d 433, 436-439 (1st Cir. 1982) the defense wanted to impeach a government witness by showing that a United States attorney had bailed him out of jail on a drunk and disorderly charge. Other extensive cross-examination had already revealed this witness's bias. The Second Circuit noted that one factor to be considered as the extent to which the excluded question bears upon character traits that were otherwise sufficiently explored. A trial court need not permit unending excursions if the impeachment reasonably completes the picture developed by the defense. Where the cross-examination is not crucial nor would it be that probative no reversible error will be found. See, Taylor v. Curry, 708 F.2d 886, 893 (2d Cir. 1983). Appellant must demonstrate that his inability to inquire about this line of impeachment created a substantial danger of prejudice to test the truth of the witness's testimony. Where a court allows substantial cross-examination and the witness has admitted his bias and the area has sufficiently been

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[3]Defense counsel brought out that Taylor had made an inconsistent statement to the effect that he took jewelry pursuant to burglaries only when in fact he admitted at trial that he took jewelry pursuant to robberies also (R 779).

explored, no conviction will be reversed on such a confrontation issue. These principals were applied to the facts in United States v. Franzen, 688 F.2d 496, 498-502 (7th Cir. 1982). In the case at bar, the essence of the impeachment was brought to the jury's attention, i.e., the witness was a career criminal, made "deals" with the state for his testimony, and hoped to have the state help him for his upcoming Georgia murder charge. The fact that this witness "confessed" to crimes which could never be charged, and which had nothing to do with this case would be of little significance and would fail in comparison to the impeachment that had already been brought forth to the jury.

Additionally, these "confessions" would unlikely help the witness's cause or status with the state authorities. As such, any error would be harmless. See, United States v. Brown, supra.

In fact, appellant never demonstrated that Taylor hoped to, or did "curry favor" with the state by these actions. Defense admitted that they did not have ample time to investigate these cases (R 1224). Since there is a lack of record to develop a confrontation violation, this point should be affirmed. See, United States v. Cunningham, 638 F.2d 696, 699 (4th Cir. 1980).

POINT V

THE TRIAL COURT HAD THE DISCRETION TO ALLOW THE PROSECUTION TO ADMIT A CONSISTENT PRIOR STATEMENT TO REBUT AN IMPLIED CHARGE OF RECENT FABRICATION.

Appellant claims the trial court erred under section 90.801(2)(b), Florida Statutes (1983), by allowing the prosecutor to have Detective Hansen relate to the jury a prior consistent statement of the state's witness, Robert Taylor. Detective Hansen had taken Taylor's statement implicating appellant in October of 1982. Appellant argues that this witness, at the time of the statement, was aware of the Georgia murder (R 786) although the charge had not been filed (R 753); ergo the October, 1982 statement to Detective Hansen was not made prior to the existence of the facts or evidence which indicate a motive to falsify.

Initially, appellee would note that the objections asserted at trial (e.g., defense counsel maintained he could not cross-examine a statement) were not the same grounds asserted by appellant herein (R 834-836, 841-843). As such, this point has not been preserved and must be affirmed. In order for an argument to be cognizable on appeal, it must be the specific intention asserted as a legal ground for objection or acception at the trial level. See, Steinhorst v. State, supra, at 338.

During cross-examination of Robert Taylor, the following information was revealed to the jury:

> Q. (by defense counsel) In fact, there was a negotiation in this case concerning an armed robbery charge, was there not, and your testimony?
>
> A. . . . I didn't understand the question.
>
> Q. You in fact pled guilty to a,

> an armed robbery charge in exchange for the state dropping another armed robbery charge against you and receiving concurrent time or time to run overlaping with your Mississippi sentence, isn't that true?
>
> * * *
>
> A. Yes, sir, I did make a deal at one time.

(R 755-756). The statement implicating appellant was obtained from Robert Taylor by Detective Hansen on October 16, 1982 (R 833). On redirect examination it was established that the robbery charge for which the witness obtained "deals" from the state were brought forth in 1983. It was also established that the Georgia murder charges were not filed until after the October, 1982 statement (R 753, 786). On cross-examination the defendant admitted that he was hoping that the Florida authorities would intervene on his behalf in the Georgia murder charge (R 783-784).

Specifically, the defense counsel impeached the witness regarding firearms. The witness stated at trial he would carry a .25 automatic weapon at times (emphasis supplied). Defense counsel referred to the witness's October, 1982 statement to Detective Hansen which stated that the witness normally carried such a weapon around [emphasis supplied (R 763)]. Again on cross-examination, the witness stated he discarded other firearms that he had owned. Defense counsel again referred to the October, 1982 statement which demonstrated that the witness had told Detective Hansen that he never threw his firearms away (R 764-765).

The clear implication of all this cross-examination is that the witness was tailoring his trial testimony to please the state authorities. The record reveals that the robberies for which the witness obtained a "deal" and the Georgia murder charge (emphasis supplied) were subsequent to

the October, 1982 statement and thus the impeachment would imply that the witness was fabricating his testimony at trial for the state because of the plea bargain concerning the robberies and the upcoming Georgia murder trial. The testimony regarding Taylor's carrying a gun and disposing of his firearms would also imply recent fabrication of his entire statement of October, 1982, and thus it was proper to show the jury that Taylor's testimony was not a recent fabrication because of the subsequent events but was, for the most part, consistent with his initial interview with Detective Hansen in October of 1982. This statement was made "prior to the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify." McElveen v. State, 415 So.2d 746, 748 (Fla. 1st DCA 1982). In Wilson v. State, 434 So.2d 59 (Fla. 1st DCA 1983), a witness was cross-examined regarding plea negotiations, the state's sentencing recommendation, and the fact that the state delayed the witness's sentencing until after the present trial was finished. The record disclosed that the witness's prior statement was made at the time of his arrest, before any plea negotiations had ensued. Likewise, in the case at bar, the October, 1982 statement was made before the robbery plea negotiations and before the Georgia murder charge was actually filed. Appellant has demonstrated no error on this point.

POINT VI

THE TRIAL COURT WAS CORRECT IN DENYING A MOTION FOR MISTRIAL BASED UPON THE PROSECUTOR'S COMMENT IN THE CLOSING ARGUMENT ON THE EVIDENCE.

Appellant contends certain comments by the prosecutor on closing argument constituted a comment on his right not to testify. Appellee notes these comments were made in rebuttal to what defense counsel had argued previously in closing argument. Defense counsel told the jury, the witness (Richard Montgomery), was a five (5) time convicted felon, who had testified for the state only to obtain a favorable position with his crimes and concomitant sentences (R 1378). Specifically, defense counsel argued:

> He cut himself a very good deal, a very, very fat deal, and what does he do in response? He offers up Donald Dufour . . . a man who is in the cell next to him in the jail, a man whose papers he has access, a man who took all of his legal papers he would have access to in the jail cell.

(R 1379). The prosecutor was implying that Montgomery had obtained the incriminating evidence against appellant by obtaining his legal papers; not by actually listening to appellant. The state attorney's objection that there was no evidence to support this was overruled by the trial court (R 1380).

The state attorney, during his rebuttal argument, did admit that Montgomery had obtained "deals" from governmental authorities (R 1396). The state then detailed the agreements that Montgomery had made with the state (R 1397-1398). The state then argued:

> Nobody has come here and said, Mr. Miller's testimony was wrong, or

> incorrect, or that that was not the deal that he was offered. So, take it, because it's uncontradicted.

