IN THE SUPREME COURT OF FLORIDA

ANTHONY PEEK,

Appellant,

v. CASE NO. 66,204

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

ISSUE I

There is no factual record support for the contention made on this appeal that the trial judge made a racial slur since the trial judge was forced to recuse himself once he found the motion to disqualify sufficient on its face. He could not affirm nor deny the truthfulness of the allegations. Moreover, the record discloses that up to the point that the trial judge recused himself, he conducted an eminently fair trial.

ISSUE II

Since this case was tried before State v. Neil, 457 So.2d 481 (Fla. 1984) that case is not applicable. Furthermore, appellant did not object when blacks were peremptorily excluded. Moreover, the record reflects the reasons for their exclusion. Reasons unrelated to race.

ISSUE III

The sufficiency of the evidence in this case has already been sustained by this court in Peek's first appeal. Peek v. State, 395 So.2d 498 (Fla. 1980). The second trial produced an even stronger case because it more clearly established how and when appellant's fingerprints were placed in the automobile and because William's Rule evidence, not used at the first trial, was properly considered as relevant evidence in support of guilt.

ISSUE IV

Evidence of a collateral crime was relevant to show the entire context as to how and why appellant was arrested, because it showed lack of mistake in interpreting the other evidence and because it

it tended to point to appellant as the assailant.

ISSUE V

Exclusion of appellant's proferred psychologist who would testify that in his opinion the Peek who admittedly raped the Jamison woman was not a sadistically brutal person and could not have committed the Carlson murder was properly disallowed. The state of the art or scientific knowledge does not permit such testimony. Moreover, it begs the very question at issue.

ISSUE VI

Grigsby v. Mabry, infra, has been rejected by this court. Witt, of Wainwright v. Witt, 83 L.Ed.2d 841 (1985) raised it to no avail because he's dead.

ISSUE VII

The state introduced detailed testimony as to the chain of custody of the hair. There was no evidence of tampering. It established that the strand of hair had not, in fact, been lost.

ISSUE VIII

Defense proferred police reports, employee evaluation reports and testimony of an officer were properly disallowed as hearsay.

ISSUE IX

Counsel for appellant did not object to the questions asked by the prosecution.

ISSUE X

Appellant did not pursue his motion attacking the composition of the Grand Jury which indicted him. Consequently, he has waived the issue.

ISSUE XI

Appellant's counsel did not object to appellant's absence from the charge conference or from legal arguments concerning William's Rule evidence. An objection is required. Furthermore, there was nothing conducted that required defendant's presence.

ISSUE XII

A defense expert proffered during penalty phase of the trial to opine that innocent men are sometimes convicted was properly dissallowed. Such testimony goes neither to the character of the defendant nor circumstances surrounding the crime.

ISSUE XIII

Appellant consented to the procedure.

ISSUE XIV

Enmund v. Florida, infra is inapplicable because appellant strangled his victim to death. Enmund facts are decided by the sentencing authority, not the jury.

ISSUE XV

Appellant concedes the courts have rejected this issue.

PRELIMINARY STATEMENT

The record on appeal which is contained in eight volumes will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

On February 16, 1978 appellant was indicted for first degree murder, sexual battery and grand larceny. (R 3 - 5) He was convicted by a jury, and sentenced to death. This court on appeal affirmed the judgment and sentences. Peek v. State, 395 So.2d 492 (Fla. 1980).

Subsequently, appellant filed a motion for Post Conviction Relief in the trial court.

The trial judge, after an evidentiary hearing granted the motion to set aside the judgment and sentence. The state appealed, but pending the appeal the State of Florida and this appellant stipulated to a voluntary dismissal with the State of Florida having the right to re-try this appellant. See State v. Peek, Case No. 64,540.

Re-trial was conducted on August 20th through 24th, 1984. Appellant was again found guilty. (R 1220) Thereafter, a majority of the jury by vote of 9 to 3 recommended the death penalty. (R 1388) The lower court reimposed the sentence of death (R 1421) after finding that under any possible combination the aggravating circumstances outweighed any mitigating be they statutory or non-statutory. (R 1429 - 1430)

This appeal ensued.

STATEMENT OF THE FACTS

Angela Wertz testified that she was the victim's (Erna L. Carlson) sister (R 489); that on Saturday, May 21, 1977, they both visited the victim's daughter. They left the daughter's home at 8:30 - 9:00 p.m. at which time the victim dropped her off and went home. (R 489 - 492) On Sunday morning at 9:00 a.m., she received a call that Mrs. Carlson had not gone to work. She went to her home and discovered the victim's body. (R 497)

Leah Ann Smith, the victim's daughter testified that she last talked to her mother that Saturday night at 10:00 p.m. over the telephone. (R 507 - 509) She stated that normally Mrs. Carlson kept her car locked and her keys in her purse. (R 510) When she went to her mother's house that Sunday morning the purse's contents were scattered all over the floor. (R 511)

A pathologist who examined the body stated that Mrs. Carlson died of stangulation and her larynx was crushed. (R 523) There was also evidence of a sexual assault. When he performed the autopsy at 11:50 a.m., May 22, 1977, (R 520) he found no evidence of rigor mortis. (R 526) He explained that rigor mortis begins two to four hours after death. It peaks in twelve to twenty four hours and gradually disappears. This indicated either a recent death or one that may have occurred prior to twelve hours before the examination. (R 526 - 527)

Forcible entry was established through two screen doors leading from the garage. (R 536 - 538)

Parked in the garage on the left side was a Volkswagen driven there by the victim's sister. (R 492) Partially beneath the

Volkswagen was a hose which had been cut, from the clothes line. (R 539 - 554)

The victim's car was missing and the police put out a BOLO. (R 569) It was found the next day before noon at a parking lot of Lake Martha Park. (R 570 - 571) The driver's side of the automobile was locked, the passenger side unlocked. (R 572) From the inside window of the driver's side two separate prints were lifted. (R 607)

Officer Bowman testified that on June 8, 1977, he received a call about a suspicious person in the neighborhood. He stopped appellant who was riding a bicycle. Appellant told him he was in the "First Step" program and living at Lake Region Motel. This is about one half mile from the Carlson home. (R 692 - 694)

Linda Jamison was sexually assaulted in her home by appellant on July 6, 1977. (R 694 - 705) Appellant entered her home at about 9:00 a.m. through an open screen door. (R 701 - 702) At the point of a knife, he ripped her clothes off (R 702) and sexually assaulted her. (R 703) At one point when the telephone rang he ripped it off the wall. (R 703) After the sexual assault appellant proceeded to go through her purse strewing its contents on the bed. (R 704) As appellant proceeded through the house looking for money, Mrs. Jamison managed to lock the bedroom door and got her husband's gun. (R 705) Appellant busted the door completely in. When he saw her with a gun he exclaimed, "Oh, my God," (poetic justice?) and fled. (R 705) She shot at him as he fled, but missed. (R 706) That night at about 10:00 p.m. she went to the sheriff's office to pick him out of a line up. (R 708) Some palm prints were lifted from the hood of Mrs. Jamison's automobile which was on the carport. (R 900 - 901)

