IN THE SUPREME COURT OF FLORIDA

HENRY CHARLES ROSS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,781

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner was the appellant in the District Court of Appeal, Fourth District, and the defendant in the trial court. The respondent was the appellee in the Fourth District and the prosecution in the trial court. In this brief, the parties will be referred to as the State and the defendant. The symbol "R" will be used to designate the record on appeal which includes the transcript of the trial proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's Statement of the Case and Facts as being a substantially true and correct account of the proceedings below with the following additions and exceptions contained below and in the argument portion of the brief:

1. Both the victim and the defendant stated that the kidnapping occurred in Pompano Beach (R. 300, 568, 570), that the co-defendant Murray drove the car for a while until they reached Deerfield Beach (R. 314, 574, 579) where the two sexual batteries occurred, and that Willie then drove to another site in Deerfield Beach where the victim was shot. (R. 324, 604).

2. Among the instructions given to the jury by the trial court were the following:

In the Information the Defendant is charged with committing the offense of kidnapping with a firearm and you will have to make specific findings in these counts as to whether or not a firearm was involved. If a crime is committed and in the course of that crime there is use of a firearm, the Florida Statute provides for a certain minimum sentence and therefore, juries have to make findings, specific findings as to whether or not a certain crime is committed and if so, is committed with or without a firearm.

(R. 732-733).

Now, with respect to Counts II and III, a sexual battery. Before you can find the Defendant guilty of sexual battery, the State must prove the following four elements beyond a reasonable doubt.

First, that [redacted] was over the age of eleven years and with respect to Count II, that the Defendant with his sexual organ, penetrated or had union with the mouth or vagina of [redacted]

With respect to Count II, he is alleged there to be a principal with Murray.

The third is that the Defendant in the process, used or threated to use a deadly weapon and,

Fourthly, that the act was done without the consent ot [redacted]

A weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm.

(R. 735-736).

The punishment provided by law for the crime of robbery is greater if,

> 'In the course of committing the robbery' the Defendant carried some kind of weapon. An act is in the course of committing the robbery if it occurs in an attempt to commit robbery or in flight after the attempt or commission. Therefore, if you find the Defendant guilty of robbery you must then consider whether the State has further proved those aggravating circumstances and reflect this in your verdict.
>
> If you find that the Defendant carried a firearm in the course of committing the robbery, you should find him guilty of robbery with a firearm.
>
> (R. 741-742).

3. On the written verdict forms, the jury was given the opportunity on each count to find the defendant guilty of a lesser included charge of committing the crime without a firearm. (R. 836-840).

4. The victim testified that the defendant approached her at the car wash with the gun. (R. 303-305). She testified that while Murray was driving the car, the defendant was holding the gun at her side and threatening to kill her. (R. 307, 309, 312). During the drive the defendant went through the victim's purse and demanded money. (R. 311-312). While Murray was raping the victim, the defendant had the gun and repeatedly opened the car door during the rape. (R. 317-320). Defendant admitted having the gun at this time. (R. 581). After Murray had finished raping her, the defendant got into the back seat with the victim and stated that "he wanted it too." Murray said no, ordered the victim to get dressed and to perform oral sex on the defendant, to

which the defendant agreed. (R. 320-321). Defendant then handed the gun to Murray. (R. 323).

POINTS INVOLVED ON REVIEW

I

WHETHER THE CRIMES FOR WHICH THE DEFENDANT WAS SENTENCED TO CONSECUTIVE THREE-YEAR MINIMUM TERMS PURSUANT TO SECTION 775.087 (2), FLORIDA STATUTES, WERE "OFFENSES [WHICH AROSE] FROM SEPARATE INCIDENTS OCCURRING AT SEPARATE TIMES AND PLACES" WITHIN THE MEANING OF THE RULE ANNOUNCED IN PALMER v. STATE, 438 So.2d 1 (Fla. 1983)?

II

WHETHER THE TRIAL COURT PROPERLY IMPOSED THREE YEAR MANDATORY MINIMUM SENTENCES WHERE THE JURY FOUND THAT THE DEFENDANT POSSESSED THE GUN? (Restated).