(R 1398).

Next, the state attorney asked the jury, how Montgomery could know all the details of the crime without hearing it from the appellant himself, because Montgomery did not know the other state's witnesses (R 1398-1399). Appellee will set out the allegedly objectionable comment in full:

> I thought it was interesting that Mr. Dvorak (the defense counsel) said that Richard Miller (a.k.a. Montgomery) could have had access to Donald Dufour's legal papers. So far as I know, when people are in jail, they are locked up in jail. They are not given the free run of the place, and you haven't number one, heard any evidence that Donald Dufour had any legal papers in the cell with him, and, number two, you haven't heard that any of his legal papers --

(R 1399-1400). At that point an objection was interposed, and the prosecutor argued that the defense counsel had argued in his closing argument that Montgomery could have gotten access to appellant's legal papers, and that the prosecutor was entitled to say that nobody testified that he had any legal papers in his cell (R 1401). The court noted that appellant's objection was "unusual and unprecidented for me to sustain that type of objection unless it's something way out of line." (R 1402). The court also noted that each advocate would have his views as to what the evidence might be.

Appellee submits that these arguments are not comments on appellant's right to testify but are rather comments on the evidence. In State v. Bolton, 383 So.2d 924 (Fla. 2d DCA 1980), the state attorney commented in argument, that the defense attorney never told the jury what his defense was. The defendant contended that this was a comment on Bolton's right not

to testify but the comments were held to be directed at the defense counsel and his theory of the case; not the defendant himself. United States v. Fogg, 652 F.2d 551, 557-558 (5th Cir. 1981), also made the distinction between comments regarding the failure of a defendant to testify as opposed to comments which contour or explain the evidence. In Fogg, the Fifth Circuit noted that the comments were proper, because it was obvious that the defendant was not the only person who could have controverted the government's case (where the prosecutor told the jury that it was the defendant who put his liberty in jeopardy because there was no legitimate explanation for the offense). In Woodside v. State, 206 So.2d 426, 427-429 (Fla. 3d DCA 1968), the Third District held that the state still could argue the character of the evidence and tell the jury that the evidence was in conflict. Smiley v. State, 395 So.2d 235, 237 (Fla. 1st DCA 1981), held that the state attorney may comment on the uncontradicted or uncontroverted nature of the evidence and may even say that there was an absence of evidence on a certain issue. Such argument would not refer to the defendant's right not to testify. The First District noted that the state was duty bound to comment on the evidence as it existed. Unquestionably, the argument of the prosecutor in the case at bar was a comment on the evidence; not defendant's right to remain silent.

In cannot be contended that the contested arguments were manifestly intended to comment on the defendant's right to remain silent. Nor could the jury possibly and necessarily construe these arguments on the evidence as a comment on defendant's right. See, United States v. Stewart-Caballero, 686 F.2d 890, 892-893 (11th Cir. 1982), in affirming a conviction where the state attorney said in opening argument that the defendant may or may not have a different version of the facts, and on closing argument

attacked one of the defendants who testified by saying that it was improbable that a stranger would let the defendants board a boat with 5.5 million dollars worth of marijuana, and that the defendants didn't answer the question to "your satisfaction."

Finally, appellee asserts that defense counsel invited this comment. Appellant was allowed to discuss the evidence as he saw it; therefore the state was certainly entitled to rebut that argument. In United States v. Diecidue, 603 F.2d 535, 552-553 (5th Cir. 1979), the court held that a response to a particular comment of the defense attorney would not be improper. The prosecutor's argument would reasonably infer that such comments would direct a jury's attention to the defendant's arguments and not the defendnat's right to remain silent. See also, Fogg, supra, at 557-558, where it was held that the state attorney could make the comments in rebuttal to the defense argument that the defendant had lived over sixty (60) years as an outstanding citizen and who's whole life was in jeopardy because of the criminal charge. There is no doubt that these comments would be proper in and of themselves, but certainly they are proper under the doctrine of "invited error" and rebuttal.

POINT VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHERE THE APPELLANT'S PRESENCE WAS NOT REQUIRED UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.180, THE APPELLANT WAS VOLUNTARILY ABSENT FROM THE HEARING, AND THE ERROR, IF ANY, WAS HARMLESS.

Appellant contends there is prejudicial error when the trial court ruled that the appellant had voluntarily absented himself from a pretrial motion to suppress statements made by appellant to inmate Richard Montgomery. See, point II, supra. Specifically appellant argues that under Florida Rule of Criminal Procedure 3.180(3) and (6), his presence was required and there was not a sufficient showing that his absence was voluntary.

Appellee submits that a pretrial motion of this nature, wherein a defendant's presence is required, is not encompassed within the rule. Rule 3.180(3) pertains to pretrial conferences only. (emphasis supplied). Rule 3.180(6) deals with the proffer of testimony; not the suppression of evidence. Motions of this kind are not contemplated in this rule as explained in the author's comment pursuant to 33 Fla. Stat. Ann. 254 (1975), which states:

> Moreover, it should be noted that the rule does not apply to hearings on motions made prior to or after trial.

The Florida Supreme Court explained this in Herzog v. State, 439 So.2d 1372, 1375-1376 (Fla. 1983), where it was held that a defendant's absence at a pretrial motion to suppress was not a crucial stage under rule 3.180. Since appellant's presence was not required under the rule, the court's ruling was superfluous.

In any event, the trial court did have the discretion to find that appellant had voluntarily absented himself because the appellant, prior to the hearing, went on a "hunger strike." Jerry James, the director of corrections

for Orange County, testified for appellant. He testified appellant had been examined by a doctor at the jail and due to his refusal to eat had lost forty-five (45) pounds (R 1106-1107). He heard appellant tell the doctor that he was refusing to eat but appellant would not answer the doctor when the physician asked why appellant refused to eat. Likewise, appellant refused to allow the doctor to draw blood. Thereafter, the doctor had to obtain appellant's consent to go to the hospital and be fed intravenously or else the appellant would have died of starvation (R 1107-1108). In cross-examination, James testified that he had not heard any comments that appellant's jail food had been adulterated (R 1110). At the time of this hearing, appellant was in the hospital (R 1111). Pursuant to that testimony (no other testimony was offered), the court found that appellant's absence was due to his own actions (R 1113). Defense counsel during argument did proffer heresay from an inmate that appellant had been struck on his head and lay on the floor bleeding for one and one-half (1 1/2) hours before being discovered and attended to by jail personnel, but defense never disclosed who the inmate was nor requested to have that person testify (R 1113). Given the testimony paraphrased above, the trial court was well within its discretion in finding that appellant had voluntarily gone on a "hunger strike" and as such voluntarily absented himself from any pretrial proceedings. A defendant can absent himself voluntarily from a crucial stage of the proceedings and thus obviate the necessity of invoking rule 3.180. State v. Melendez, 244 So.2d 137, 139 (Fla. 1971) and Lowman v. State, 80 Fla. 18, 85 So. 166, 169-170 (Fla. 1920). Appellee submits there is no difference between a defendant who voluntarily walkes out of the courtroom and appellant who voluntarily disables himself so that he is not able to attend (or understand) the ongoing court proceedings.

