IN THE SUPREME COURT OF FLORIDA

JESSIE JAMES LIVINGSTON,

Appellant,

v. Case No. 68,323

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT
IN AND FOR TAYLOR COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, hereinafter referred to as the State, accepts appellant's preliminary statement and will use the designations set out therein.

STATEMENT OF THE CASE AND FACTS

The State accepts appellant's statement of the case and statement of the facts even though it omits facts pertinent to the resolution of the issues raised on appeal. The State submits the following additions and clarifications which are intended to be read in conjunction with appellant's statements of case and facts.

Around twelve noon on February 18, 1985 the home of T.A. Jackson on South Jefferson Street in Perry, Florida was broken

into and the following items were discovered missing: two cameras, .38 caliber Smith and Wesson pistol, one-half box of .38 caliber shells, and several pieces of men's jewelry. (T 628-636, 815). Mr. Jackson discovered the burglary at approximately 7:00 p.m. that evening when he returned home. He immediately called the police and by 7:15 Ben Flowers from the Perry Police Department had arrived to investigate. (T 624, 653).

Sometime between three and five the afternoon of February 18, 1985, Freddy Banks (age 18) and Willie (Buddy) Flowers (age 20) were driving around Perry when appellant stopped them and asked for a ride. Freddy and Buddy were both acquainted with appellant. When Buddy showed appellant his gas pellet pistol, appellant boasted that was nothing and pulled out a .38 caliber revolver. Appellant told Freddy and Buddy he needed some money and that he was going to rob some store. Freddy told appellant he was crazy. They dropped appellant off and did not see him again. Buddy recalled appellant had been wearing blue jeans, a black jacket, converse tennis shoes with red in them, and a black and white checkerboard cap. (T 638-655).

Appellant was seen that evening by Terry Baker. Terry had been sent to buy sodas and chips. Terry first stopped at the SuperTest Station. Since they did not sell pringle potato chips, he walked to another store. This is the first place Terry saw appellant. After Terry stood on a corner for a while, he walked

back to the SuperTest. As Terry left the SuperTest he saw appellant standing outside the building. Terry recalled appellant was wearing a checkerboard cap, red and white Converse All Stars, blue jeans, a black leather jacket and a white T-shirt. Terry returned to his home which is two or three blocks from the SuperTest Station. (T 704-707).

At approximately 8:00 p.m. that same evening Deveda Wagner, a friend of appellant's sister, was walking by the SuperTest Station. Deveda saw a man she later recognized as appellant go into the store. She saw Ms. Hill, the cashier, throw up her hands and heard two shots. As she was walking on she heard another shot. She then saw appellant exit the building and go around the side of the store. It looked like appellant was trying to run. Appellant was wearing a black leather jacket and a black and white hat. (T 656-663).

Ms. Millie Evans, a sixty-seven year old woman who helped Ms. Hill at the store every night by moping the floor, was in the back of the store when Ms. Hill was shot. On direct examination Ms. Evans explained that Ms. Hill was sitting at the counter stapling stockings when Ms. Evans went into the storage room in the back to get a mop. After Ms. Evans had been in the storage room for a while, she heard two shots. Prior to the shots Ms. Evans had not heard or seen anything unusual. Ms. Evans then saw a man, whom she positively identified as appellant, come back

towards her. As appellant got close to her he said, "Now I'm going to get the one in the back." Appellant pointed the gun at Ms. Evans. Ms. Evans closed the door to the storage room. Appellant fired as the door was closing. The bullet passed through the door and came close enough to Ms. Evans that the sparks burned her on her cheek. (T 668-676). The bullet was subsequently found in the back wall of the storage room. (T 803). The storage door locked from the inside and was not capable of being opened from the outside. (T 985). Ms. Evans stayed in the storage room for a while and when she came out she saw Ms. Hill lying behind the counter in a pool of blood. She then ran outside for help. (T 668-677).

In cross-examining Ms. Evans, appellant's counsel elicited testimony to the effect that she could not see what was going on when the first two shots were fired and that Terry Baker was the last person she had seen in the store before she heard the shots. (T 692-693). On redirect Ms. Evans clarified that while this whole ordeal was happening she never heard or saw anyone else but appellant in the store. On recross examination, Ms. Evans admitted that from her position in the storage room she could only hear very loud noises due to the refrigerator units in the store. (T 692-696).

