OIA 4-9-86

IN THE SUPREME COURT OF FLORIDA

WILLIE LEE MURRAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,414

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 rcord 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 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. It should be noted that at sentencing, appellant's counsel told the trial court that because the jury found the defendant to have used a firearm to commit the attempted manslaughter, there would be a mandatory minimum sentence. (R. 848).

2. After the Fourth District rendered its opinion on rehearing, reinstating defendant's conviction and sentence for attempted manslaughter, defendant never moved for rehearing on the issue of the mandatory minimum.

3. The victim testified that as she started walking away from the defendant, he shot her in the head. (R. 335). She stated that at the time of the shooting, she and the defendant were not touching. (R. 335). The victim also denied making any attempt to grab the defendant's gun or arm before the shooting. (R. 388).

Dennis Grey, an expert in ballistics and firearms identification (R. 523), testified that it would take six and five-eighths (6 5/8) pounds of pressure to pull the trigger in a single action mode. (R. 526). Mr. Grey also testified that it would take over twelve (12) pounds to fire the handgun

in a double action mode. (R. 526). He further stated that the firearm had a transfer bar, a safety device, which prevented the firearm from firing accidentally by dropping. (R. 526). Grey stated that unless the transfer bar was in a position to strike the firing pin, it would not fire. (R. 527).

In the defendant's statement to the police, the defendant did not state that he did not intentionally shoot the victim, but, rather that his co-defendant, Henry Charles Ross had shot her. (R. 597-599, 610).

4. During the charge conference, Appellant's counsel requested that the jury be charged with attempted manslaughter as a lesser included charge of attempted first degree murder. (R. 764-765).

5. The victim testified that the kidnapping occurred in Pompano Beach, (R. 308). The defendant drove the car for a while. As they approached Deerfield Beach, the money was taken from the victim's purse. (R. 320). When they got to Deerfield Beach, the sexual batteries occurred. (R. 321). After the sexual batteries, the victim's necklace was taken. (R. 330). The defendant then drove to another site in Deerfield Beach, where the victim was shot. (R. 331, 337). The victim's car was then taken.

6. At the sentencing hearing, the state requested that the trial court retain jurisdiction because of the heinous chain of offenses. (R. 844). The trial court stated that the defendant and the co-defendant had terrorized the victim for a couple of hours. (R. 844). Defense counsel then stated

stated that the defendant was under his instructions not to make any comments about the case. (R. 844). The trial court stated that there was not much he could say anyway because the facts spoke for themselves. The court stated that it was a terrible crime, that animals do not maim or kill without a reason, and that the defendant had no reason to treat the victim the way he did. (R. 845). Defense counsel argued in mitigation, that the defendant had no prior record, except juvenile petit theft, and that the jury did not believe it was a cold blooded animalistic act when they came back with attempted manslaughter. (R. 847). The defendant then stated that he was sorry for what had been done. (R. 850).

The trial court then imposed sentence, stating that it would be retaining jurisdiction for thirty (30) years. (R. 852). Defense counsel objected, stating that the state did not prove that the defendant was a danger to the public. Counsel argued that the court should take into account the defendant's prior record, age, and the fact that the victim, although shot and raped, was not cut, maimed or beaten. (R. 853). The state replied that the victim was blinded from the shooting, and that was certainly maiming someone. (R. 853).

In its written order retaining jurisdiction, the trial court set out factual aspects of the crime, i.e., that the victim was abducted at gunpoint, repeatedly threatened with death by the co-defendant, and sexually assaulted by both the defendant and co-defendant, that a firearm was used during

the commission of all offenses, that the victim was terrorized and fearing for her life, that she begged the defendant not to kill her, yet she was shot in the head, resulting in the destruction of her left eye. The trial court found that the defendant's use of force and violence exhibited an utter disregard for the rights, safety, physical and psychological welfare of the victim and that it would be in the best interest of society and the public if the defendant remained incarcerated for a minimum of thirty (30) years. (R. 892-893).