Finally, appellee submits that even if error could be found, it would be harmless. Captain Michael Penn's testimony regarded his interactions

with inmate Richard Montgomery and as such appellant's presence would not be necessary to aid his attorney (R 1123-1141). The only other evidence admitted at this hearing is the deposition of Richard Montgomery, which defense counsel quoted from extensively. There was no allegations that appellant was in attendance at this deposition nor that his presence would have enhanced or helped his attorney in any way in this proceeding. See, McGee v. State, 433 So.2d 66 (Fla. 4th DCA 1983), where it was held error under rule 3.180 in considering and rejecting a proffer of evidence by the state without the presence of the defendant, but the error was held harmless beyond a reasonable doubt.

POINT VIII

THE COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT APPELLANT'S SECOND MOTION FOR CONTINUANCE.

Appellant argues the trial court abused its discretion by refusing a second motion to continue. The second motion to continue was predicated upon the initial refusal of the trial court to authorize expenses for travel to depose Robert Taylor in Mississippi and Raymond Ryan in Georgia (R 2363-2364, 2401). The motion alleged that certain Mississippi law enforcement officers had information and statements regarding Robert Taylor's crimes in Mississippi and Florida. The motion did not say what the names of these officers were, nor detail the specific information, nor say what the information would lead to (R 960, 2363-2364).[4]

Although the trial court did deny the motion to provide travel expenses, on March 23, 1984 the court ordered the state to provide Robert Taylor and Raymond Ryan for deposition not less than thirty (30) days prior to the trial date (R 967, 2401). Additionally, the state attorney told defense counsel that he (the prosecutor) would obtain the names of police from Mississippi who had information regarding Robert Taylor for defense counsel, and would ask these police officers to cooperate with the defense should the defense choose to telephone these potential witnesses (R 963). The state attorney commented that appellant knew that Robert Taylor had pled to "life" in a Mississippi murder case in order to testify against appellant (R 966).

Additionally, defense counsel filed a motion and the trial court ordered the state to disclose the past criminal records of Robert Taylor and

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[4]At the hearing defense counsel did say that a Detective Erickson of Mississippi did have information regarding robberies in Mississippi committed by Robert Taylor but again no specifics were supplied nor was any information disclosed on how it would lead to discoverable materail.

Raymond Ryan (R 2365, 2402). There was and is no allegation that the state did not obey this order. In addition, the defense had transcripts and hand written statements from Raymond Ryan (R 1025). The record discloses that Robert Taylor was indeed available for defense counsel to depose within thirty (30) days of trial (R 1047). Although Raymond Ryan was not available within this time (the state explained he was paroled before he could be brought down from Georgia), the state indicated that the defense did not depose Ryan until ten (10) days from when he was available due to a defense schedule conflict (R 1048). In any event, Raymond Ryan was available to be deposed on May 4; seventeen (17) days before trial (R 1024, 1026, 1048).

The record discloses that Raymond Ryan was extensively cross-examined (R 813-830). The crux of the cross-examination was to establish that Robert Taylor owned the murder weapon, was a drug dealer and user, had possession of much of the stolen jewelry of the victim's, was untruthful about his past employment, and made a comment that he did not want to be "stuck" with the murder weapon (R 813-823). Additionally, Ryan was impeached from his deposition that he got much of the information regarding the murder from the police officers; not appellant (R 829-830). Appellant has not, and cannot now at this moment demonstrate any prejudice resulting from the denial of his motion to continue regarding Raymond Ryan.

Robert Taylor was impeached extensively regarding his past crimes, "deals" with the state as well as federal authorities, his present murder charge in Georgia, as well as his hope to get state officials to intervene in that case, his drug use, his possession of firearms, and stealing jewelry in the course of robberies as well as in the course of burglaries (R 755-784). Taylor's deposition was used to impeach his testimony (R 768).

Any witnesses that appellant wished to depose regarding the inmate Richard Montgomery, were available to him because they were local witnesses

(e.g., Jerry James and Gary Bourdon of the Orange County Sheriff's Office). Gary Bourdon was in fact deposed on May 10, 1984 (R 1040). Again the record discloses that this inmate was thoroughly impeached regarding his aliases, his "deals" with law enforcement authorities concerning armed robberies, his violation of parole, his stealing a car, his "jumping" bond, and an agreement that he would be a witness if he did not have to testify against his sister in criminal charges. He also admitted lying to the police in the past (R 1285-1307).

Appellant has alleged no discovery violation by the state. Appellant in filing his motion for cause to travel to Mississipi and Georgia, alleged that certain Mississippi authorities had information regarding Robert Taylor (R 2363-2364). This information was as much available to the defense as it was to the state. Where the information demanded by defendant is accessible to the defendant, as well as the state, a denial of a continuance will not be an abuse of discretion. See, State v. Counce, 392 So.2d 1029, 1031 (Fla. 4th DCA 1981). A motion for continuance which is denie will be affirmed when no abuse of discretion clearly and affirmatively appears in the record. Additionally, the appellant must make a clear showing of a palpable abuse of that discretion. See, Magill v. State, 386 So.2d 1188 (Fla. 1980) and Mobley v. State, 327 So.2d 900 (Fla. 3d DCA 1976). Appellant has not demonstrated any prejudice. He has not even shown on the record who these witnesses would be, much less what they would say or how their information could lead to any discoverable material. The record demonstrates that the state's witnesses were thoroughly impeached. In Herman v. State, 396 So.2d 222, 227 (Fla. 4th DCA 1981), a denial of a motion to continue by the defense was upheld because the defense had an opportunity to depose each state witness prior to his testimony. In the case at bar, all the state witnesses were deposed and all the witnesses had their testimony transcribed. Defense counsel was able to use these depositions (and

did so) to impeach these witnesses. Indeed, there was no specified time period established as a matter law, lack of preparation on the part of the counsel so as to mandate a continuance. See, Cox v. State, 354 So.2d 957 (Fla. 3d DCA 1978), which announced this principle in holding that no continuance need be granted where a new attorney (both from the same law firm) was appointed one (1) day prior to a violation of probation hearing. Appellant, after his continuance motion was denied, never proffered any other new witnesses or new evidence either relating to impeachment or defensive nature. See, Lusk v. State, 446 So.2d 1038, 1040-1041 (Fla. 1984), which upheld a denial of a motion to continue where the depositions were completed shortly before trial but the depositions were transcribed.

The fact that Robert Taylor took the Fifth Amendment during his deposition should likewise not be grounds for granting the continuance. See, Jent v. State, 408 So.2d 1024, 1048 (Fla. 1981), which denied a motion to continue based on the same grounds. Appellant, who has not properly proffered any testimony, cannot argue that any of this potential evidence would exculpate him.

It must be remembered that appellant's prior motion to continue on January 25, 1984, was granted by the court (R 2343-2344, 2342). This factor can be considered in determining whether there was abuse of discretion to deny continuance motion. See, Mills v. State, 280 So.2d 35 (Fla. 3d DCA 1973).

Finally, no abuse of discretion can be found where the appellant has not complied with Florida Rule of Criminal Procedure 3.190(g) by not writing the motion nor making the proper verifications. See, Durcan v. State, 350 So.2d 525 (Fla. 3d DCA 1977), where it was held that no abuse of discretion resulted in denying a motion to continue where the procedural prerequisite were not complied with by defense counsel.