After appellant ran out of the store he went to Terry Baker's house. Appellant sat down for a short time and then

asked Terry to step outside. He then asked Terry if he knew how to open a cash register. Terry replied no, and asked if he had one. At that point appellant stated, "I just shot this white bitch in the head and in the chest." Appellant also said he had fired at the black lady but she ran in the back. (T 707-709). Terry had only known appellant two to three weeks and did not believe him. (T 703, 709) About five minutes after he and appellant went back inside Terry went across the street to Jimmy Lee Molden's house. Terry related to Jimmy Lee what appellant had told him. Jimmy Lee thought Terry was joking until he saw the police cars. At that point Terry decided to get his mother out of his house. His mother met him out on the street, they walked to another neighbor's house, and Terry's mother notified the police of appellant's whereabouts. (T 709-711, 727-728).

By the time this call was made, the police were already at the SuperTest Station securing the scene and talking to Ms. Evans. (T 770-772). Medical emergency personnel had arrived at the scene by 8:30 and Ms. Hill was en route to the emergency room at the hospital in Perry. (T 730-734). Jim Robertson, the chief investigative officer on the case, arrived at the station sometime between 8:00 and 8:30. Officer Ben Flowers, who was investigating the burglary at Mr. Jackson's house, left that burglary investigation and arrived at the SuperTest Station as the ambulance was leaving. (T 754-755). While at the scene the radio dispatcher related the message received from Terry's mother

and indicated the suspect was at Terry Baker's residence. (T 770-772). Officers Flowers and Robertson both proceeded to the Baker residence. When they arrived Terry ran up and told them the person who had robbed the SuperTest was in his house. Robertson proceeded to the back and Flowers went to the front of the house. Appellant came out shouting "don't shoot, I'm coming out." As Flowers was handcuffing appellant Robertson asked Terry how he knew appellant was the one who had robbed the store. (T 758, 772). At trial appellant's attorney objected to Robertson testifying to Terry's reply on the grounds that it was hearsay. The State responded by arguing it was admissible as a prior consistent statement, inasmuch as it rebutted the inference raised at that point in the trial that Terry may have been involved, i.e. improper motive. The trial court, having already heard the cross-examination of Mr. Evans, ruled the statement was admissible since appellant had established that Terry was the last person seen in the store by Ms. Evans prior to the shots being fired, inferring that Terry, and not appellant, could have shot Ms. Hill. (R 773-775). Robertson was allowed to testify that Terry told him that appellant had come to his house and told him: (1) that he had shot the lady at the SuperTest Station in the head, (2) that he had taken the cash register, (3) that he had thrown the cash register in the dumpster because he could not get it open, and (4) that he needed Terry's help to open the register. (T 776).

Robertson and Flowers took custody of appellant and brought him back to the store where Ms. Evans positively identified him as the one who had shot at her. (T 691, 712, 759, 778). Robertson then brought appellant to the jail. Appellant was wearing a tee shirt, blue jeans, a black and white checkered cap and several items of jewelry. The jailer took custody of the jewelry. (T 783). At 9:30 p.m., after having been advised of his constitutional rights and after having waived those rights, appellant denied any involvement or knowledge of the robbery and shooting, claiming he was at a local teen club. This interview lasted 15-20 minutes. By 11:00 p.m. appellant had been taken to the booking area of the jail. At that point Robertson asked appellant to remove his shoes. Robertson observed what appeared to be blood stains on one side and toe of the shoe. At that time appellant asked if he could talk to Robertson again. After again being advised of his rights, appellant said "I shot the lady." Appellant explained he had been at a local teen club earlier in the evening and that he wanted to buy some pot but he was broke. He decided to rob the SuperTest to get some money. Appellant waited outside till the store was clear. He then went inside and told Ms. Hill to give him the money. Ms. Hill bent over and screamed. He shot her one time and she fell to the floor. He then reached across the counter and shot her again while she was on the floor. Appellant then turned and fired once at Ms. Evans who was in the back of the store. When Ms. Evans

ran back in the closet area of the cooler, appellant ran around corner, unplugged the cash register and ran out of the store with the register. He threw the cash register in the dumpster, hid the gun underneath the air conditioner unit at the club next to the store and went to Terry Baker's house. (T 781-788). The pistol and cash register were found by law enforcement officials exactly where appellant said he had put them. (T 744-745, 764, 767, 789)