These compared positively with appellant's prints. (R 906 - 907)

On July 7, 1977, one day after appellant's arrest on the Jamison assault the officers interviewed him at the jail. When asked, he stated he had never personally been at the Lake Martha area or the Carlson home. (R 638, 657, 1102) Significantly, this was verified by appellant himself when he testified in his own behalf. He attempted to explain that after he had been confronted by a patrolman as being a suspicious person in the neighborhood[1] (R 938) He was visited at the First Step Rehabilitation Center by Officer Donnelly. (R 938) He attempted to explain that when Donnelly asked him about Lake Martha he did not know any Lake Martha by name so " . . . I told him I didn't know about any car at no Lake Martha." (R 939) When he was subsequently arrested on the Jamison assault, he was visited by Officer Latner and Henry. (R 941 - 942)

They again asked him about a car at Lake Martha and he again said that " . . . I had never been there." (R 943) He claimed he lied on that occasion because he had already responded untruthfully to Officer Donnelly and although he did know of the lake's name by the time of this second interview he would be making inconsistent statements. (R 943)

The fingerprints obtained from the victim's car, located at Lake Martha were compared with those of appellant's and found to be positive to the extent of having 40 points of characteristics. (R 872) The F.B.I. says 12 or more is sufficient. (R 873)

A hair found on the white hose found under the Volkswagen was

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[1] It must be remembered this occurred June 8, 1977. (R 692 - 694)

compared with hairs taken from appellant's head. (R 828) The expert testified that he did notice some similarities, but the size of the unknown specimen was too small to make a conclusive determination. (R 833 -836)

The victim's pajamas and bed sheets were examined. Seminal fluid and blood were detected. (R 855 - 860) Females do not secrete seminal fluid. (R 857) It was determined that the stains and seminal fluid were donated by a type "O" secretor. (R 851) No other type of blood other than "O" was detected. (R 857) Appellant is a type "O" secretor. (R 854) Of the entire population, male and female, 47% to 48% are type "O" blood. (R 853) Eighty per cent of the population, male and female are secretor. (R 854) On cross-examination, defense counsel established that when those two factors are combined only 36% of the population are type "O" secretors. (R 862) This includes males and females. (R 862) Since, of course, the assailant was a male, the percentage would be less.

ARGUMENT

ISSUE I

THE TRIAL JUDGE'S REFERENCE TO APPELLANT'S FAMILY AS "NIGGERS" DENIED APPELLANT A FAIR TRAIL, EQUAL PROTECTION OF THE LAWS, DUE PROCESS FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDEMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

On August 24, 1984 (R 1125) at 7:15 p.m. the jury returned its verdict. (R 1220) The cause was then rescheduled for September 15, 1984, for purposes of conducting the penalty phase of the trial. (R 1222) On August 31, 1984, appellant, pursuant to Florida Rule of Criminal Procedure 3.230, filed a motion for disqualification of the trial judge (R 1240) on the grounds that the judge had made a prejudicial comment ". . . concerning a penalty phase witness." (R 1240) This motion was supported by two affidavits which alleged the trial judge made ". . . a comment racially oriented against the defendant's penalty phase witness." (R 1242 - 1243)

A hearing was held on that motion, wherein it was agreed that when such a motion is filed, the court's only concern is the legal sufficiency of the motion and ". . . not to rule on or make comments as to what the court agrees or disagrees with the conclusions that are made." (R 1252) Pursuant to that understanding and under authority of Rule 3.230, the judge, upon finding that the motion was legally sufficient, disqualified himself. At that hearing, it was explained to appellant that if the judge disqualified himself, a new judge would take over the case. (R 1254)

Subsequently, on September 5, 1984, (R 1260) prior to the penalty phase of the trial before another judge (Honorable William

A. Norris), appellant filed a motion for mistrial predicated on the argument that one judge should handle both phases of the trial. (R 1264 The judge denied the motion. (R 1266)

The penalty phase of the trial was then conducted. (R 1261 - 1395) As stated, the jury recommended death. Thereafter, on September 10, 1984, (R 1396) another hearing was conducted for the purpose of allowing the affiants to support their affidavits through testimony. At the hearing, Mr. Jacobs and Mr. Mathews testified to the statements appearing on page 16 of appellant's brief. The assistant state attorney testified under oath he did not recall any such statement being made. (R 1400 -1401)

The above-factual setting has been set out because it is important to understand the context in which appellant makes his claim.

In presenting his argument, appellant first assumes, as established fact, that Judge Langston made the statement. He ignores the fact that Judge Langston recused himself, not because he conceded making the statement or because he was prejudiced, but because under the rule, he was required to automatically disqualify himself without questioning the truthfulness of the assertions.

Seizing upon this automatic disqualification, appellant argues that he was denied a fair trial because, ". . . reference to appellant's family as 'niggers' gives the appearance of impropriety and injustice." (Appellant's brief, page 17)

As stated, there is no determination in this record that the judge actually made the statement.

Even if one assumes, arguendo, that the statement was made, appellant was not thereby denied a fair trial. Appellant argues

that the trial must not only be fair, but appear to be fair. We submit that when this court scans through this record, it will be satisfied that Judge Langston conducted an eminently fair trial.

In an attempt to show that Judge Langston was unfair, appellant says that ". . . when defense counsel continually complained that the prosecutor was using peremptory challenges to exclude blacks from the jury, the judge failed to even inquire into the prosecutor's actions." (Appellant's brief, p. 21) This is a blatant distortion of the record. In the first place, defense counsel never complained, he only "noted" in the record. See discussion, Issue II herein. In the second place State v. Neil, infra had not yet been decided by this court; consequently, there was no reason for Judge Langston to inquire into the prosecutor's actions.

Appellant then argues that the judge was unfair because he allowed the state to introduce Williams Rule evidence. Of course, if this court finds that it was improperly admitted, then reversal will be had on that basis. However, as we discuss under Issue IV herein, Judge Langston was eminently correct in allowing evidence of the collateral crime.

Significantly, appellant is left to argue that ". . . there were literally dozens of other decisions made by the judge where his racial beliefs could have influenced the outcome, including the motions for directed verdict and new trial." (Appellant's brief, p. 22, emphasis supplied) Appellant conveniently ignores the fact that defense counsel insisted on Judge Langston ruling on the motion before he disqualified himself (R 1246 - 1247) and when presenting the motion represented to the court "[i]t's all the garbage stuff" (R

1246) indicating he was filing it as a formality. Moreover, this court in Peek I held the evidence sufficient on, what we submit, was a weaker case that the instant one. See Issue III.

As to the literally "dozens of decisions," that appellant claims were influenced by the judge's alleged prejudice, appellant significantly cannot point to them. The fact is Judge Langston allowed the defense wide latitude in its attempt to present evidence that someone else committed the crime (R 1039 - 1045, 1071 - 1074, 1078 - 1090); in criticizing police procedures through the use of a so called forensic scientist (R 1003 - 1013), and allowing an attack on the character of one of the police officers through evidence by his ex-wife that he was often intoxicated. (R 1093)

Appellant does not complain that Judge Norris conducted an unfair penalty phase and it was he who sentenced appellant.