POINT IX

THERE WAS NO DISCOVERY VIOLATION COMMITTED BY THE STATE ATTORNEY AND EVEN IF THE STATE'S ACTIONS COULD BE DEEMED A DISCOVERY VIOLATION, APPELLANT SUFFERED NO PREJUDICE THEREBY.

After a hearing was conducted pursuant to appellant's motion to either dismiss the indictment or in the alternative to exclude the witness, Stacy Sigler (R 2559-2560), the court found that the witness was not actually subpoenaed and that it was not improper for the state to pursue the matter by withdrawing its subpoena and proceeding to secure the witness' statement without appellant's counsel being present (R 1202). At the hearing, the state argued that Stacy Sigler was at the state attorney's office voluntarily to give a statement pursuant to an agreement with her attorney (R 1194). The state attorney read from this first hearing (deemed a "deposition" by appellant). This first hearing revealed that Stacy Sigler's attorney was present and he indicated on the record that the witness was testifying voluntarily and would be given immunity (R 1195). The state attorney also argued that the witness appeared a day or two after the subpoena date had passed (R 1195). The state attorney read from Stacy Sigler's deposition, taken by defense counsel subsequent to the disputed statement given by the witness, Sigler (R 1196). The excerpts read into the record were as follows:

> (by the witness, Sigler) . . . They withdrew the subpoena, so, I went down there right of my own free will.
>
> Q. (by appellant's attorney) Would you have gone down there before the 16th of December, 1983, that you lied under oath (sic)?
>
> A. Yes.

(R 1197). Other excerpts from the deposition taken by appellant's counsel, indicated that it was not the subpoena that compelled Stacy Sigler to give her

initial statement but her desire to avoid prosecution and to tell the truth by testifying against appellant (R 1198). Finally, the state argued that had the witness wanted to take the Fifth Amendment or not talk, it would have had to issue another subpoena (R 1199). In a proceeding of this nature, a trial court has broad discretion and it is incumbant upon the appellant to demonstrate a palpable abuse of that discretion. See, Holman v. State, 347 So.2d 832 (Fla. 3d DCA 1977), where a state rebuttal witness, who was not listed on discovery, was allowed to testify at trial because the defense knew of this witness before trial even though the witness was not on the discovery list. In the case at bar, appellant has offered little or nothing to support his position. There is nothing in the record to indicate that Sigler's initial statement to the state attorney was "tainted" as argued by defense counsel below (R 1193). Even if there were, there certainly is substantial and competent evidence by which the trial court could determine that the initial statement of the witness was not pursuant to a subpoena, but pursuant to an immunity agreement worked out by her attorney and the prosecution. Reinforcing this conclusion is the fact that the witness' attorney was present at this statement (R 1195).

Under Florida Rule of Criminal Procedure 3.220(b)(3), defense counsel must be given notice and an opportunity to question a witness at deposition, when he has filed a reciprocal discovery list and that witness is included on that list. Appellee submits though that under the wording of the rule, that witness must be one whom the defense "expects to call . . . at trial." During the hearing on this motion, appellant's counsel argued that the witness told police officers initially that she knew nothing about the case (R 1190). It was not until this statement was taken initially by the state attorney that Sigler implicated appellant (R 1190). Under section 90.604, Florida Statutes (1983) a witness must have personal knowledge of the case before that witness can even testify. Defense counsel indicated it was his belief then, that the witness

was not even compent nt to testify; therefore, the witness, Sigler was not a witness that the defense "expects to call . . . at trial." It was revealed at this hearing, that the defense witness list was merely a duplicate of the state's witness list (R 1194). Appellant relies on State v. Barriero, 432 So.2d 138, 140, n.5 (Fla. 3d DCA 1983), to support his position that a defense counsel merely needs to file a witness list to ensure that he will be able to attend a deposition. Yet this is dicta; the actual issue in Barreiro was whether the state attorney could subpoena a witness pursuant to an investigative subpoena where the defense never filed a demand for discovery in the first place. Appellee submits that the mere filing of a witness list does not comprise of all defense witnesses "expected" to be called at the trial.

Even if there were a discovery violation, appellant has not demonstrated any prejudice. The key issue in any discovery violation is prejudice. A discovery violation will not necessarily require an exclusion of a witness. These principles were announced in Holman, supra. The purpose of discovery rules are to eliminate surprise at trial and allow defense counsel to plan his trial strategy. See, Carnivale v. State, 271 So.2d 793, 795 (Fla. 3d DCA 1973), where it was held that disclosing a co-defendant right before the trial was prejudicial to the defense where the co-defendant was never listed as a witness. See also, Kelly v. State, 311 So.2d 124 (Fla. 3d DCA 1975), where the defense at trial was never notified that a deposition had been taken nor was the defense supplied with the deposition transcript. In the case at bar, appellant can claim no surprise. Sigler's deposition was taken by defense counsel subsequent to her statement given to the state attorney (R 1196). Furthermore, appellant had not shown on the record how Sigler's statement was "tainted" nor how this fact prejudiced him in the preparation of the trial. Appellant's argument is speculation at best.

Even assuming that the prosecutor did "taint" the testimony of

Sigler and forced her to testify against her will, and even assuming that defense counsel was not able to "flush" this fact out at the subsequent deposition, the sanction of excluding the witness or dismissing the indictment under this discovery rule would not be proper. Under section 27.04, Florida Statutes, (1983), the state attorney could have actually subpoenaed Sigler prior to the indictment. Pursuant to this investigative subpoena the prosecutor could have "tainted" her testimony and forced her to testify the way he desired. Under such circumstances, the defense would have no remedy under rule 3.220(b)(3) to have this witness excluded or to have the indictment dismissed. But since the deposition would be taken post-indictment, appellant seeks to use discovery-violation remedies. But there is no nexus between the discovery violation and the allegation of abuse. There may be other avenues to disqualify such a witness, but the discovery rules are a shield, not a sword. Appellant cannot, by merely demonstrating a technical violation of a discovery rule, transform that violation into a panecea for all conceivable issues. See, Collier v. Baker, 155 Fla. 425, 27 2d. 652 (Fla. 1945), where a state attorney, post-indictment, issued an investigative subpoena pursuant to section 27.04, Florida Statutes (1941), but the witness refused to testify because she participated, being a defense witness, and it was held that she was in contempt for not responding to the subpoena.

POINT X

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING APPELLANT TO WEAR LEG IRONS AT HIS TRIAL, ESPECIALLY WHERE NO OBJECTION WAS INTERPOSED FOR A MISTRIAL, AND SUCH ERROR IF ANY, WOULD BE HARMLESS.

Appellant's counsel below objected to appellant being shackled with leg irons during the trial. The counsel did acknowledge that there was a covering but in his observation it stuck "out like a sore thumb." Defense counsel further argued he was not convinced that the cover which hid the leg shackles was adequate because appellant might need to shift his feet during the long hours of the trial (R 3). Defense counsel, as well as the argument on appeal, contends that there was adequate security so that there was no compelling reason to have appellant's legs shackled. The trial court did, pursuant to defense requests, remove the handcuffs from appellant (R 13, 334, 1506).