POINTS INVOLVED ON APPEAL

The state respectfully rephrases defendant's points on appeal as follows:

I

WHETHER THIS COURT SHOULD DECIDE IN THE INSTANT CASE IF THE MINIMUM MANDATORY PROVISIONS OF SECTION 775.087(2)(a). FLORIDA STATUTES, APPLY TO DEFENDANT'S CONVICTION FOR ATTEMPTED MANSLAUGHTER WITH A FIREARM?

II

WHETHER THE DEFENDANT IS ENTITLED TO A NEW TRIAL ON THE CHARGE OF ATTEMPTED MANSLAUGHTER, WHERE THE ALLEGED ERRONEOUS JURY INSTRUCTION WAS REQUESTED BY THE DEFENDANT, AND WHERE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONCLUSION THAT THE SHOOTING OF THE VICTIM WAS DONE WITH THE REQUISITE CRIMINAL INTENT AND NOT MERE CULPABLE NEGLIGENCE?

III

WHETHER THE CRIMES FOR WHICH THE DEFENDANT WAS SENTENCED TO CONSECUTIVE THREE YEAR MANDATORY 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)?

IV

WHETHER THE TRIAL COURT PROPERLY RETAINED JURISDICTION OVER DEFENDANT'S PAROLE?

SUMMARY OF THE ARGUMENT

Because of the procedural posture in which the issue of the application of the mandatory minimum sentence to the defendant's conviction for attempted manslaughter, came to this Court, the state would urge this Court to remand the case back to the trial court, to allow the defendant to file a motion pursuant to Rule 3.800 of the Florida Rules of Criminal Procedure.

This Court should not exercise its discretion to consider the other three 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, those issues are without merit. The defendant's request for the instruction on attempted manslaughter coupled with more than sufficient evidence to support the intential act of the defendant in shooting the victim, precludes this Court from reviewing the issue of the jury instruction on appeal. The imposition of consecutive mandatory minimum sentences for the defendant's convictions of robbery and sexual battery were proper where there was sufficient separation of the acts which occurrred in distinctly different locations and at different times. Finally, the trial court properly retained jurisdiction over the defendant's parole, where it orally stated its reasons, and then reduced its reasons, with more detail, to writing.

ARGUMENT

I

IT IS UP TO THIS COURT TO DETERMINE WHETHER IN THE INSTANT CASE IT SHOULD DECIDE IF THE MINIMUM MANDATORY PROVISIONS OF SECTION 775.087(2)(a), FLORIDA STATUTES, APPLY TO DEFENDANT'S CONVICTION FOR ATTEMPTED MANSLAUGHTER WITH A FIREARM. (Restated.)

The state submits that before this Court determines whether it should decide the issue raised by the defendant as to the application of the minimum mandatory provisions of section 775.087(2)(a), Florida Statutes, to his conviction for attempted manslaughter with a firearm, it is necessary for this Court to understand the procedural posture in which this issue came before the Court.

At trial, during the sentencing hearing, Appellant's counsel told the trial court that because the jury found the defendant to have used a firearm to commit the attempted manslaughter, there would be a mandatory minimum sentence. (R. 848). On appeal to the Fourth District, the defendant challenged in separate issues, his conviction and sentence for attempted manslaughter. The state argued that the conviction was proper, but made no argument to uphold the mandatory minimum sentence.

In its initial opinion, rendered on July 5, 1984, the Fourth District reversed the conviction and sentence for attempted manslaughter based on alleged erroneous jury instructions. Murray v. State, 471 So.2d 70 (Fla. 4th DCA 1985). The state moved for rehearing requesting the court to reinstate

the conviction for attempted manslaughter. On June 26, 1985, The Fourth District issued its opinion granting the motion for rehearing, reinstating the attempted manslaughter conviction, on the basis of Tillman v. State, 471 So.2d 32 (Fla. 1985), and also without request by either party, reinstated a consecutive mandatory minimum sentence for the conviction. 471 So.2d at 73.

Although, he would have been permitted to do so, the defendant did not file a motion for rehearing in the Fourth District on the basis of the alleged error in reinstating the mandatory minimum sentence, or citing to the court, their prior opinion in Jones v. State, 356 So.2d 4 (Fla. 4th DCA 1977) or any other opinion from another district court, i.e., Strahorn v. State, 436 So.2d 447 (Fla. 2d DCA 1983); Rozier v. State, 353 So.2d 193 (Fla. 3d DCA 1977). Instead, the defendant filed his notice of intention to invoke the discretionary jurisdiction of this Court.[1/] This Court subsequently decided to accept jurisdiction.