III

WHETHER THE TRIAL COURT PROPERLY IMPOSED A THREE YEAR MANDATORY MINIMUM SENTENCE ON COUNT III, WHERE JURY FOUND THAT THE DEFENDANT HAD POSSESSION OF THE GUN AND THE EVIDENCE SHOWED THAT THE GUN WAS USED TO FORCE THE VICTIM TO PERFORM THE SEX ACT? (Restated).

SUMMARY OF THE ARGUMENT

Although this Court has recently answered the specific certified question in the negative in two cases State v. Ames, ___ So.2d ___, 10 FLW 229 (Fla. April 28, 1985) and Wilson v. State, ___ So.2d ___, 10 F.L.W. 233 (Fla. April 18, 1985), the facts in the instant case are readily distinguishable. Where the kidnapping and robbery occurred in different cities, and with some time in between the offenses, there was a sufficient separation of the offenses to warrant the imposition of multiple three year mandatory minimum sentences.

This Court should not exercise its discretion to consider the other two issues raised by the defendant because they are merely an attempt to provide a second record review of cases already resolved by the district court of appeal. Furthermore, both issues are without merit where it is clear from the evidence that the defendant actually possessed the firearm during the commission of the felonies, including the sexual battery charge in count three, where it was his use of the firearm which forced the victim to submit, where the jury was instructed on the requirement of finding that the defendant had possessed the firearm, and where the jury verdicts clearly showed a finding that the defendant was guilty on each charge "with a firearm."

ARGUMENT

I

THE CRIMES FOR WHICH THE DEFENDANT WAS SENTENCED TO CONSECUTIVE THREE-YEAR MINIMUM TERMS PURSUANT TO SECTION 775.087(2), FLORIDA STATUTES, WERE "OFFENSES [WHICH AROSE] FROM SEPARATE INCIDENTS OCCURRING AT SEPARATE TIMES AND PLACES" WITHIN THE MEANING OF THE RULE ANNOUNCED IN PALMER v. STATE, 438 So.2d 1 (Fla. 1983).

Under different factual situations, this Court has recently answered the above certified question in the negative in State v. Ames, ___ So.2d ___, 10 F.L.W. 229 (Fla. April 18, 1985) and Wilson v. State, ___ So.2d ___, 10 F.L.W. 233 (Fla. April 18, 1985). In these recent decisions, this Court interpreted its holding in Palmer v. State, 438 So.2d 1, 4 (Fla. 1983), that consecutive mandatory minimum sentences for offenses arising from separate incidents occurring at separate times and places were not prohibited, as meaning that consecutive mandatory minimums are not prohibited if the offenses are not committed during a single, continuous criminal episode. To determine if the crimes were part of a single, continuous episode, this Court looked as to whether there was sufficient separation of the offenses to warrant the imposition of multiple three-year mandatory minimum sentences. State v. Ames, supra, 10 FLW at 230.

In State v. Ames, the defendant armed with a firearm pushed his way into the victim's house, knocked her to the floor, threatened to kill her, forced her into an adjoining room and

demanded money, led the victim through the house in a quest for more money, and when the victim told him she only had jewelry, he took her to the bedroom, removed the jewelry and raped the victim. This Court held that the defendant's convictions for armed burglary of a dwelling, robbery with a deadly weapon and sexual battery with a deadly weapon were all offenses committed during a single, continuous criminal episode so that consecutive minimum mandatory sentences could not be imposed. In Wilson v. State, supra, the defendant armed with a gun, confronted the victim as she attempted to enter her apartment, forced her into his car, drove a short distance and raped her. 10 F.L.W. 233. All these acts took place in Fort Walton Beach. Wilson v. State, 449 So.2d 822, 825 (Fla. 1st DCA 1984). This Court, as it did in Ames found the defendant's convictions for sexual battery with a firearm and kidnapping with a firearm to have occurred during a single continuous episode. As such, consecutive minimum mandatory sentences were improper.

The State submits that the facts in the instant case are distinguishable from those in Ames or Wilson, so that the imposition of consecutive minimum mandatory sentences for the kidnapping with a firearm and robbery with a deadly weapon, to wit, a firearm, were proper. The defendant abducted the victim at gunpoint. (R. 303-305). He forced her into her car. This occurred in Pompano Beach. (R. 300, 568, 570). The co-defendant Murray drove, with the defendant sitting next

to the victim, holding the gun at her side and threatening to kill her. (R. 307, 309, 312). As they drove north, the defendant went throught the victim's purse and demanded money. (R. 311-312). They drove to a wooded area in Deerfield Beach where the two sexual batteries occurred. (R. 314, 574, 579). After the sexual batteries, the defendant and Murray took the victim's purse (R. 324), and then the defendant took her necklace. (R. 324). They then drove to a warehouse area in Deerfield Beach where Murray shot the victim and the defendant and Murray took her car. (R. 329-331).