But the court ruled that the leg shackles must remain. The trial court noted for the record that there was a table turned to block appellant's table "in an effort to provide some type of shield or modesty panel" and the court also noted that the appellant and his counsel were seated so as to obscure the fact that the appellant had leg restraints (R 5). In United States v. Forrest, 623 Fd.2d 1107, 1116 (5th Cir. 1980), a trial court's findings that a defendant's dress did not badge him as a prisoner in the jury's eyes (where defendant contended the dress was a prison uniform), was upheld on appeal. In the case at bar, the trial court is in the best position to judge the effect, if any, of appellant's legs being shackled. The court's description on the record is not refuted by appellant, even though appellant may disagree with the trial court's ultimate finding. There is simply not enough information on the record to show an abuse of discretion; rather the facts as noted by the trial court would amply support his finding.

Later on in the proceedings, appellant renewed his motion to have the leg chains removed. At this point, appellant finally argued that to compel the appellant to wear the restraints could be reversible error (R 334). During this argument, appellant requested the court to put another table at the state attorney's table (in a similar position to the table that was blocking appellant's feet from the jury). The court asked the prosecutor to respond to the request. The prosecutor said he had no objection to putting another table at the state attorney's table similar to appellant's arrangement (R 335-336). Thereafter, no other objections were interposed by appellant, nor was any argument presented. In Foster v. State, 266 So.2d 97, 99-100 (Fla. 3d DCA 1972), a defendant moved for a curative instruction and a mistrial. The judge did give the curative instruction and it was held that since the defendant made no further motions for mistrial he had waived that issue. In the case at bar, appellant made no motion resembling that for a mistrial until later in the proceedings. When counsel did argue that the leg irons could constitute "reversible error" the state attorney agreed to place another table similar to appellant's arrangement. Since no other objection was interposed, appellant has waived any motion for mistrial. See also, United States v. Morrow, 537 F.2d 120, 147 (5th Cir. 1976), where the defendant did not renew his motion for mistrial.

Appellant's argument that there was no compelling reason for shackling his legs is also refuted by the record. The state reminded the court that appellant had attempted to escape from the Orange County Jail and was on death row for two (2) murders in the state of Mississippi (R 334-335). The state noted that there were no bailiffs between appellant and the prosecution. The state argued appellant had nothing to lose. The court explained that the concern was not whether appellant could successfully escape, but that in an attempt someone could get hurt (R 335-336). Appellant relies upon Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), which cited Illinois v. Allen, 397 U.S.

337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The Supreme Court in Estell explained that the Allen decision allowed physical restraint during a trial when there was an essential state policy. Estelle, supra, at 1693. The Supreme Court in Estelle, distinguished prison garb which furthered no essential state policy from shackles which could be essential. In the present case, the trial court has adequate grounds to shackle the legs of appellant.

Finally, appellee submits, that the error, if any, is harmless. Richard Miller, a.k.a. Montgomery, testified on behalf of the state that he and appellant were fellow inmates at the Orange County Jail (R 1256-1319). In United States v. Henderson, 472 F.2d 556 (5th Cir. 1973), it was held there was no error, where a defendant was tried in prison garb because he was charged with a prison murder. In the case at bar, even if the jury noticed the leg shackles, they heard admissible testimony that appellant was incarcerated for this murder. See also, Neary v. State, 384 So.2d 881, 885 (Fla. 1980), where it was held that the inadvertent sight a defendant in handcuffs by the jury was not so prejudicial as to require a mistrial.

POINT XI

THE TRIAL COURT ADEQUATELY EXPLAINED THE REASON FOR THE EXCUSAL OF THE ONE (1) JUROR AND WAS CORRECT IN DENYING A MOTION FOR MISTRIAL BECAUSE NO PREJUDICE COULD HAVE RESULTED TO THE REMAINING JUROR.

During the trial, juror Phyllis Girdner, told the court she received a strange phone call (R 1282-1283). The court explained to her that her phone number and address were not matters of public record and that no one connected with the case would have occasion to call her (R 1283-1284). The court determined that Girdner's phone number was under her husband's name and it believed that juror Girdner was confident that the call had nothing to do with the case and left her on the jury for the time being (R 1283). But right before closing arguments ensued, the court out of abundance of caution dismissed the juror (R 1344, 1360). Ms. Girdner indicated she talked to juror Dianne McGee about the call (R 1347). The court talked to Ms. McGee alone. McGee related what she heard from Girdner, i.e., that her husband answered the phone on Tuesday morning and an individual asked if Mr. Girdner was there and after Mr. Girdner responded yes, the caller hung up (R 1349). (emphasis supplied). The court explained to Ms. McGee that the call had nothing to do with the case nor originated from people involved in the case and juror McGee stated she had no reason to believe the call had anything to do with the case (R 1350). Upon determining that other juror might have heard about the phone call, the court called in juror Vickie Kline (R 1355). She told the court she heard nothing about the call until a few seconds ago, relating to a juror but no other information was divulged to her (R 1355).

At this juncture, the trial court called the jury in. The court explained about the phone call received by Mr. Girdner, and assured the jury

that the call had no connection with the trial, that it could not have come from anyone involved in the case, and that the call was not in connection with Girdner's jury service. The court explained that phone numbers of the jurors were not part of the public records, nor made available to the public but wanted to make sure that jurors had no reservations about their service (R 1358-1359).

Determination of whether a substantial justice warrants a mistrial is within the discretion of the trial court. Dealing with the conduct of jurors is likewise left to that same discretion. This principle was announced in Doyle v. State, 460 So.2d 353, 356-357 (Fla. 1984), in holding that there was no error in the trial court's refusing to grant a mistrial based upon a juror's comment to the defendant's attorney. A trial court must determine if the contact raised any serious questions or possible prejudice to the litigants. Barring such prejudice, a trial court's determination that the jurors can be impartial should not be overturned. See, Alfonso v. State, 443 So.2d 176 (Fla. 3d DCA 1983), upholding a trial court's decision not to grant a mistrial where two (2) jurors had talked to a police witness and only one (1) jurors was dismissed. In the case at bar, the trial court did not abuse its discretion in granting a mistrial because it was adequately demonstrated on the record that the phone call could not have raised any serious question of possible prejudice. The record shows the call was to Mr. Girdner, not the juror. The court very meticulously explained that the call could not have resulted from the trial, inasmuch as phone numbers and addresses of jurors were not divulged to the public.

Certainly, the trial court's explanation to the jury, in the case at bar, would dissolve any reasonable doubt that the jurors were tainted with the knowledge of this phone call. In Clark v. State, 443 So.2d 973, 976 (Fla.

1983), the trial court gave such an instruction after the jury requested to see an exhibit not admitted into evidence. The court instructed the jury not to draw any inferences from the non-admitted exhibit or speculate why it was not in evidence. It was held no abuse to deny the mistrial in light of this instruction. See also, State v. Tresvant, 359 So.2d 524, 526-527 (Fla. 3d DCA 1978), holding no abuse of discretion where the trial court obtained assurances from the jury that their encounter with the defendant in the parking lot would not affect their partiality.

In United States v. Spinella, 506 F.2d 426, 428-429 (5th Cir. 1975), two (2) jurrors received threatening phone calls. One (1) juror was excused. The review court held that these vague phone calls were not so inherently prejudicial as to require a mistrial. In the case at bar, there is a very tenuous connection between the phone call and the trial. The call in the case at bar was certainly less aggravating than the calls in Spinella. The phone call was not even directed toward the juror but her husband (and the phone number was in his name). The conversation was minimal even compared to the phone conversations in the Spinella case. In such a situation, appellant has demonstrated no abuse of discretion by the trial court.