The state acknowledges that this Court could decide the issue of the application of the mandatory minimum sentence to attempted manslaughter in this appeal. However, the state would only urge this Court, because of the procedural posture in which this case has reached the Court, to remand the case to the trial court, to allow the defendant to file a motion

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[1/] The state would submit that the other three issues raised by the defendant in this appeal would not have been accepted for review by this Court on their own.

pursuant to Rule 3.800 of the Florida Rules of Criminal Procedure, which allows the trial court to correct any illegal sentence.

II

THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL ON THE CHARGE OF ATTEMPTED MANSLAUGHTER, WHERE THE ALLEGED ERRONEOUS JURY INSTRUCTION WAS REQUESTED BY THE DEFENDANT, AND WHERE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONCLUSION THAT THE SHOOTING OF THE VICTIM WAS DONE WITH THE REQUISITE CRIMINAL INTENT AND NOT MERE CULPABLE NEGLIGENCE.

(Restated.)

The defendant asserts that he is entitled to a new trial because the trial court's instructions on attempted manslaughter were flawed in that they defined manslaughter as an offense based on either proof of an act or procurement done with the requisite criminal intent, and based on mere negligence. The defendant argues that because a conviction based on the latter, would be in violation of Taylor v. State, 444 So.2d 931 (Fla. 1938), and thus a non-existent crime, the error was fundamental.

Initially, the state would submit that this Court should not exercise its discretion to consider 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 Fourth District's

determination that on the basis of this Court's opinion in Tillman v. State, 471 So.2d 32 (Fla. 1985), the flawed jury instruction was not fundamental error.

If this Court should decide to exercise its discretion and review this issue, then the state submits that it is without merit. In the instant case, there is no question that not only did the defendant fail to object to the jury instruction on attempted manslaughter, he affirmatively requested it. (R. 764-765). In Ray v. State, 403 So.2d 956, 960 (Fla. 1981), this Court held that appellate courts should exercise their discretion concerning fundamental error "very guardedly", and that "the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." In the area of improper lesser included jury instructions, this Court held that where defense counsel has requested the improper instruction, the error is not fundamental and is deemed to be waived. 403 So.2d at 961.

The defendant attempts to circumvent this rule by asserting that the jury instruction could have caused the jury to convict him of a non-existent crime. See Achin v. State, 436 So.2d 30 (Fla. 1982). However, this Court has specifically rejected the defendant's argument in Tillman v. State, supra. In Tillman, the defendant was convicted of attempted manslaughter, and like the instant case, the trial occurred before this Court's opinion in Taylor v. State, supra, and thus defense counsel did not object to the jury instruction on attempted manslaughter,

which allowed the jury to find its verdict on the ground of an act or procurement on the one hand or culpable negligence on the other. This Court however, specifically found that Taylor was not a fundamental departure in this area of the law, and thus the defendant's failure to object to the instruction precluded its consideration on appeal. 471 So.2d at 35.

The defendant attempts to distinguish Tillman by stating that the defendant in the instant case defended on the claim that the facts did not show an intentional or voluntary discharge of the firearm. This Court, however, in Tillman, as stated supra, did not ground its finding of non-preservation of the issue, on any such grounds. Furthermore, this Court found no reversible error because there was sufficient evidence in the record to support the conclusion that the shooting was the result of an act of the defendant done with the requisite criminal intent and not mere culpable negligence. Tillman v. State, supra, 471 So.2d at 35. Similary, this Court in Taylor v. State, supra, although not discussing the jury instructions, upheld the conviction for attempted manslaughter on the basis that there was sufficienct evidence to support the jury's verdict of attempted manslaughter. 444 So.2d at 934. See also Brown v. State, 455 So.2d 382 (Fla. 1984) (gun discharged during scuffle with police officer); Ashley v. State, 445 So.2d 360 (Fla. 3d DCA 1984); Andrews v. State, 448 So.2d 551 (Fla. 4th DCA 1984). See generally Charlton v. Wainwright, 588 F.2d 162 (5th Cir. 1979).