ISSUE II

THE PROSECUTOR'S USE OF FOUR PEREMPTORY CHALLENGES TO EXCLUDE ALL BUT ON BLACK FROM THE JURY, WITHOUT EXPLANATION, DENIED APPELLANT A FAIR TRIAL, EQUAL PROTECTION OF THE LAWS, DUE PROCESS OF LAW, THE RIGHT TO AN IMPARTIAL JURY AND A JURY COMPRISED OF A FAIR CROSS-SECTION OF THE COMMUNITY, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

When this case was tried, this court had not yet rendered its decision in State v. Neil, 457 So.2d 481 (Fla. 1984). Neil was decided on September 27, 1984, and although appellant was not sentenced until October, the jury had, by the time of the decision, found appellant guilty and recommended the death sentence. In Neil, this court held that its decision was not retroactive. Appellant conveniently ignores this fact.

One might contend that Neil's non-retroactivity pronouncement did not apply to cases not yet final on appeal. But, the court said that the decision did not ". . . warrant retroactivity or to warrant relief in collateral proceedings . . . " Id. 488. (emphasis supplied) If non-retroactivity were only to apply to collateral proceedings, the disjunctive "or" would not have been used.

Moreover, it would be difficult to assert in one breath that ". . . the initial presumption is that peremptories will be exercised in a nondiscriminatory manner," id. 486, and in the next to say that the decision announces such a fundamental constitutional principle that it should be applied to cases on appeal.

Even should Neil be retroactive with respect to this case, it would not avail appellant. In the first phase, appellant never

objected. Neil requires ". . . a timely objection." Id. 486. All that counsel did here was request that there be ". . . a notation for the record . . . that Mr. Pickard is striking three and both people, Brenda Elrod, being black and Samuel Stevens, also being a black person." (R 356 - 367) Again, when the state excused juror Hinson, counsel did not object, he only requested that ". . . the record relect . . .." (R 441) When the state excused Mr. Anderson, all that counsel said was ". . . I'd like to note . . .," (R 386) and further ". . . I am noting for the record, that Victoria Wilson is black and he has not struck her." (R 386)

Perhaps counsel wanted to bait the lower court by not formerly objecting yet to "make enough noise" so that it could be argued to this court that what he was really doing was objecting. He should have read the court's decisions in Francois v. State, 407 So.2d 885 (Fla. 1981), Moody v. State, 418 So.2d 989 (Fla. 1982), and Lucas v. State, 376 So.2d 1149 (Fla. 1979) all of which essentially hold that an objection must not only be made, but pursued so as to clearly apprise the trial court of why it is erring unless it rules as requested.

Not only did he not object, he also failed to ". . . demonstrate on the record that the challenged person . . . [were] . . . challenged solely because of their race." Neil at 486. The fact is, this record demonstrates quite the opposite. As appellant states in his brief of nine peremptory challenges the state used, five were not blacks. Moreover, one black did sit on the jury. (Appellant's brief, page 26)

Additionally, the record demonstrates that at least two of the

blacks excused, Stevens and Anderson, were peremptorily excused by the state because of feelings respecting capital punishment (R 291 - 292, 370 - 371) which would have been insufficient to excuse for cause under Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968). In fact, when the state moved to excuse juror Love for cause, appellant's counsel complained

> MR. JACOBS: Why didn't you excuse the first guy for the same grounds this morning? You used one of your challenges for him.
>
> (R 408)

To which the assistant state attorney responded:

> MR. PICKARD: Because I didn't think his answers were quite as definite as Mr. Love's, and if there was any equivocal, I just use a peremptory for cause only if it's fairly clear.
>
> (R 409)

ISSUE III

THE TRIAL JUDGE ERRED AND APPELLANT WAS DENIED A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BY THE FAILURE TO GRANT HIS MOTION TO DISMISS, HIS MOTION FOR NEW TRIAL, WHERE THE CIRCUMSTANTIAL EVIDENCE FAILED TO ESTABLISH HIS GUILT BEYOND A REASONABLE DOUBT AND WAS NOT INCONSISTENT WITH APPELLANT'S REASONABLE HYPOTHESIS OF INNOCENCE.

In appellant's previous appeal, this court, in finding the evidence sufficient to sustain a conviction, stated:

> The case against appellant is concededly circumstantial. But we are satisfied that, when considered in combination, the evidence relating to the matching fingerprints, the hair comparison, and the blood and semen analysis enabled the jury to reasonably conclude that appellant's guilt was proven beyond a reasonable hypothesis of innocence, that he entered the victim's car at the lakeside park the morning following the murder, was effectively discredited by Officer Donnelly's account on rebuttal of appellant's original assertion that he had never been in the vicinity of the park. In view of this prior inconsistent statement, the jury was justified in disbelieving appellant's version of events.
>
> Peek v. State, 395 So.2d 495, 498 (Fla. 1980)

Appellant would want this court to believe that this time around, the evidence is weaker than it was on the first appeal. Nothing could be further from the truth. The fact is, the evidence was stronger in this trial than the last.

In the first place, the state presented evidence of another breaking and entering and sexual battery, committed by appellant on another woman in her home, evidence which was not presented at the guilt phase of the last trial. The relevancy of this testimony will be discussed in Issue IV, infra. Suffice it to say now that if this

court finds that evidence relevant, it is evidence which may be considered in determining the sufficiency of the evidence. In Mason v. State, 438 So.2d 374 (Fla. 1983) this court, in reviewing the sufficiency of the evidence, emphasized that such collateral crimes evidence could be considered saying:

> Finally, as previously noted, the collateral crimes evidence was relevant and its admission was not improper. Thus, in view of the foregoing, there was sufficient evidence to support the trial court's denial of appellant's motion for judgment of acquittal.

Id. 378

Try as appellant may, he cannot escape the fact that two juries, two trial judges and four justices of this court have already found this evidence not only convincing, but justifying the sentence of death.

Moreover, with respect to how and when the fingerprint evidence was placed in the victim's automobile, the evidence was decidedly stronger this time around.

In this trial, as in the last, appellant attempted to explain the presence of his fingerprints in the car by testifying that he entered the victim's car at the lakeside park the morning following the murder. In the last trial, only Officer Donnelly rebutted this testimony when he testified to

> ". . . appellant's original assertion that he had never been in the vicinity of the park."

Peek v. State, at 495.

In the instant trial it was established that appellant had made the statement not only to Donnelly when Donnelly visited appellant at the halfway house, but to officers Latner and Henry after his

arrest on the Jamison case.

Furthermore, while in this trial, appellant again attempted to explain his fingerprints away, he admitted to having told Donnelly during the first interview prior to his arrest, and to Latner and Henry after his arrest, that he had never been to the park. Since this admission was not made at the first trial[2] one would be hard put to argue that, with respect to <u>when</u> the fingerprints were placed in that car, the evidence was not considerably stronger in this trial than the last.