POINT XII

APPELLANT'S PROPOSED JURY INSTRUCTION WAS PROPERLY PRECLUDED BY THE TRIAL COURT.

Appellant's requested charge in the pertinent part was as follows:

> . . . You are in power to decline to recommend the penalty of death even if you find one or more aggravating circumstances and no mitigating circumstances.

(R 2693).

Appellee submits that the trial court was correct in denying this charge in that it would be superfluous and repetitous of the charges already given to the jury. In Jennings v. State, 453 So.2d 1109, 1114-1115 (Fla. 1984), this court rejected special jury instructions requested by defendant regarding the weighing of aggravating and mitigating circumstances and held that the appropriate standard jury instructions were adequate. In MacKiewicz v. State, 114 So.2d 684, 691 (Fla. 1959), this court held there was no error to deny a defendant's requested charge, where the issue was already covered by the general instructions. In Bolin v. State, 297 So.2d 317, 319 (Fla. 3d DCA 1974), in rejecting a proposed jury instruction on self-defense, it was held that a conviction would not be reversed because a particular instruction was denied where on the whole, the charges as given were clear, comprehensive and correct. The court did instruct that if the jury found that the aggravating circumstances did not justify the death penalty, then their recommendation should be life imprisonment (R 1634). The court also charged the jury that if they found sufficient aggravating circumstances they still would have the duty to determine whether the mitigating factors outweighed those aggravating circumstances (R 1634-1635). The trial court also instructed the jury that they must consider all the evidence tending to establish one (1) or more mitigating factors and give that evidence such weight as they feel it should it receive and that the jury must reach its own conclusion

(R 1635). The trial court further cautioned the jury that the recommendation was not a counting process but rather a reasoned judgment in light of the totality of the circumstances present in the case (R 1635-1636). Further, the trial court charged the jury that the mitigating circumstances need not be proven beyond a reasonable doubt (R 1636). Appellee submits these later charges are more than adequate to give the jury an opportunity to recommend a life sentence. The jury is on notice that it had the discretion to find no aggravating circumstances, or even if they find an aggravating circumstance that it can be outweighed by a mitigating circumstance. The proposed instruction would add nothing to the charges already given. In Yanks v. State, 261 So.2d 533 (Fla. 3d DCA 1972), it was held that a reviewing court would look to the entire charge rather than to one statement out of context in determining whether a jury charge is in error. When looking at the total charge given, it cannot be argued that the proposed instruction would be necessary, rather it is superfluous and repetitive.

Appellee submits that the proposed instruction, in light of the proper standard jury instructions given by the court in the case at bar, would be erroneous. In Griffin v. State, 370 So.2d 860, 861 (Fla. 1st DCA 1979), in reviewing a jury charge, the court held, ". . . it is fundamental that the court's instructions to the jury should relate to and be confined to issues concerning evidence which has been received at the trial, . . ." In effect, the proposed instruction would be analogous to requesting a jury pardon. The result of such instruction would be to invite a jury to ignore the evidence (as opposed to weighing it). Jury pardons may exist in fact but have never existed in law. Appellant has not cited any case law to the effect that such an instruction would be applicable at a trial phase and appellee submits such a charge should likewise not be applicable at the penalty phase. The trial court, in the case at bar, specifically instructed the jury that their advisory sentence should be based upon the evidence that was heard at trial and at the penalty phase (R 1633).

The charge quoted by appellant, requested the jury to follow the law and to base their recommendation on whether a sufficient number of mitigating circumstance[s] existed to outweigh any aggravating circumstances found to exist (R 1632-1633). Finally, the court instructed the jury:

> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances and your advisory sentence must be based on these considerations.

(R 1636). Appellee submits that a trial court cannot, in one breath tell the jury to follow the law and in another instruct the jury that it may disregard the law.

Appellee submits then, that this proposed jury instruction would not only be superfluous but would also contradict and obfuscate the correct standard jury instructions already given to the panel. Appellee notes that appellant did not move to strike the standard jury instructions below. In Bolin, supra, the review court noted that the defendant did not argue at trial that the lower court erred in giving the other self-defense jury instructions where the defendant was proposing an additional instruction. Since the instructions given (recited in this point, supra) would be inconsistent with the proposed instruction, defense counsel below should have objected to the standard jury instructions (i.e., that the jury must follow the law and the evidence educed at the trial in the penalty phase). To the extent the defense counsel below did not do this he has failed to preserve the objection for proper review.

Appellee submits that appellant's assertion cannot be predicated upon Gregg v. Georgia, 420 U.S. 155, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976), nor Randolph v. State, 8 F.L.W. 446 (Fla. November 10, 1983). Neither of these cases imply that the proposed instruction is proper. Judge McDonald's dissent in Randolph was not in relation to jury instructions but was a directive

to trial courts. Id. at 449. In any event, this court has explicitly rejected such a proposed jury instruction in Kennedy v. State, 9 F.L.W. 291, 292 (Fla. July 12, 1984) (i.e., imprisonment could be recommended even though no mitigating circumstances were found).

POINT XIII

THE TRIAL COURT PROPERLY PERMITTED TESTIMONY REGARDING A PRIOR CAPITAL CONVICTION PURSUANT TO SECTIONS 921.141(1) AND (5)(d), FLORIDA STATUTES (1983).

Appellant contends that evidence of his prior conviction went "to far" because it became the "feature" of the penalty phase. Appellant makes an analogy between the evidence presented at the penalty phase and section 90.404(2)(a), Florida Statutes (1983), (which deals with similar fact evidence of other crimes to prove the offense charged at trial).

Appellant acknowledges that prior case law allows evidence and facts of a prior capital felony to be presented at the penalty phase as opposed to only admitting the mere judgment and sentence. See, Elledge v. State, 346 So.2d 998, 1001-1002 (Fla. 1977), and the pertinent part of section 921.141(1), Florida Statutes (1983), quoted therein. Justus v. State, 438 So.2d 358, 368 (Fla. 1983), (admitting the confession of a prior capital or violent crime), Delap v. State, 440 So.2d 1242, 1255 (Fla. 1983), (admitting evidence of a prior conviction of a felony entailing the use or threat of violence), and Perri v. State, 441 So.2d 606, 607-608 (Fla. 1983), (admitting details of a prior felony involving the use or threat of violence). This court explained in Alvord v. State, 322 So.2d 533, 538-539 (Fla. 1975):

> There should not be a narrow application nor interpretation of rules of evidence in penalty hearing, whether in regard to relevance or as to any other matter except illegally seized evidence.

Appellant's analogy to similar fact evidence [i.e., section 90.404(2)(a)] is not tenable. Section 921.141(1) allows any evidence the court deems relevant to the nature of the crime and the character of the defendant, and includes matters relating to any of the aggravating circumstances which certainly includes section 921.141(5)(b), Florida Statutes (1983). In effect, demonstrating the character

of the defendant by his past capital felonies is as much of a feature in the penalty phase as proving the capital crime in the present offense at the trial. By contrast, section 90.404(2)(a) deals with similar fact evidence admissible at trial to prove motive, opportunity, etc., but precludes this evidence when it is used solely to prove bad character. Yet under section 921.141(1), the state is and can show circumstances of the crime to prove bad character; the character of the appellant is what the advisory jury must consider.