The state would also submit this Court has rejected the defendent's argument in analogous situations. In Tafero v. State, 459 So.2d 1034 (Fla. 1984), a defendant sentenced to death alleged that his death sentence violated the Eighth Amendment per Enmund v. Florida, 458 U.S. 712 (1982), because his jury had been instructed on both felony-murder and premeditated murder, and the jury did not specifically find that he killed anyone, attempted to kill anyone, or intended that anyone be killed. 459 So.2d at 1035. This Court rejected the defendant's argument, finding that the evidence establish premeditated murder, and thus the defendant was not entitled to a new sentencing hearing. Id. at 1036. See also Cabana v. Bullock, ___ U.S. ___, 38 CrL. 3093 (January 22, 1986).[2/]

In the instant case, the Fourth District found that there was "overwhelming evidence of an intention to kill" on the defendant's part. Murray v. State, supra, 471 So.2d at 72. The record supports the finding that there was

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[2/] Another analogous situation, in which there is a general verdict returned by the jury on alternate theories, that is, those where this Court was confronted with the issue of the impropriety of separate convictions for first degree murder and an underlying felony where the defendant has been charged in the alternative with premeditated murder and felony-murder. In sustaining the separate convictions, this Court looked only to whether there was sufficient evidence of premeditation to support the murder conviction. This Court did not speculate that the jury's verdict was based on felony-murder despite evidence to support the charge. See Blanco v. State, 452 So.2d 520, 525 (Fla. 1984); White v. State, 446 So.2d 1031, 1037 (Fla. 1984); Breedlove v. State, 713 So.2d 1, 8 (Fla. 1982).

sufficient evidence to establish that the shooting of the victim was done with the requisite criminal intent and not mere culpable negligence. Despite the closing argument of defendant's counsel, the victim testified that as she started walking away from the defendant, he shot her in the head. (R. 335). She stated that at the time of the shooting, she and the defendant were not touching. (R. 335). The victim denied making any attempt to grab the defendant's gun or arm before the shooting. (R. 388).

Dennis Grey, an expert in ballistics and firearms identification (R. 523), testified that it would take six and five-eights (6 5/8) pounds of pressure to pull the trigger in a single action mode. (R. 526). Mr. Grey also testified that it would take over twelve (12) pounds to fire the handgun in a double action mode. (R. 526). He further stated that the firearm had a transfer bar, a safety device, which prevented the firearm from firing accidentally by dropping. (R. 526). Grey stated that unless the transfer bar was in a position to strike the firing pin, it would not fire. (R. 527).

Defendant's assertions of culpable negligence or accident are further refuted by his own statements. In the defendant's statement to the police, the defendant did not state that he did not intentionally shoot the victim, but, rather that his co-defendant Henry Charles Ross had shot her. (R. 597-599, 610). Thus, the state submits that there was sufficient evidence to support the Fourth District's finding

that the shooting resulted from an intentional act. As such, unlike, the case in Achin v. State, supra, the defendant in the instant case was convicted of an existent crime. The defendant's failure to object to the jury instructions on attempted manslaughter was not fundamental and he is not entitled to a new trial.

III

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). (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. In addition, the State would point out to this Court that this issue is presently pending before this Court in the defendant's case, Henry Charles Ross v. State, Case No. 67,414.

However, if this Court should decide to exercise its discretion and review this issue, then the State submits that it is without merit. In Wilson v. State, 467 So.2d 996 (Fla. 1985) and State v. Ames, 467 So.2d 994 (Fla. 1985), 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, 467 So.2d at 995-996.

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. 467 So.2d at 997. 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 sexual batteries and the robbery with a deadly weapon, to wit, a firearm, were proper. The defendant and his co-defendant Ross abducted the victim at gunpoint, forcing her into her car. This occurred in Pompano Beach. (R. 308). The defendant drove, with Ross sitting next to the victim, holding the gun at her side and threatening to kill her. As they drove north, money was taken from the victim's purse. (R. 320). They then drove to Deerfield Beach, where in a wooded area, the two sexual batteries occurred. (R. 321). After the sexual batteries, the victim's necklace was taken. (R. 330). The defendant then drove to another site in Deerfield Beach, where the victim was shot. (R. 331, 337). The victim's car was then taken.