In its brief on the last appeal, the state argued:

> To put it another way. The fact that appellant has the same type blood as the assailant may be accidental; the fact that appellant's hair was of the same type characteristically as that of the assailant may, together with the blood analysis, be coincidental. But when the fingerprint evidence is added to this computation we have more than coincidence; we have mathematical certainty.

This remains true, but even more so because the evidence as to <u>when</u> the fingerprints were placed in the automobile is considerably stronger. In the first appeal, the state argued the combined weight of the above evidence in order to demonstrate <u>when</u> and <u>who</u> placed the fingerprints in the car, i.e., the assailant. In view of the fact that officer Donnelly had been the only witness to rebut appellant's trial version the combined weight of the three items of evidence was important. In this appeal the combined weight of this

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[2] Since this court has the record of the last trial, this can easily be verified by reading Peek's testimony.

evidence, while as strong as before, is not as important because four witnesses rebutted appellant's version as to when and how his fingerprints were placed in the vehicle: Donnelly, Latner, Henry and appellant himself.

Understandably, appellant would want this court to reject his statements to Donnelly, Latner and Henry and to accept his trial version of events. The jury didn't.

Appellant strains to argue that there are other reasonable hypotheses for explaining how the hair got on the stocking and further argues that the hair comparison and blood-semen comparison were not conclusive. We agree that the hair comparisons and the blood-semen comparisons by themselves are not conclusive, but in combination with all the other evidence presented by the state they point to appellant and to no other person. Whether evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine and this court will not reverse a judgment based upon a verdict returned by the jury when there is substantial competent evidence to support the jury verdict. Rose v. State, 425 So.2d 521 (Fla. 1983); Heiney v. State, 447 So.2d 210 (Fla. 1984). Since in combination there is substantial competent evidence the jury verdict must be upheld.

Realizing that the statements he made to officers Donnelly, Latner and Henry together with his admissions to having made them are like an albatross around his neck, appellant attempts to argue that Donnelly could not be believed because " . . . he was usually intoxicated . . ." (appellant's brief, page 35); that ". . . appellant probably did lie to the police . . . " and that the ". . .

entire incident is completely confused." (Appellant's brief, page 36) Again we would point out that the jury was far from being confused.

Citing Smith v. State, 379 So.2d 996 (Fla. 1980) appellant argues that while Donnelley's statement may have been admissible as impeachment, it does not constitute substantive evidence against appellant. In the first place, appellant's denial of ever being in Martha Park was first presented in the state's case in chief; consequently, not impeachment. In Brown v. State, 391 So.2d 729 (Fla. 3 DCA 1980) it was held that it was not erroneous to allow the state to prove in its case in chief that the defendant was not, as he had stated in a voluntary post-arrest interview, employed by a certain concern on the date of the robbery since it was not introduced as impeachment testimony. In the second place appellant quarrels, not with the state, but with this court because in Peek this court considered Donnelly's testimony as substantive evidence even though in that trial he testified on rebuttal. In the third place, appellant is mistaken. Inconsistent statements made under oath can be used as substantive evidence. Moore v. State, 452 So.2d 559 (Fla. 1984). Since appellant himself, under oath, testified that he had told the three officers he had never been to Martha Park, his testimony could be considered as substantive evidence.

Finally, appellant argues that there were other suspects and that he had an alibi defense. He was allowed wide latitude at trial to attempt to show someone else did it and the jury wouldn't buy. As far as his alibi is concerned he himself admitted at trial that no one checked to see if he signed out (R 945); that one could leave

without the counselor knowing (R 946) and that he had left Sunday morning without signing out. (R 949)

He denied ever telling Donnelly that he had been out Saturday night and had returned at 11:00 p.m. (R 930), but Donnelly testified to this fact on rebuttal. (R 1102)

ISSUE IV

THE TRIAL JUDGE'S ADMISSION OF EVIDENCE OF ANOTHER CRIME WHICH HAD NO SIMILARITY WITH THE CRIME CHARGED AND WHICH SEVERELY PREJUDICED THE JURY AGAINST APPELLANT, ADMITTED BASED UPON THE TRIAL JUDGE'S FEELING THAT "IT SHOULD ALL HANG OUT" AND THAT HE WOULD NOT BE ON THE CRIMINAL BENCH IN THE EVENT OF REMAND, VIOLATED FLORIDA'S EVIDENCE CODE AND DENIED APPELLANT A FAIR TRIAL AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In Williams v. State, 110 So.2d 654 (Fla. 1959), this court held that evidence of other crimes is admissible where relevant to prove a material fact in issue except where the sole relevancy is propensity or character of the defendant. The Williams case is often cited but little read. In reading Williams, appellant may discover that the "Williams" rule is not a rule of exclusion, but a rule of admissibility. Prior to Williams, the rule was that evidence of another crime was inadmissible unless the state could fit it into some category such as motive, modus operandi, lack of mistake, etc. In Williams, the Supreme Court emphasized the basic principle of the

> " . . . admissibility of all relevant evidence having probative value in establishing a material issue."

Id. 658

and stated that henceforth evidence of other crimes was not to be viewed in terms of exclusion, but of admissibility. That is, ". . . relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime."

Id. 659. Since Williams, the state no longer has to find an applicable category within which this evidence fits, otherwise it will be excluded. All that the state need establish is that the evidence is relevant. If it is relevant to any material issue it is admissible.[3] Relevant evidence is evidence tending to prove or disprove a material fact. Florida Evidence Code 90.401. (emphasis supplied)

Consequently, the primary issue in this case is the identity of the assailant . All evidence which tends to identify appellant as the assailant in this case is admissible.

This Court has explained relevancy thusly:

> " . . . and although the relevancy of any fact, when standing alone, may not be apparent, yet, when taken in connection with any other fact, or all the other facts, properly admitted, its relevancy is made to appear, it should go to the jury for their consideration.
>
> Jenkins v. State, 18 So. 182, 191 (1895)

Aside from the fact that the Jamison assault tends to establish identity through modus operandi, the Jamison assault is relevant to show the entire context of how and why appellant was arrested and how the arrest on that crime led to solving this case. Smith v. State, 365 So.2d 704 (Fla. 1978), Heiney v. State, 447 So.2d 210 (Fla. 1984), Hall v. State, 403 So.2d 1321 (Fla. 1981).

It is manifestly clear that the Jamison arrest led the officers to focus on appellant. The state was entitled to show that this was not a situation where appellant's name was picked out of a box.

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3 More recently, this court emphasized that the test of admissibility is relevancy, not necessity. Ruffin v. State, 397 So.2d 277 (Fla. 1981)

Additionally, as stated, the evidence was relevant to identity in that the modus operandi of the two crimes was similar. Naturally, appellant would argue that the offenses have to be identical in method of operation and that any dissimilarity at all will render the evidence inadmissible.

The seminal authority with respect to similarity of crimes is, of course, Drake v. State, 400 So.2d 1217 (Fla. 1981) and since the Drake decision, it has been common practice for appellant to set out a list of dissimilarities such as appellant attempts to do here.[4]

Drake continues to recognize that the test of admissibility is one of relevancy; nevertheless, while evidence may be logically relevant, it might not be legally relevant. Drake holds that evidence of another similar crime is not legally relevant when it is used to establish a method of operation to prove identity unless ". . . the points of similarity . . . have some special character or be so unusual as to point to the defendant." Id. 1219.