The following morning Robertson was in his office reviewing cases that had come in on the previous day. In reviewing the February 18, 1985 burglary report of Mr. Jackson's residence, Robertson noticed the list of stolen property included a .38 caliber pistol and several items of jewelry that matched the description of the jewelry appellant had been wearing when taken into custody. Robertson went to the jail, looked at the jewelry which had been removed from appellant, and contacted Mr. Jackson. Mr. Jackson came to the jail and positively identified the jewelry as his. At that point Robertson conducted a third interview with appellant. After being advised of his rights and waiving those rights, appellant admitted he broke into Jackson's home around noon on February 18th. While in the house he took all the property listed as being stolen on the offense report, which included the jewelry, the .38 caliber pistol and two cameras. (T 809-817). A fourth interview with appellant resulted in an admission that he had dropped two bullets about ten feet

from where the weapon was located. Robertson later recovered those bullets at the exact location appellant had given. During each of the interviews with appellant, Terry Baker was never implicated by appellant as a participant. (T 818-821).

At trial expert witnesses were offered by the State to prove (1) that appellant's fingerprints matched the latent prints lifted off the .38 caliber revolver which had been found under the air conditioner and which had been positively identified as Mr. Jackson's (T 1000); (2) that the bullet removed from the wall in the back of the store and the bullet that passed through Ms. Hill's chest and on to the floor at the end of the counter were fired from this same .38 caliber revolver (T 963-966); (3) that the cooper jacket portion of the bullet removed from Ms. Hill's head during surgery was fired from this .38 caliber revolver (T 970); (4) that four of appellant's fingerprints and one of his palm prints were found on the cash register in a position consistent with someone lifting the cash register (T 995-999); (5) that none of Terry Baker's prints identified with any of the prints lifted from items in the store (T 1006-1007); (6) that one bloody shoe track leading from the pool of blood at the counter out the door identified with the left Converse All Star shoe that appellant gave Robertson the evening of the 18th at the jail (T 992); (7) that appellant's shoes could have made two more tracks found in the store inasmuch as the tread designs and shape of his shoes matched the shoe tracks (T 992-993); (8)

that human blood was present on appellant's left shoe, that human blood type B was present on the left leg of the blue jeans that appellant had turned over to Robertson, that the blood from the floor behind the counter and at the end of the counter was type B, and that both appellant's and Ms. Hill's blood was type B (R 555-556; T 925-926); and (9) that the cause of Ms. Hill's death, which occurred approximately five weeks after the shooting, was a gun-shot wound to the head. (T 742, 853, 867, 946).

At the conclusion of the trial both parties gave closing arguments. The prosecutor's argument focused on each piece of evidence that supported each element of every criminal charge filed against appellant. Anticipating that appellant's counsel would suggest that somehow Terry Baker was involved in the crime, the State emphasized that appellant had never implicated Terry in any of his confessions and that Terry Baker's fingerprints were not found on any item in the store. The State suggested that while Terry Baker had previous convictions and was not a model citizen, his testimony at trial was credible. The jury was then reminded by the prosecutor that there was ample evidence offered by the State to prove appellant's guilt in the event they were not satisfied with Terry Baker's testimony. (T 1015-1045). Appellant's counsel's closing argument addressed only the murder and attempted murder charges, and focused primarily on the evidence pertaining to the cause of Ms. Hill's death. (T 1045-1055). The jury was then charged with the applicable

instructions of law, and after approximately one hour of deliberations, the jury returned guilty verdicts on each of the crimes charged. (T 1082, 1091-1092).

At the penalty phase the State relied on the evidence presented at trial. Appellant offered testimony from appellant's older sister Mary Katherine Williams. Her testimony revealed that when appellant was eight or nine years old, his mother married Jimmy Williams and appellant's life changed. According to Mary Katherine, Jimmy was "cruel", self-centered and very possessive. Jimmy punished appellant for little things like not being on time, not helping his mother and for not telling her where he was going. Before Jimmy came along appellant had more freedom in coming and going. (T 1124-1127). About fifth grade, appellant's attitude towards school changed. He did not want to go home and normally he stayed at Mary Katherine or another sister's house. At age 13 or 14, appellant started hanging with an older, wilder, fast crowd and got involved with liquor and drugs. (T 1129-1133). Mary Katherine explained that appellant was not retarded or a slow learner, but to the contrary, was intelligent. (T 1134). She also admitted that of all the members of the family, appellant was the only one whose conduct and disposition was affected by Jimmy Williams. (T 1137).