It is the state's position that although these offenses took place over a period of thirty to thirty-five minutes, there was sufficient separation of the offenses of kidnapping and robbery as to warrant the imposition of consecutive minimum mandatory sentences. The kidnapping occurred and was completed in Pompano Beach, when the defendant, by gunpoint forced the victim into her car, transported her and threatened to kill her. The robbery of the victim's purse, necklace and car occurred in Deerfield Beach after she had been transported there and the sexual batteries had been completed. As such there was sufficient separation in defendant's commission of these crimes. See, e.g., Smith v. State, ___ So.2d ___, 10 FLW 395 (Fla. 5th DCA, February 14, 1985) (where sexual battery and robbery were committed at a different place and the intent to commit the robbery was formed after the sexual batteries, consecutive mandatory minimum sentences were proper).

The state would further note that if the objective of section 775.087(2), Florida Statutes (1981) was to serve as a deterrent, that is, to discourage the criminal use of firearms, then such an objective is met in the instant case. Whereas, the defendant in Palmer v. State, supra, who robbed thirteen people at the same place and time, would not be deterred by the statute, the imposition of the consecutive mandatory minimum sentences in the instant case would have had such an effect. Because the crimes occurred at different places and over a sufficiently long period of time, the statute could have deterred the defendant from further possession of the firearm. In fact, after the defendant gave Murray the gun just before forcing the victim to commit oral sex, the statute could have deterred him from regaining possession of the firearm during the subsequent robbery. Thus, where the imposition of consecutive mandatory minimum terms would further the legislative intent, the sentences should be affirmed.

II

THE TRIAL COURT PROPERLY IMPOSED THREE YEAR MINIMUM SENTENCES WHERE THE JURY FOUND THAT THE DEFENDANT POSSESSED THE GUN. (Restated).

Initially, the state would submit that this Court should not exercise its discretion to considering this issue on appeal, where it was raised and rejected by the Fourth District. As this Court stated in State v. Hegstrom, 407 So.2d 1343, 1344 (Fla. 1981), this Court will not accept a case for review on one basis and then reweigh the evidence once reviewed by the district court, in order to provide a second record review of cases already resolved by the district courts of appeal. See also Sobel v. State, 437 So.2d 144, 148 (Fla. 1983). This Court should thus accept the factual determinations of the Fourth District that the jury had made the requisite findings that the defendant had possessed the firearm.

If this Court should decide to exercise its discretion and review this issue, then the State submits that it is without merit. In State v. Overfelt, 457 So.2d 1385 (Fla. 1984), this Court affirmed the Fourth District's holding in Overfelt v. State, 434 So.2d 945 (Fla. 4th DCA 1983), that it is the jury's function to be the finder of fact with regard to whether an accused actually possessed a firearm when committing a felony. In Whitehead v. State, 446 So.2d 194 (Fla. 4th DCA 1984) pet. for rev. den. 462 So.2d 1108 (Fla. 1985), the Fourth District applied its decision in Overfelt to hold that "where the information makes reference to a deadly weapon and the jury is

instructed to that effect a verdict which incorporates the crime charged in the information by reference constitutes a specific finding that the crime was committed with the use of a deadly weapon." 446 So.2d at 198.

In Whitehead, Whitehead and a co-defendant, Landrau were charged together in the same count with aggravated assault. Included in the charge was the specific allegation that they used a deadly weapon, to wit, a handgun. The trial court instructed the jury that one of the elements of aggravated assault was that the assault was made with a deadly weapon. 446 So.2d at 198. The jury returned a verdict of guilty of aggravated assault as charged in the information. The testimony at trial was clear that the assailant was armed. Id. at 197. The Fourth District held that these factors when viewed together constituted a specific finding that the crime was committed with the firearm.