Drake is a recognition of what was said in Duncan v. State, 291 So.2d 241 (Fla. 2 DCA 1974) to the effect that modus operandi is not the end itself, but the means by which the end, identity, (or some other issue) is sought to be proven.

Quite naturally, most defendants, through their lawyers, read more into Drake than is there.

When the only evidence of identify is modus operandi, we have no doubt but that the method of operation must be so unique as to be

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[4] Interestingly, appellant does not cite Drake.

the equivalent of the defendant's signature on the crime. But in most cases, the method of operation is not the sole or primary evidence tending to show identity. It is merely supportive of other evidence and goes more to dispel any possibility of mistake with respect to the interpretation given the primary evidence. For instance, a rape victim may identify her assailant in court. Evidence of another rape, similarly committed, would be admissible as tending to show that the victim's identification is not mistaken. In such an instance, the modus operandi need not be so unique as to say that the defendant placed his signature on the crime.

For instance, in White v. State, 407 So.2d 247 (Fla. 2 DCA 1981), cited by appellant, the victim was unable to identify her assailant. The state sought to establish identity by introducing evidence of two other assaults. The Second District determined that the method of operation of the crimes was not sufficiently similar or unusual as to point to the defendant as the perpetrator of the crime charged.

On the other hand, in State v. Maisto, 427 So.2d 1120 (Fla. 3 DCA 1983) a nine year old could apparently identify her assailant. The state sought to introduce two other similar crimes. One of the crimes was held not to be admissible because there was ". . . nothing so unique or particularly unusual about the act so that it would tend to establish that the actor in that transaction is the same actor in the charged crime." Id. 1122. The other "Williams Rule" crime was held to be admissible by the court, stating:

> Concededly, the first six acts are general similarities which, alone, might not qualify as admissible similar acts evidence. But the first

> six similarities which serve to bolster the identification, along with the seventh similarity - which stands out as a "ritual" connnected to the deviant conduct - is the unique modus operandi which makes relevant and admissible the evidence of respondent's May 31st act.
>
> Id. 1122. (emphasis supplied)

As can be seen, the court suggests that even without the seventh similarity, the evidence would be admissible because it bolstered the child's identification.

Returning to White momentarily, can it be said the Second District would have held evidence of the other crimes inadmissible if the victim had been able to idenfify her assailant? Even though the primary issue would continue to be identify, a secondary issue would be lack of mistake - especially if there had been extensive cross-examination questioning that identification. Although the other crimes might not have been sufficiently similar to put White's signature on the offense charged, they would have been sufficiently similar to have bolstered the victim's identification.

In other words, it would have been more probable that the victim's identification of White was correct because of other similar sexual assaults committed by him. We recognize, of course, that there must be some similarities, but they need not be as unique as in a case where the issue is identity and the state seeks to prove it solely or primarily with evidence of modus operandi. Certainly, evidence of two robberies would not be relevant because the fact that a defendant commits robbery is not legally relevant to prove he committed sexual battery. But, we submit, other sexual assaults, committed in a generally similar manner, tending to prove

the victim is not mistaken, would be relevant.

It will be argued that such evidence demonstrates a defendant's propensities and it well may, but if in doing so this evidence tends to prove another material issue, such as lack of mistake, then propensity is not the sole basis for its introduction and Williams, supra, allows it.

Implicitly, at least, this court has, on several occassions, indicated that Drake is limited to cases where modus operandi is the sole or primary evidence to prove identity. In Heiney v. State, 447 So.2d 210 (Fla. 1984), the defendant had shot one Terry Philips in the abdomen and fled. The defendant was next seen in the company of the victim, the day prior to the victim's death. The victim was found savagely beaten with a claw hammer. The state introduced evidence that the defendant used the victim's credit cards and also introduced evidence of the shooting of Phillips. Neither of these offenses were similar, much less uniquely similar, yet the court held them admissible under Williams to show motive.

In Squires v. State, 450 So.2d 208 (Fla. 1984) the defendant, in one of his confessions, had stated it was his accomplice, not he, who had killed the abducted victim. At trial, his defense was basically that of alibi, but he did introduce evidence that in another kidnapping episode he had spared the victim and that he was averse to killing. This court, without commenting on any similarities, held that it was proper for the state to introduce evidence of other occassions where the defendant had shot at persons in order to rebut his assertion of non-violent character. Again, in Oats v. State, 446 So.2d 90 (Fla. 1984), the defendant was charged with robbery and

murder, during a robbery. The state introduced evidence of another robbery and attempted murder. This court approved of this similar fact evidence without even commenting on Drake. Obviously this was because the evidence was introduced not to prove identity (the defendant had confessed), but to rebut ". . . Oats' contention in his confession that the Martel murder was an accident." Id. 95.

Not only has this court not applied Drake to non-identity issues, but even in cases in which the "Williams Rule" evidence has been introduced as an aspect of identity, the court has not applied Drake strigently.

In Mason v. State, 438 So.2d 374 (Fla. 1983), there were many distinctions between the two crimes. As stated by this court:

> " . . . one was a homicide, the other a rape; one home was ransacked and robbed, the other was not; the knife used in one crime was taken from a kitchen drawer, the other from a kitchen sink, and so on. Especially important, states appellant, are the dissimilar physical descriptions of the attackers given by the state's witness in each case.
>
> Id. 376

The similarities were:

> They occurred within two days and eight-tenths of a mile of each other. In both cases the attacker entered the home through a window, armed himself with a knife from the kitchen and assaulted a woman in her bedroom. One victim was stabbed through the heart while the other was verbally threatened with the same, and a towel was found in the bedroom and outside near the points of entry at both locations. Finally, appellant's fingerprints were found at both scenes.
>
> Id. 376 - 377

The court found the similarities to be sufficiently unique although, quite obviously, it did not apply Drake as stringently as

defense lawyers would like. Why? We suggest because the "Williams Rule" evidence was neither the sole nor the primary evidence of identity. It only tended to corroborate the child's identification[5] and to establish, circumstantially, the point in time when the fingerprints were placed on the scene.

This court glossed over the fact that one case was a homicide and the other was a rape. Yet, that was a crucial distinction in Drake. See Chandler v. State, 442 So.2d 171, 173 (Fla. 1983).

Chandler demonstrates another departure from Drake. There the "Williams Rule" evidence was used to prove identity. We cannot determine from the opinion what other evidence of identity the state may have introduced, but we venture to guess that there was other evidence, because in footnote 2 of the opinion this court sets out five points of similarity. All were of a general nature commonly found in thousands of such homicides. No one would seriously contend that if the circumstances surrounding the crime in Chandler had been fed into a computer, it would have brought up Chandler's name.

Thus, it can be seen that Drake has not been applied to non-identity issues and, even with respect to identity issues, not as stringently when there has been other substantial evidence of identification.