In the penalty phase arguments the State urged the jury to find beyond a reasonable doubt that the mitigating circumstances

of age and appellant's character were not sufficient to outweigh the aggravating circumstances. (T 1148-1155). Appellant's counsel argued (1) that the State had not met its burden of proving the third aggravating circumstances, i.e. witness elimination; (2) that appellant was only seventeen years old and consistent with his youth, he acted only on impulse; (3) that appellant had an unstable childhood and was abused by Jimmy Williams; and (4) that appellant was cooperative in the investigation. (T 1157-1171). After being properly charged on the law pertaining to the three aggravating circumstances and mitigating circumstances, and the respective standards of proof, the jury recommended a sentence of death. (R 725, 813-817, T 1179).

After reviewing the pre-disposition study prepared by the HRS (R 752-754) and the PSI (R 755-771), and with no objection by appellant's counsel, (R 749) the trial court determined that appellant should be treated as an adult for sentencing purposes. In making this determination the court commented on (1) "the sophistication and maturity of appellant as determined by consideration of his home environmental situation, emotional attitude and pattern of living", (2) appellant's numerous previous contacts with Children and Youth Services, HRS, law enforcement agencies and the courts; (3) appellant's prior periods of probation or community control; his prior adjudications of violations and his prior commitments to

institutions. (R 750-751).

Prior to the imposition of sentence, appellant's attorney agreed that on all the non-capital charges, the judge could impose a sentence outside the guidelines. Specifically, appellant's attorney stated:

> We concede that the circumstances surrounding this offense and defendant's prior record are such that the court can correctly go outside the sentencing guidelines and impose whatever sentence the court feels is just in this case, and that the sentences could be made to run consecutive.

(T 1191). In view of the above concession, the prosecutor limited his argument to the sentence for the first-degree murder. (T 1203) In addition to addressing aggravating and mitigating circumstances, the State emphasized that the jury, the victim's family, Ms. Evans and the Department of Corrections all recommended a sentence of death. (T 1204-1209). After reviewing each potential statutory aggravating and mitigating circumstance and after reviewing non statutory mitigating circumstances the court concluded there were sufficient aggravating circumstances to justify the death penalty and that those circumstances outweighed appellant's unstable upbringing and age of 17 years and eight months. Therefore, the court agreed with the jury's advisory sentence of death. (T 1211-1219).

Pages three through five of appellant's initial brief sets

out the court's findings with respect to the aggravating and mitigating circumstances and with respect to the reasons for an upward departure from the recommended guidelines sentence on the other charges.

SUMMARY OF ARGUMENT

The State contends consolidation of the information and indictment was proper inasmuch as the crimes were related in an episodic sense. The evidence tending to prove each of the crimes was interrelated. Even if the consolidation was improper, reversal is not proper inasmuch as appellant has failed to demonstrate that the error resulted in a miscarriage of justice or injuriously affected substantial rights of his.

The State also contends the trial judge did not abuse his discretion in limiting cross-examination of Terry Baker inasmuch as the relevance of the question, in these particular circumstances, was not shown. Robertson's testimony concerning Terry Baker's testimony was properly admitted for non-hearsay purposes, or in the alternative, to rebut the improper motive raised on Ms. Evan's cross-examination. In the event either of these rulings was erroneous, the harmless error standard would prevent reversal as these errors would not have affected the jury's verdicts.

The State proved beyond a reasonable doubt that the murder was committed to avoid lawful arrest, and appellant's age and

unfortunate childhood were properly weighed against the three aggravating circumstances. The jury's recommendation of death should be accorded great weight. Finally, the departure sentence was supported by permissible reasons, and to the extent any are impermissible, it is clear beyond any reasonable doubt that the judge would have imposed the same sentence.