It is the state's position that there was sufficient separation of the offenses of the robbery of the money while the victim was held at gunpoint in her car and the theft of the car after the sexual batteries to permit consecutive mandatory minimum sentences for the robbery and sexual battery convictions. The robbery of the money occurred as the defendant was transporting the victim from Pompano Beach to Deerfield Beach. The sexual batteries occurred in a wooded area in Deerfield Beach. The robbery of the necklace took place after the sexual batteries had been completed. The robbery of the car took place also in Deerfield Beach, but at a different and distinct time and place. As such there was sufficient separation

in the defendant's commission of these crimes. See Smith v. State, 463 So.2d 542 (Fla. 5th DCA 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). See also Connolly v. State, 474 So.2d 912 (Fla. 2d DCA 1985); Castro v. State, 472 So.2d 796 (Fla. 3d DCA 1985); James v. State, 462 So.2d 858 (Fla. 2d DCA 1985).

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. Thus, where the imposition of consecutive mandatory minimum terms would further the legislative intent, the sentences should be affirmed.

IV

THE TRIAL COURT PROPERLY RETAINED JURISDICTION OVER DEFENDANT'S PAROLE. (Restated.)

As with the issues in Point II and III 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 it is without merit. The defendant asserts that the trial court failed to follow the requirements of Section 947.16(3), Florida Statutes by failing to express its reasons for retention of jurisdiction in open court at the time of sentencing. The record, however, fails to support the defendant's contention.

Section 947.16(3)(a), requires the trial court, in retaining jurisdiction to state its justification with individual particularity. Said justification shall be made a part of the court record and a copy is to be delivered to the Department of Corrections. The reason for the requirement of a record is to permit the sentencing judge or his successor to later know why the initial decision was made in that particular case, and also serves to cause the parole Commission to send a notice of the release order to the trial court. See Moore v. State, 392 So.2d 277, 279 (Fla. 5th DCA 1980)

(Cowart, J., concurring specially). No where does the statute require that said reasons be done in open court. Furthermore, decisions of this Court and others which have addressed the lack of findings justifying retention of jurisdiction, have not required the findings to initially be made in open court, only that they be made part of the record. See, e.g., Mobley v. State, 409 So.2d 1031, 1038 (Fla. 1982); Tompkins v. State, 386 So.2d 597, 598 (Fla. 5th DCA 1980). Compare State v. Jackson, 478 So.2d 1054 (Fla. 1985).

The State recognizes that the Fourth District has recently held that such findings are required to be made in open court in order to allow the defendant to contest the reasons for retention.[3/] See Larkin v. State, 474 So.2d 1282, 1284 (Fla. 4th DCA 1985); Robinson v. State, 458 So.2d 1132 (Fla. 4th DCA 1984). But see Hampton v. State, 419 So.2d 354 (Fla. 4th DCA 1982); Palmer v. State, 416 So.2d 878, 881 (Fla. 4th DCA 1982). If this Court does hold that such findings must be made in open court, then the State submits that such was done in the instant case.

At the sentencing hearing, the State requested that the trial court retain jurisdiction because of the heinous chain of offenses. (R. 844). The trial court stated that

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[3/] The State would submit that for those reasons succiently stated by two appellate judges in Moore v. State, 392 So.2d 277 (5th DCA 1980) (Cowart, J., concurring specially) and Wilson v. State, 449 So.2d 822 (Fla. 1st DCA 1984) (Nimmons, J., concurring specially) it is questionable whether there should be appellate review of the sufficiency of the subjective reasons stated by the trial court for retention.

the defendant and the co-defendant had terrorized the victim for a couple of hours. (R. 844). Defense counsel then stated that the defendant was under his instructions not to make any comments about the case. (R. 844). The trial court stated that there was not much he could say anyway because the facts spoke for themselves. The court stated that it was a terrible crime, that animals do not main or kill without a reason, and that the defendant had no reason to treat the victim the way he did. (R. 845). Defense counsel argued in mitigation, that the defendant had no prior record, except juvenile petit theft, and that the jury did not believe it was a cold blooded animalistic act when they came back with attempted manslaughter. (R. 847). The defendant then stated that he was sorry for what had been done. (R. 850).