Appellant specifically argues that the facts of the Mississippi murder focused on an aggravating factor (section 921.141(5)(h), Florida Statutes (1983), heinous, atrocious, or cruel) but that this latter factor is not established in the present case. Therefore, the evidence in the Mississippi murder should have not been admitted. In support of this contention, appellant notes that the Mississippi stabbing murder was committed after the murder in the case at bar (R 1531, 1536). But as this court noted in Elledge, supra, a subsequent murder and its attendant facts are admissible at the penalty phase if it is a "previous conviction" pursuant to section 921.141(5)(b). Id. at 1001-1002. Appellant has not and cannot refute that the contested evidence did relate to the character of the defendant pursuant to section 921.141(1) and was relevant pursuant to section 921.141(5)(b).

Appellee submits that the issue argued on appeal was not argued below. Defense counsel below made a general objection to having the prosecutor illicit any facts regarding the Mississippi murder conviction (R 1501). The only specific objection and argument was to the pictures admitted of the Mississippi murder and their possible prejudicial effect (R 1509). The court subsequently disallowed the introduction of two (2) out of the four (4) pictures (R 1563). This court should note that counsel below never argued any of the theories presented herein and as such the arguments presented on appeal have not been preserved for review. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

POINT XIV

THE TRIAL COURT WAS CORRECT IN DENYING APPELLANT'S MOTION TO STRIKE DEATH AS A POSSIBLE PENALTY.

Appellant essentially argues that since death is a unique penalty its status should be elevated to an element of the offense as opposed to being a penalty or sentence. Appellant acknowledges that his argument has been rejected in Sireci v. State, 399 So.2d 964, 970-971 (Fla. 1981). This court, in holding that the aggravating circumstances were not a part of the allegation for a capital crime, rejected the analogy to differing degrees of burglary and robbery. The defendant would not be on notice of which degree of burglary or robbery was charged unless the necessary allegations in the information were present.[5]

The legislature has decreed that the death penalty is a possible sentence for first degree murder, pursuant to section 775.082(1), Florida Statutes (1983). The penalty provisions of this statute regarding death are only limited by section 921.141, Florida Statutes (1983). Appellant, in support of his argument, makes a distinction between substantive and procedural law. Appellee submits that this distinction adumbrates the problem. A more appropriate distinction would be to make a dichotomy between a charging document (i.e., an offense) and a sentence. As an example, an information charging robbery with no other elements under section 812.13(c), Florida Statutes (1983), would be punishable by a maximum term of imprisonment of fifteen (15) years. A charging document which alleged that a robbery occurred with a weapon or fire-

[5]This argument was also rejected in Hitchcock v. State, 413 So.2d 741, 746 (Fla. 1982), where it was held that notification is provided by the enumerated, aggravating factors in section 921.141(5), Florida Statutes (1975) and need not be alleged in the indictment.

arm pursuant to sections 812.13(2)(a) and (b), Florida Statutes (1983), would be punishable up to a life term imprisonment. If the indictment alleged that a murder occurred during the perpetration of the robbery pursuant to section 782.04(1)(a), Florida Statutes (1983), then the possible penalties would be either twenty-five (25) years imprisonment with no opportunity for parole or death. But the latter allegation in the indictment would certainly put the defendant on notice that death would be a possible sentence for punishment because the allegation contains the necessary element that a person was killed during the perpetration of the robbery.

In Rusaw v. State, 451 So.2d 469 (Fla. 1984), this court held that sexual battery committed against a child eleven (11) years of age or younger would still be a capital offense even though the death penalty was no longer a possible penalty, and that the defendant would still have to receive a sentence of twenty-five (25) years imprisonment without parole. This court explained:

> It is well settled that the legislature has the power to define crime and to set punishments.

(emphasis supplied). Id. at 470. Although the death penalty was eliminated as a possible sentence for this particular offense, that elimination did not change the status of the offense as being a capital offense. The trial court in Rusaw, was still compelled to treat the offense as a capitol offense. Likewise, in the case at bar, the trial court was duty bound to comply with the sentencing provisions of section 775.082(1). The death penalty could not be eliminated as a possible punishment merely because the factors that account for the sentence are not alleged in the indictment.

As a practical problem, if the aggravating factors were alleged in the indictment, the state would be forced to prove these factors at trial. Or at the very least, the indictment would be read to the jury. Therefore, the

jury would hear illegal and inflamatory evidence which would normally never be admissable at a trial.

Appellant relies upon Lindsey v. State, 416 So.2d 471 (Fla. 4th DCA 1982), where the Fourth District held that an information was defective to charge first degree burglary when it did not allege the elements of assault even though it alleged that an assault occurred during the burglary. Appellee notes that this court viewed that case in State v. Lindsey, 446 So.2d 1074 (Fla. 1984). This court reversed that decision and held that the information did properly charge first degree burglary. This court noted that Lindsey's motion for a statement of particulars as to what comprised the assault did not receive a ruling by the trial court. Assuming arguendo, that the punishment provision should be alleged in the indictment, appellant's analogy still fails under Lindsey v. State, supra. Looking at both Lindsey cases, it is apparent that not alleging the elements of assault is not a fundamental defect. As such, a defendant could move for a statement of particulars. But defense counsel below in the present case (R 2517) never made any such motion for a "statement of particulars" so that he would be notified of the particular aggravating circumstances. Appellant below asked the indictment to be dismissed or that death not be a possible penalty (R 2516-2517). Appellee submits, even under appellant's theory, such a drastic measure should not have been put forth by appellant until a motion for a "statement of particulars" had been filed and ruled upon by the trial court. In the absence of such a motion, appellee submits that the issue is not preserved for review.

As a final comment on this point, appellee notes that under sections 947.16(3) (relating to the trial court retaining jurisdiction for enumerated crimes) and 921.001, Florida Statutes (1983), (the guideline statute), there is no requirement that the provisions of these statutes be alleged in an information or indictment. For purposes of notification, the defendant is on notice

that he is subject to the statutory maximum penalty for the offense charged in an indictment or an information. A defendant is not entitled to any notice of whether the state will proceed or how the state will proceed under the latter two (2) statutes. By analogy, the appellant should likewise not need any notification except for the fact that death is a possible punishment and that the state can produce evidence to support that penalty under section 921.141(5).

POINT XV

APPELLANT WAS PROPERLY SENTENCED TO DEATH.

A. THERE WAS SUBSTANTIAL, COMPETANT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED FOR AVOIDING OR PREVENTING A LAWFUL ARREST OR AFFECTING AN ESCAPE.

Appellant takes issue with the court's finding that the murder was committed for avoiding or preventing a lawful arrest or effecting an escape pursuant to section 921.141(5)(e), Florida Statutes (1983). The findings of the trial court cited specifically the testimony of Ray Ryan, to the effect that appellant told him, "anybody hears my voice or sees my face has got to die." (R 809, 2720). Based upon this testimony, the trial court could find this aggravating circumstance. See, Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984), where testimony from the detective that the defendant told him he shot a store clerk during a robbery to prevent that clerk from being a witness was sufficient to find this aggravating circumstance and Johnson v. State, 442 So.2d 185, 188 (Fla. 1983), where a co-defendant explained that the defendant told him that he killed the clerk in a robbery because, "dead witnesses don't talk" and this was held to be a proper finding under section 921.141(5)(e).