ARGUMENTS

ISSUE I (Restated)

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE CHARGES ARISING OUT OF THE BURGLARY OF MR. JACKSON'S RESIDENCE WERE "SUFFICIENTLY CONNECTED" TO THE CHARGES ARISING OUT OF THE INCIDENT AT THE SUPERTEST STATION EIGHT HOURS LATER TO BE CONSOLIDATED FOR TRIAL.

Appellant seeks a reversal and new trial on apparently all his convictions on the basis that consolidation of the charges in the information with the charges in the indictment was improper. Appellant suggests that the crimes were of a dissimilar nature, were committed differently, and were not part of the same episode. Appellant further contends that except for the .38 caliber revolver, none of the evidence pertaining to the burglary was interwoven with the evidence pertaining to the robbery, murder and attempted murder. Finally, appellant argues that prejudice is conclusively presumed and reversal is mandated. (Appellant's Initial Brief at 9-14)

Appellant's argument lacks merit in that it (1) fails to apply the proper standard of review to the trial judge's decision to grant the motion to consolidate; (2) ignores facts present in this case that demonstrate connection in an "episodic sense" as contemplated by this Court in Paul v. State, 385 So.2d 1371 (Fla.1980); and (3) incorrectly suggests that an improper consolidation is reversible per se.

It is well recognized that a trial court has discretion as to whether a motion for consolidation made in accordance with Rule 3.151 of the Florida Rules of Criminal Procedure shall be granted. Ashley v. State, 265 So.2d 685 (Fla.1972); Hall v. State, 66 So.2d 863 (Fla.1953); Blackwelder v. State, 100 So.2d 834 (Fla.1st DCA 1958). Likewise, granting or denying a motion for severance is a discretionary matter for the trial court. In reviewing these discretionary rulings, the test for the appellate court is whether the trial court abused its discretion. Johnson v. State, 438 So.2d 778 (Fla.1983); State v. Vasquez, 419 So.2d 1088 (Fla.1982); Crum v. State, 398 So.2d 810 (Fla.1981). Appellant's entire argument fails to demonstrate an abuse of discretion by the trial judge.

Contrary to appellant's assertion that consolidation was improper, the State submits the facts demonstrate two transactions connected in an "episodic sense." Appellant stole a .38 caliber revolver, jewelry and cameras at noon. A few hours

later appellant was showing off the stolen revolver to Freddy Banks and Buddy Flowers. Testimony from these two witnesses at trial established elements of the charges in the information as well as elements of the charges in the indictment. Not only did their testimony prove appellant was in possession of Mr. Jackson's property within a few hours after the burglary, but also it established appellant's premeditated decision to rob the SuperTest in order to get some money. These witnesses would have been called to testify in both trials had the burglary and robbery/murder charges not been consolidated. A few hours after his encounter with Banks and Flowers and no more than eight hours after the burglary, appellant used the stolen pistol in committing a robbery, first degree murder and attempted first degree murder. This occurred approximately one mile from Mr. Jackson's residence. A fingerprint expert testified that appellant's fingerprints were on the .38 caliber pistol. This expert's testimony would have been admissible to prove the charges in the information (the burglary and grand theft) as well as to prove the charges in the indictment (proved appellant had been in possession of the murder weapon). In addition, Officer Robertson clearly would have been called as a witness in separate trials. It was through appellant's second statement to Robertson that law enforcement officials were able to locate the pistol. This particular confession would have been admissible in a separate burglary and grand theft trial to show possession of the

stolen pistol, thereby implying appellant's presence in Jackson's residence. Obviously, the confession would have also been used to prove the charges contained solely in the indictment. Furthermore, when arresting appellant on the murder charges, Robertson observed that appellant was wearing several items of jewelry. Had Robertson not been involved in the robbery/murder investigation he may not have put two and two together the following morning when he reviewed the offense report on the burglary. Robertson was able to testify to Jackson's positive identification of the stolen articles and appellant's subsequent confession to the burglary. Finally, Officer Ben Flowers would have been a witness in separate trials inasmuch as he was investigating the burglary when he was called to the scene of the robbery. As these facts indicate, the gun was not, as appellant suggests, the only link between these crimes. The burglary and grand theft charges were relevant to the robbery/murder because the evidence tending to prove the former charges was interwoven with the evidence tending to prove the latter charges. Thus, appellant's contention that the burglary "simply showed his criminal propensity" is absolutely refuted by the facts in this record.