Whitehead is virtually indistinguishable from the instant case. Each count of the information charged that the defendant and Murray had been in possession of a firearm during the commission of the felonies. (R. 825, 826). The jury was specifically instructed on the required specific finding that the defendant had used or carried a firearm (R. 732-733, 741-742), or a deadly weapon (R. 735-736) during the commission of the felonies. The various verdict forms each contained lesser included offenses of the crimes charged "without a firearm." (R. 836-840). The evidence, through both the victim's testimony and the defendant's statement

clearly showed that he was in possession of a firearm (R. 303-305, 307, 309, 312, 317-320, 325, 578, 581). The jury returned verdicts that the defendant was guilty on each charge "with a firearm." (R. 836-840).

These circumstances show without a doubt that the jury necessarily found that the defendant had actual possession of the firearm.[1/] This is not a case, as was this Court's concern in State v. Overfelt, supra, in which the trial judge had invaded the jury's historical function, which could lead to a miscarriage of justice. Rather, it would be a miscarriage of justice in this case if the three year minimum mandatory sentence were not imposed.

[1/] The defendant's lack of objection at trial is also an indication that trial counsel also believed that the jury had properly found that the defendant was in actual possession of the firearm.

III

THE TRIAL COURT PROPERLY IMPOSED A THREE YEAR MANDATORY MINIMUM SENTENCE ON COUNT III, WHERE THE JURY FOUND THAT THE DEFENDANT HAD POSSESSION OF THE GUN AND THE EVIDENCE SHOWED THAT THE GUN WAS USED TO FORCE THE VICTIM TO PERFORM THE SEX ACT. (Restated).

As with the issue in Point II of this brief, the state submits that this Court should not exercise its discretion to consider this issue on appeal. It is nothing more than an attempt to have a second record review of a case already resolved by the district court of appeal. State v. Hegstrom, supra.

However, if this Court should decide to exercise its discretion and review this issue, then the State submits that like Point II, it is without merit. The defendant asserts that because he did not have the firearm in his hands during the time the victim was forced to perform oral sex on him, the imposition of the three year mandatory minimum sentence was improper. The State asserts that under the peculiar circumstances of this case, the imposition of the mandatory minimum sentence was appropriate.

The victim testified that during the drive in the car, the defendant held the gun at her side and continually threatened to kill her. (R. 307, 309, 312). She testified that while Murray was raping her, the defendant had the gun and was repeatedly opening the car door. (R. 317-320). The defendant admitted having the gun at this time. (R. 581).

After Murray had finished raping the victim, the defendant got into the back seat with her and stated that "he wanted it to." Murray said no, ordered the victim to get dressed and to perform oral sex on the defendant, to which the defendant agreed. (R. 320-321). The defendant then handed the gun to Murray while the act was performed. (R. 323).

After being instructed that an element of sexual battery with a deadly weapon, was that the defendant had used or threatened to use a deadly weapon, (R. 735-736), the jury returned a verdict of guilty of sexual battery with a firearm as charged in the information. (R. 838). The jury did not find the defendant guilty of the lesser included offense of sexual battery without a firearm. (R. 838). Thus, the jury clearly found that the defendant had used the gun to perpetrate the sexual battery in Count III.

The jury's verdict is supported by the evidence. Although the gun was not technically in the defendant's hands when the victim performed oral sex on the defendant, it was the defendant use and threatening use of the firearm when it was in his actual possession which forced the victim to perform oral sex. The fact that the defendant momentarily relinquished the physical possession of the firearm should not be the determinative factor, when it was the defendant's actions when he had actual possession of the firearm immediately proceeding the sexual battery, which made the act non-

consensual.[2] Thus, the trial court properly imposed the minimum mandatory sentence.[3] See, e,g, Smith v. State, 438 So.2d 10, 14 (Fla. 2d DCA 1983); Bradley v. State, 413 So.2d 1248 (Fla. 1st DCA 1982).

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[2] This is especially true if the defendant prevails on point one, that is, if this Court finds that all these acts were committed during a single continuous criminal episode.

[3] Again, the lack of an objection by the defendant indicates that trial counsel also believed that the jury had properly found that the defendant was in possession of the firearm when he committed the sexual battery.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State submits that this Court should AFFIRM the Fourth District Court of Appeal's decision in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits has been furnished to ALLEN J. DeWEESE, ESQUIRE, Assistant Public Defender, Attorney for Petitioner, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier this 6 day of May, 1985.

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