The trial court then imposed sentence, stating that it would be retaining jurisdiction for thirty (30) years. (R. 852). Defense counsel objected, stating that the State did not prove that the defendant was a danger to the public. Counsel argued that the court should take into account the defendant's prior record, age, and the fact that the victim, although shot and raped, was not cut, maimed or beaten. (R. 853). The State replied that the victim was blinded from the shooting, and that was certainly maiming someone. (R. 853).

Thus, the trial court orally stated its reasons to the defendant in open court, why it was retaining jurisdiction, i.e., that the facts showed the terrible way in which the

defendant treated the victim. The defendant had the opportunity to object to those reasons. Thus, the policy reasons for stating the reasons in open court were complied with.

In its written order retaining jurisdiction the trial court set out factual aspects of the crime, i.e., that the victim was abducted at gunpoint, repeatedly threatened with death by the co-defendant, and sexually assaulted by both the defendant and co-defendant, that a firearm was used during the commission of all the offenses, that the victim was terrorized and fearing for her life, that she begged the defendant not to kill her, yet she was shot in the head, resulting in the destruction of her left eye. The trial court found that the defendant's use of force and violence exhibited an utter disregard for the rights, safety, physical and psychological welfare of the victim and that it would be in the best interest of society and the public if the defendant remained incarcerated for a minimum of thirty (30) years. (R. 892-893).

The trial court's written order did not differentiate from its oral pronouncement. Its written order only went into more detail on the facts of the case. Interestingly, it should be noted that the defendant does not and has not alleged on appeal that the record does not support the trial court's findings of fact or is somehow unconstitutional. Compare Owen v. State, 441 So.2d 1111 (Fla. 3d DCA 1983). He only argues that his lack of a significant prior criminal

history does not support a determination that the retention of jurisdiction is justified. The reasons stated by the trial court were clearly sufficient. See, e.g., Snow v. State, 464 So.2d 1313 (Fla. 1st DCA 1985) (ample justification to retain jurisdiction because defendant terrified and terrorized victim of sexual battery); Harden v. State, 428 So.2d 316 (Fla. 4th DCA 1983) (conviction of agressive and injurious behavior is sufficient justification)

Retention of jurisdiction is discretionary with the trial court, upon the conviction meeting the statutory criteria. The defendant has failed to demonstrate an abuse of that discretion. Thus, the trial court's order retaining jurisdiction should be affirmed.[4/]

[4/] The state would assert that if this Court should reverse the retention order because the reasons were not sufficiently stated orally, then the case should should be remanded for resentencing to allow the defendant to be apprised of the reasons prior to the trial court's sentencing.

CONCLUSION

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

Respectfully submitted,

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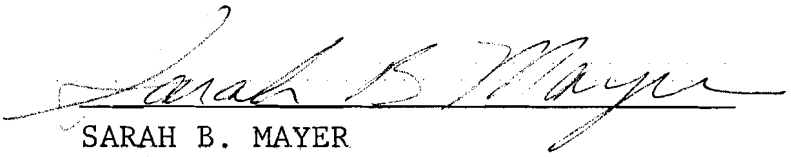

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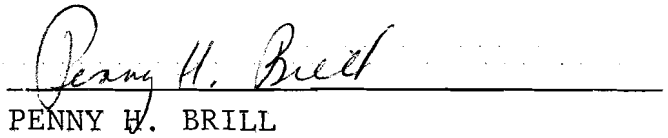

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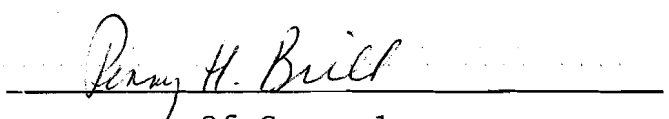
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits has been furnished to LOUIS G. CARRES, ESQUIRE, Assistant Public Defender, Attorney for Petitioner, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier this 14 day of February, 1986.



Of Counsel