Appellant argues that there were many dissimilarities in this case and proceeds to set them out in his brief. To be sure in Mattera v. State, 409 So.2d 257, 259 (Fla. 4 DCA 1982) the Fourth

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5 An eleven year old daughter of the victim, although unable to identify the defendant from photographs identified him at trial as the intruder and assailant. Mason, supra at 376.

District stated that the state should not be permitted to ". . . ignor[e] the large number of dissimilarities," but as can be seen, this Court observed in Chandler that dissimilarities may suggest" . . . differences in opportunities . . . rather than significant differences in modus operandi . . ." Id. 173. Assuming that Drake is even applicable in this case, to whatever degree, the dissimilarities, as in Chandler, only suggest differences in opportunity.

A few examples. On page 42 of his brief, appellant sets out what he contends were some dissimilarities. In the Carlson slaying he says that entry was gained by cutting of the screen door and that in Jamison, there was no forced entry. There was no forced entry because the screen (similarity?) door was unlocked in the Jamison case. (R 702) He argues that in the Carlson case, the victim was severly beaten, strangled and tied up; whereas, in the Jamison case, the victim was not beaten, strangled or tied. Conveniently, he ignores the fact that appellant's departure from the Jamison home was premature, before he was able to do more damage due to the fact that his victim gained possession of a gun. Moreover, tearing a woman's clothes off at the point of a knife, forcing her to have oral sex and busting the door completely in (R 705) sufficiently indicates that the only reason he didn't kill Ms. Jamison is because the opportunity was not there.

He says that in Jamison there was no attempt to conceal fingerprints. Again, he ignores the fact that there was no opprotunity to wipe his prints. Furthermore, he assumes the assailant in the Carlson murder attempted to conceal his prints. This is belied by the

fact that prints were found in the car.

He says that in one, the telephone lines were cut from the outside while in another, torn off the wall in the inside. The fact that appellant, in both cases, thought in terms of cutting the telephone lines is a point of similarity, not dissimilarity.

Now, to points of similarity. In both, the victim was a female; in both, the victim was sexually assaulted; in both, telephone wires were cut or torn; in both, entry was made through a carport or garage screen door; in both, the assailant also sought money throughout the house and in both, the contents of the victim's purse were strewn throughout; and finally, in both, appellant left his prints on the victim's automobile.

ISSUE V

THE TRIAL JUDGE'S EXCLUSION OF EVIDENCE THAT THE SUPPOSEDLY SIMILAR CRIME WAS TOTALLY DISSIMILAR WITH THE CRIME CHARGED WAS ERROR AND DENIED APPELLANT A FAIR TRIAL, THE RIGHT TO PRESENT EVIDENCE IN HIS OWN DEFENSE AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellant complains that the lower court excluded the testimony of a Dr. Norman, a clinic psychologist, who supposedly has some expertise in forensic psychology.

The essence of his proffered testimony was that based on his examination of appellant and the circumstances of the Jamison and Carlson cases he opined that appellant could not have committed the Carlson murder because the psyche of the individuals who committed the two crimes was not the same.

He proffered that he examined the police reports, depositions, etc. of both trials and interviewed appellant (R 1052 - 1053) and that in his opinion, the person who committed the Carlson murder was a sadistic type who liked to inflict pain; whereas, the one who committed the Jamison assault[6] was not; that Peek was primarily interested in sex (R 1055 - 1059). Were this case not so serious, his testimony would be laughable. How Dr. Norman could have testified with a straight face that the Carlson assailant was a sadist who liked to inflict pain whereas Peeks, who raped and brutilized a woman was not, escapes reason.

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[6] Peek, in open court, admitted that he was the person who sexaully assaulted Mrs. Jamison. (R 940)

Nevertheless, the assistant state attorney cited numerous cases disallowing such testimony, Commonwealth v. Gibson, 400 At.2d 221 (Penn. 1979) and Douglas v. United States, 386 At.2d 2, 9 (D.C. Court of Appeals 1978). Appellant cited none below and little here, in support of his contention that this tesitmony should have been admitted. In Douglas the court said:

> Furthermore, "expert testimony is inadmissible if 'the state of the pertinent art or scientific knowledge does not permit a reasonale opinion to be asserted even by an expert.'" Dyas v. United States, supra at 832, quoting McCormick on Evidence, §13 at 31 (E. Cleary, 2d ed. 1972). In the instant case, the defendant, through expert testimony, was attempting to prove that the absence of articulated or observable sexual abnormalities established the fact that he did not commit the particular offense with which he had been charged. We do not regard the field of psychology as being so exact, however, as to be able to determine with sufficient reliability that an individual did not commit a certain act, based solely on the presence of some characteristics and the absence of certain observable symptoms.

(text at 296)

Similarly in Gibson, the court said that a psychiatrist's proffered testimony that the defendant's personality make up was such that he was not a criminal was properly excluded because it begged the very question at issue. See also Johnson v. State, 438 So.2d 774 (Fla. 1983) where the trial court was held not to have abused its discretion in refusing to allow a psychologist testify in the field of eyewitness identification.

ISSUE VI

THE TRIAL COURT'S EXCLUSION FOR CAUSE OF JUROR LOVE BASED UPON HIS OPPOSITION TO THE DEATH PENALTY AND THE REFUSAL TO POSTPONE "DEATH QUALIFICATION" UNTIL THE PENALTY PHASE VIOLATED FLORIDA STATUTE 913.13, AND DENIED APPELLANT A FAIR TRIAL, DUE PROCESS OF LAW, THE RIGHT TO AN IMPARTIAL JURY AND A JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

Juror Love was properly excused for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968) and, most certainly, under authority of Wainwright v. Witt, 83 L.Ed.2d 841 (1985). Appellant, naturally is enamored with Grigsby v. Mabry, __ F.2d __ (8th Cir. 1983) Case No. 83-2113, decided January 30, 1985. But, Witt relied on Grigsby and he is dead. Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1985), cert. denied, 36 Cr.L. 4227. This court has also rejected Grigsby. Caruthers v. State, 10 F.L.W. 114 (Fla. 1985); Copeland v. State, 457 So.2d 1012 (Fla. 1984)

ISSUE VII

THE TRIAL JUDGE'S ADMISSION OF HAIR EVIDENCE WHICH WAS WHOLLY UNRELIABLE AND HAD NO PROBATIVE VALUE EXCEPT TO INCITE RACIAL PREJUDICE AGAINST APPELANT WAS ERROR AND DENIED APPELLANT A FAIR TRIAL AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellant's primary contention under this issue concerns the chain of custody of the questioned hair found in the hose. Concededly, when this court decided Peeks I, it commented that the hair had been lost subsequent to its examination by the Sanford Laboratory. Peek v. State, 395 So.2d at 495. Nevertheless, this court determined that, at least up to the point that the hair was examined at the Sanford Laboratory, there was no problem with the chain of custody.

As appellant states in his brief, the questioned hair was subsequently found and re-examined by another hair analyst. Ignoring certain facts, exaggerating others and, still yet, twisting others, counsel for appellant attempts to paint a picture of a laboratory in disarray suggesting the one quarter inch of hair subsequenty examined was not the same strand.