But there was more evidence to support the trial court's finding. Ray Ryan testified how appellant dismantled the gun used in the murder and disposed of it in a junk yard (R 751-752, 810, 813). Robert Taylor testified that right after the murder the appellant told him he drove the car away and left it a mile from his apartment and had his girlfriend, Stacy Sigler, pick him up (R 747). Stacy Sigler testified that appellant took the victim's car to an orange grove after he committed the murder, three (3) miles from his brother's house and had her follow him and left the car abandoned at that orange grove

(R 885). Richard Miller, a.k.a. Montgomery, testified that he was told by appellant that he (the appellant) drove the victim's car from the orange grove where the killing took place and left it at another orange grove and had Stacy Sigler pick him up because he was, "afraid that the cops or kids would find it out there." (R 1267). All this testimony reinforces the court's finding that appellant committed the murder to avoid or prevent an arrest.

Appellant argues that the testimony of Ann Cole refutes the finding by the court. Notwithstanding that the trial court has the discretion to find this aggravating circumstance and not accord the weight to Ann Cole's testimony that appellant desires, Ann Coles' testimony taken in total context reinforces the court's finding. Although Ann Cole did testify she lived across the street from where the murder occurred, she testified that the orange grove was a very large one (R 620). Although Ann Cole did hear some arguing, she could not see anyone because the victim and appellant were far back in the grove. Additionally, these events occurred about 9:30 or 10:00 at night (R 621). Ms. Cole had testified that she had heard commotions in the orange grove before, so she did not call the police (R 622). Finally, Ann Cole testified that her house was quite a distance back from the road (R 623). (It should be remembered that she lived across the street from the orange grove, R 620).

Appellant relies upon, but should take no comfort from the case of Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979). In Menendez, the only evidence adduced by the state to establish this aggravating factor was the fact that the defendant used a silencer on the firearm to commit the murder. In holding this factor was not established, this court explained:

> . . . we do not know what events proceeded the actual killing, we only know that a weapon was brought to the scene which, if used, would minimize detection. We cannot assume Menendez' motive; . . .

Id. at 1282. In the case at bar, there is ample evidence of what proceeded, as

well as what followed the murder to support the court's finding.

B. THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In Johnson v. State, 10 F.L.W. 123, 125-126 (Fla. Feb. 14, 1985), where a defendant picked up a victim (a topless dancer) in his car and the victim's body was found near an unoccupied house and there was evidence of strangulation, this court found a proper basis to support a finding under section 921.141(5)(i), Florida Statutes (1983). The evidence, in the case at bar, to support this factor is as follows: Stacy Sigler testified that while she was driving with appellant, he told her that he planned to find a homosexual, rob him, and kill him. (R 879-880). He then told her to drive to a bar and then wait for him to call her, which he subsequently did. Pursuant to that call, Stacy Sigler testified that she picked up appellant at his brother's house (R 881). The time period between leaving appellant at the bar and picking him up at his brother's house was thirty (30) minutes to one (1) hour. When she first saw appellant after the murder, she saw him taking things out of the victim's car (R 882). She testified appellant took the victim's car to an orange grove three (3) miles away from his brother's house and she followed him in her car (R 885). Richard Miller, a.k.a. Montgomery, corroborated the testimony about the murder plan given by Stacy Sigler (R 1267). Aside from the planning, the facts adduced at trial surrounding the murder itself amply support the trial court's finding. The medical examiner testified that there were multiple gunshot wounds on the victim's body; one in the head and one in the chest (R 679). The shot in the chest entered from the back and was consistent with the muzzel of the gun being held very close (R 680). There was a

gunshot wound to the right side of the head as well, and either gunshot wound by itself would have been sufficient to kill the victim (R 682, 686). Again, Richard Miller, a.k.a. Montgomery, corroborated the testimony. Appellant told this witness that he had the victim back by his (the victim's) car and asked for the victim's gold. The victim said he did not have it. The victim tried to run, but appellant told the inmate that he shot the victim in the heart and as the victim was running, also shot him in the head (R 1267-1268). See, O'Callaghan v. State, 429 So.2d 691, 696-697 (Fla. 1983), where the defendants beat a victim unconscious in a bar, placed him in a van, drove out to a dirt road where they threw the victim down, shot the victim twice, placed the body in the bushes, threw the murder weapon in the canal, and removed the victim's car and where this court held that this type of execution killing would support a finding pursuant to section 921.141(5)(i). Appellee submits that the facts not only show a high degree of planning, but also show an execution-style murder. See also, Squires v. State, 457 So.2d 208, 212 (Fla. 1984), where a service station was robbed, the attendant kidnapped, and that attendant was found dead in a wooded area with five (5) shots at close range and these facts supported a finding pursuant to section 921.141(5)(i).

The trial court found two (2) other aggravating circumstances in addition to the two (2) contested factors herein. The trial court found no mitigating circumstances (R 2720-2721). Under such circumstances, the death penalty is presumed correct and even if this court found one (1) or both of the aggravating circumstances improper, the penalty should still be affirmed, without remand.

POINT XVI

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL.

Appellant's last argument deals with the number of general issues attacking the capital sentencing statute. Appellant candidly acknowledges that these issues have been rejected. Appellee will address some of these issues specifically in the order that they appear in appellant's brief.

Appellant contends that the capital sentencing statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh the mitigating factors" and that the aggravating circumstances have been applied in a vague and inconsistent manner. Additionally, appellant contends the capital sentencing process fails to provide for individual sentencing determinations through the application of presumptions, mitigating evidence, and other factors. These contentions have previously been rejected in Lightbourne v. State, 438 So.2d 380 (Fla. 1983) and State v. Dixon, 283 So.2d 1 (Fla. 1973), as well as other cases.

Further on, appellant argues that the statute is unconstitutional in that it does not require an advisory opinion by a unanimous or by a substantial majority of the jury. Although this point has no merit on a legal basis, it is totally inapplicable in the case at bar, inasmuch as it was a unanimous recommendation for the death penalty (R 1648).

Appellant addresses issues pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). No specific issues in the trial were litigated on appeal and as such, even if there were any such issues they have not been preserved for appeal.

Appellant also mentions that the addition of section 921.141(5)(i), (cold and calculated) renders the statute unconstitutional. This argument has

been rejected in Harris v. State, 438 So.2d 787 (Fla. 1983), and Jent v. State, 408 So.2d 1024 (Fla. 1981).

The issues raised in this general point have been resolved against appellant in the following cases as well: Alford v. State, 307 So.2d 433 (Fla. 1975); Alvord v. State, 322 So.2d 533 (Fla. 1975); Booker v. State, 397 So.2d 910 (Fla. 1981); Lewis v. State, 398 So.2d 432 (Fla. 1981); Tafero v. State, 403 So.2d 355 (Fla. 1981); Ferguson v. State, 417 So.2d 639 (Fla. 1981); Peavy v. State, 442 So.2d 200 (Fla. 1983); Clark v. State, 443 So.2d 973 (Fla. 1983); Spinkellink v. Wainwright, 578 F.2d 582 5th Cir. (1978); Proffitt v. Florida, 428 U.S. 279 (1976); and Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983). Appellee urges that the last challenges under this point be rejected in light of the long line of cases upholding the constitutionality of section 921.141, Florida Statutes (1983).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished, by mail, to Brynn Newton, Assistant Public Defender for appellant, at 1012 South Ridgewood Avenue, Daytona Beach, Florida 32104, this 18th day of March, 1985.

for _____
W. BRIAN BAYLY
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