In the instant case, the state presented detailed testimony pertaining to the chain of custody not only through the first examination, but throughout the second examination and up to the point of trial.

Officer McDonald testified he found the cut hose partly under the Volkswagen. (R 539) He gave the hose to Detective Donnelly. (R 539) He identified exhibit 7 as the hose. (R 540) Officer

Donnelly verified this and identified exhibit 7 as the bag and contents containing the hose through his name and case number. (R 721)

Diana Bass, the first analyst, testified she received exhibit 7 on May 23, 1977. (R 768 - 769, 778) Sometime between May 23, 1977, and June 20, 1977, she examined the hose for hair fragments and assigned a laboratory number of K-4D to the white hose. (R 769) She found a hair fragment on that exhibit and prepared it for microscopic examination by mounting it in a glass microscopic slide. (R 770) She explained this is done by gluing the hair on the slide with a translucent substance and covering it with a cover glass. (R 770)

This is to enable it to be placed in a container and not have it brushed away. (R 770) She identified the slide. (R 772)

After examining the items she sealed them back in the package. she also filed a report on June 20th indicating she had found the hair fragment in the hose. (R 778) On July 12, 1977, she received samples of Peek's hair for comparison. (R 773)

It must be remembered that when she first received the hair fragment (May 23, 1977), the investigation had not focused on Peek. It was not until July 7, 1977, after his arrest for the Jamison assault that hair samples were taken from him. (R 609 - 610) Consequently, Diana Bass had not yet received Peeks' known hair when she placed the questioned hair on the slide. (R 788) It would have been normal for her to keep the slides in the laboratory for comparison with other subject hairs. (R 789)

Here again, another explanation is necessary. At the first trial, she testified that she examined this hair on December of 1977. See Peek v. State, 395 So.2d at 495. In the instant trial she explained that there was no transmittal letter for December 7, 1977, but for July 12, 1977 (R 785); that the statements she had made at the previous trial about having received the hair for analysis on December 7, 1977, probably resulted from the fact that her interrogator had suggested December as the date when he really meant July 12, 1977. (R 785 - 788) If one transposes 7/12/77 we have 12/7/77. (R 819)

David Jernigan testified that on March of 1984, he was employed by the Sanford Laboratory (R 816) as an expert in the field of hair examinations. (R 817) He received exhibits 7, 9, 10, 12 and 15 for comparison. (R 821 - 822) He also identified exhibit 15 as the slides prepared by Diana Bass. (R 823) He took the hair fragment from the slide prepared by Diana Bass and put it on one of his own. (R 829) He identified exhibit 17 as the slides prepared by him (R 830) and conducted his own examination. After the examination, he returned the items to the evidence vault to be returned to the Winter Haven Police Department. (R 823)

One other aspect needs explaining: the finding of the hair fragment after the first trial. Mark Pellham, employed by the laboratory (R 808) testified that on November of 1981, he wrote to the Winter Haven Police Department because there had been some evidence pertaining to the Peek case that had been in possession of the laboratory for some four years. (R 810) Subsequently, the items were turned over to Patrolman Hutzell on December 2, 1981. (R 813)

These items included the slides prepared by Diana Bass. (R 813)

Officer Hutzell testified they were in her custody from December 2, 1981 through March 20, 1984, when they were resubmitted for additional testing.

Consequently, what this court said in 1981, respecting the admissibility of this evidence continues to apply. Peek v. State, 395 So.2d at 495. The value of this evidence was for the jury. The jury well understood this evidence and its significance.

ISSUE VIII

THE TRIAL JUDGE'S EXCLUSION OF THE NUMEROUS ITEMS OF EVIDENCE INCLUDING POLICE REPORTS, WITNESS STATMENTS TAKEN BY POLICE, AND THE HAIR ANALYST'S EMPLOYEE EVALUATION WAS ERROR AND DENIED APPELLANT A FAIR TRAIL, THE RIGHT TO PRESENT EVIDENCE IN HIS OWN DEFENSE AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellant recognizes that with respect to matters ". . . involving the admission of evidence, the trial judge's decision is given great discretion." (Appellant's brief, p. 63) He argues, however, that the judge's demonstrated cavalier attitude requires this court to make a de novo review of its admissibility. As we have demonstrated under to Issue I herein, the trial judge was eminently fair. Moreover, he was correct in each of the rulings wherein appellant herein complains.

PROFFER OF OFFICER McDONALD'S TESTIMONY

Appellant proffered officers McDonald's testimony that some lady had heard an automobile around the Carlson home at 2:30 or 3:00 a.m.. Contrary to what appellant asserts, she did not tell him it was the victim's car. (R 561 - 562) This was clearly hearsay. Florida Evidence Code, 90.801.

THE EMPLOYEE EVALUATION OF DIANA BASS

This was also hearsay because proffered by someone other than the witness testifying (R 880). It was prepared after the case went to trial the first time (R 880) and was strictly an opinion. (R 881) Moreover, counsel called Diana Bass as a defense witness and went extensively into her handling of evidence. (R 790 - 793)

THE POLICE REPORT OF OFFICER LATNER

Appellant contends that this report identified a more promising suspect who was not investigated. We deny this. When counsel offered to introduce the report, he conceded during argument that he could ask Latner about this evidence instead of introducing the report. (R 1034) This report was also hearsay. Parenthetically, we could point out that appellant was allowed wide latitude in examining witnesses about other suspects. (R 1039 - 1045, 1074, 1078 - 1080, 1082 - 1090).

ISSUE IX

THE PROSECUTOR'S QUESTIONING OF APPELLANT ABOUT THE EXERCISE OF HIS RIGHT TO REMAIN SILENT IN A PREVIOUS CASE VIOLATED FLORIDA RULE OF CRIMINAL PROCEDURE 3.250 AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

On page 66 of his brief, appellant sets out a dialogue between his client and the assistant state attorney, while appellant was testifying, which appears in R 957 - 958.

Suffice it to say, appellant's counsel did not object. Wainwright v. Sykes, 433 U.S. 72 (1977),

ISSUE X

WHERE THE GRAND JURY WHICH INDICTED APPELLANT CONTAINED ONLY ONE BLACK AND THE WHITE FOREMAN WAS SELECTED BECAUSE HE WAS AN ACQUAINTANCE OF THE JUDGE, APPELLANT WAS DENIED A FAIR TRIAL, EQUAL PROTECTION OF THE LAWS, DUE PROCESS OF LAW, THE RIGHT TO AN IMPARTIAL JURY, AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the first place appellee cannot accept appellant's allegations as the percentage of blacks and whites on the venire. (See appellant's brief, p. 70)

Appellant filed a motion to dismiss predicated on the contention that the grand jury was improperly constituted because there were insufficient blacks summoned to draw a representative sample and because the selection process was such that no blacks were considered. (R 65 - 66) His motion did not allege any facts supporting its conclusory allegations.

Subsequently, the state attempted to have an evidentiary hearing conducted on said motion, but, as we shall see, to no avail because defense counsel did not proceed with the production of any evidence.

When the hearing commenced, appellant's trial counsel represented to the court that he could present affidavits concerning these matters. (R 93) The state contended that the defense had the burden of proof to come forward with some prima facie evidence (R 93 - 94) complaining that all that had been presented were counsel's comments. Representations by counsel do not constitute evidence and are insufficent to support a motion. State v. Montgomery, 310 So.2d

440 (Fla. 3 DCA 1975); State v. Church, 353 So.2d 219 (Fla. 2 DCA 1977).

The court agreed that appellant had the burden. (R 94) After a lengthy discussion, appellant's counsel asked to pass the motion so that he could conduct further investigations. (R 101) Nevertheless, since former Judge Stokes was present to testify for the state (R 102) his testimony was taken.

Mr. Stokes testified, essentially, that he could not remember the details, but that Mr. Holmes was selected as foreman because, although they were not close, they were social friends and felt that his background in dealing with people made him an excellent foreman. (R 107) He also testified that while he was on the bench, he had selected a black female as Grand Jury Foreman because of her leadership qualifications. (R 108) Moreover, in selecting the Grand Jurors there were no discriminatory practices utilized. (R 104 - 10)

After Mr. Stoke's testimony , appellant's counsel again asked to put matters " . . . back on the motion calendar at a later point in time, . . . " (R 113) They were.

The hearing above described was held on June 26, 1984. (R 84) Counsel for appellant chose not to pursue his motion. Instead, he elected to file an affidavit by a Lisa Daye Hall (R 216) and some other documents which were unverified. (R 217 - 219)

These were filed August 17, 1984, three days prior to the start of the trial. Since appellant did not pursue his motion, he has waived it, Francois v. State, 407 So.2d 885 (Fla. 1981), Moody v. State, 418 So.2d 989 (Fla. 1982) and this court should so hold so

that federal courts do not use the excuse that they can rule on the merits because this court did as occurred in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981) and other such cases.

ISSUE XI

APPELLANT'S ABSENCE FROM THE COURTROOM DURING PORTIONS OF THE TRIAL VIOLATED HIS RIGHTS TO CONFRONTATION, DUE PROCESS AND THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellant complains that he was not present during arguments of counsel with respect to Williams Rule testimony and at the charge conference on jury instructions. He recognizes that as to the first, counsel specifically waived his client's presence. (R 236) When the attorneys went to the judge's chambers to discuss the instructions, no objection was interposed to appellant's absence.

Naturally, appellant cites Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) modified on rehearing, 706 F.2d 311 (11th Cir. 1983). On rehearing, the Proffitt court held that a defendant's absence could not be excused absent a personal waiver by the defendant himself. Having been counsel for the state in Proffitt, the undersigned would submit that the Eleventh Circuit misread all of the cases which it relied on in support of its authority. In the interests of brevity, we will not discuss those underlying cases. Suffice it to say that in Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984) Judge Hill analyzed the cases and came to the conclusion that the writer of Proffitt misread them. Hall, 780 - 786.

More recently, the Supreme Court of the United States put a damper on the Proffitt opinion holding that a defendant's presence can be waived by failing to object. Moreover, presence is not required at all stages. It must be viewed in light of the whole

record and violates due process only to the extent that a fair and just hearing would be thwarted. United States v. Gagnon, 36 Cr.L. 4235, Case No. 84-690, decided March 18, 1985.

In order to demonstrate prejudice, appellant argues that it was at the charge conference where the judge allegedly made the statements "niggers". The charge conference was transcribed and no such statement appears. (R 1116 - 1122) Again such statements as "I'm not going to be on the criminal court anyway if and when this thing is reversed" do not appear in the record except as an assertion by defense counsel of what he claimed the judge said. (R 1399)

The statement "let it all hang out" was made by the judge, but how this can be interpreted as prejudicial escapes the undersigned. This was merely a colloqual expresssion by the judge indicating he was going to allow the William's Rule testimony. (R 249)

ISSUE XII

THE TRIAL JUDGE'S EXCLUSION OF PENALTY PHASE EXPERT TESTIMONY OFFERED TO SHOW THAT ERRORS IN THE DETERMINATION OF GUILT SOMETIMES OCCUR IN CASES LIKE THE INSTANT ONE AND THAT THE IMPOSITION OF THE DEATH PENALTY ON APPELLANT WOULD HAVE NO DETERRENT EFFECT VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT AND LOCKETT V. OHIO, 438 U.S. 586 (1975).

Appellant cannot be serious in contending that the testimony of Proffessor Radelett should be allowed. In effect he sought to retry the case on an issue already determined by the jury; viz: the appellant's guilt.

Lockett v. Ohio, 438 U.S. 586 (1975) does not hold that any evidence that the accused wants to present is admissible. It must be relevant to the circumstances surrounding the crime or the character of the defendant. This testimony was not relevant to either of those aspects.

As to the deterrent effect of capital punishment, the testimony would have been completely irrelevant because capital punishment is constitutional irrespective of its deterrent effect. Gregg v. Georgia, 428 U.S. 153 (1976).

ISSUE XIII

THE USE OF DIFFERENT JUDGES FOR THE GUILT AND PENALTY PHASES, WHERE A CHANGE WAS REQUIRED BECAUSE OF RACIAL COMMENTS MADE BY THE PRIOR JUDGE, VIOLATED SECTION 921.121(1), FLORIDA STATUTES, AND DENIED APPELLANT A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

When appellant filed his motion for disqualification, Judge Langston had little alternative except to recuse himself as requested by appellant.

Appellee was specifically told that if the judge recused himself a new judge would have to take one the second phase of the trial. (R 1252 - 1254) Knowing what would occur, appellant insisted on the record he wanted Judge Langston off the case. (R 1254)

Appellant has failed to allege prejudice or cite any cases holding the procedure followed to be prejudical.

ISSUE XIV

THE IMPOSITION OF APPELLANT'S DEATH SENTENCE WITHOUT A CLEAR FINDING THAT APPELLANT INTENDED TO TAKE LIFE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Citing Enmund v. Florida, 102 S.Ct. 3368 (1982) appellant contends that if the evidence showed that appellant killed the victim purely by accident a sentence of death would be inappropriate. This argument is ludicrous under the facts of this case. He strangled the life out of his victim. If that is accidental there is no such thing as murder.

Moreover, appellant's Enmund argument is premised on the contention that it is the jury who must make the Enmund determination He is mistaken. Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983), Hall v. Wainwright, 733 F.2d 766 (Fla. 1981), Ross v. Kemp, __ F.2d __ (11th Cir. 1985), Case No. 82-8413, decided March 25, 1985.

ISSUE XV

THE IMPOSITION OF APPELLANT'S DEATH SENTENCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT IS RACIALLY DISCRIMINATORY IN THAT BLACKS AND PERSONS WHO KILL WHITES ARE DISPROPORTIONATELY LIKELY TO RECEIVE A DEATH SENTENCE THAN WHITES AND PERSONS WHO KILL BLACKS.

Since appellant concedes this argument has been rejected, no comment is necessary.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the judgment and sentence showed be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Edward S. Stafman, Esq. P. O. Box 11112, Tallahassee, Florida 32302, this 3rd day of May, 1985.

OF COUNSEL FOR APPELLEE