The correctness of the trial judge's exercise of discretion in consolidating the burglary and robbery/murder charges is supported by the following case law. In Johnson, supra, the defendant caught a ride with a cab driver in Polk County in the

late evening hours of January 8, 1981. After midnight a dispatcher heard a stranger's voice over the cab's radio. Five days later the cab and the driver were found. The driver had been shot and his wallet and fare money was missing. In the early morning hours of January 9, 1981, the defendant, claiming his car would not run, asked a couple coming out of a Lakeland restaurant for a ride. When the girl saw the defendant hold a pistol on her male friend she locked her car doors and drove to a store where she called the sheriff's department. Two deputies responded and returned with the girl to the area she had left the two men. Meanwhile another deputy radioed he had seen the suspect. The two deputies found the third officer's body. Later that day searchers found the man's body. He had been shot and his wallet was missing. On January 10, 1981 the defendant was arrested for the January 9 homicides. The following week he was charged with the taxi driver's murder. Responding to the argument that Paul, supra mandated that the taxi driver's murder be tried separately from the other two homicides, this Court stated: "We find Paul distinguishable from the instant case because there the offenses occurred five weeks apart. Here, on the other hand, only hours separated the three homicides and related crimes. We do not find that a severance would have been necessary to fairly determine the defendant's guilt or innocence in the crimes charged." Johnson, supra at 778. For the same reason Johnson is distinguishable from Paul, this case is also

distinguishable. The crimes in the case sub judice were committed within eight hours of each other at locations approximately one mile apart. In Paul, the crimes were committed more than one month apart. Unlike the facts in Paul, the burglary/grand thefts were "related" to the robbery/murder charges in terms of time and thus constituted an "episodic" connection. See also Johnson v. State, 222 So.2d 191 (Fla.1969) (separation of twenty-four hours between crimes did not mandate separate trials)

Appellant contends that a separation of several hours is fatal to consolidation when discrete crimes are involved. Appellant cites to Harris v. State, 414 So.2d 557 (Fla.3d DCA 1982) and McMullen v. State, 405 So.2d 479 (Fla.3d DCA 1981) to support this argument. In the former case the separate crimes occurred six days apart, in the latter, the separate crimes occurred within a nine day period. The crimes in those cases were separated by several days, not merely a few hours. Those cases are simply not controlling.

Appellant also implies that consolidation is proper only if the crimes are "similar". The State disagrees. This Corut has emphasized that the similarity of offenses, even if they occur within a matter of days does not make them "related". Williams v. State, 439 So.2d 1014 (Fla.1st DCA 1983), approved in State v. Williams, 453 So.2d 824 (Fla.1984). In Bundy v. State, 455 So.2d

330 (Fla.1984) this Court upheld the trial court's refusal to sever crimes which occurred a few hours apart, noting the similar nature of the crimes and the manner in which they were committed. By acknowledging the evidence would have been admissible as Williams rule evidence, this Court did not hold that absent this fact the crimes could not have been tried together. The fact that crimes are possibly dissimilar does not mean they cannot be "related" in an episodic sense. In Parker v. State, 421 So.2d 712 (Fla.3d DCA 1982) the defendant sold pot to one of two individuals present at a certain location. During the encounter the defendant removed a necklace from the other person's neck. The buyer returned to the same location twice the following day. When he finally saw the defendant he reported him to the police. When the police approached the defendant he fled. When apprehended, the defendant had cocaine in his possession. The defendant was charged with robbery, possession of cocaine and resisting an officer without violence. The trial court denied a motion to sever the robbery from the other two counts and the appellate court affirmed on the grounds that the offenses were "connected in an episodic sense." The offenses were part of the same course of conduct and occurred within a period of a few hours. The first offense led to and was connected to the other offense. The robbery and subsequent investigation led to the arrest and two other charges.

Not unlike Parker, the investigation of appellant's

involvement in the robbery/murder led to his arrest on the burglary charges. The offenses in the case sub judice are related not only because of the jewelry and revolver, but also because the investigations and evidence tending to prove the commission of all the crimes are interwoven. Furthermore, appellant's motive to get money because he was broke indicated the burglary and robbery/murder were one prolonged criminal episode connected in purpose, time, sequence, and geographical area. See Williams v. State, 409 So.2d 253 (Fla.4th DCA 1982). Contrary to appellant's assertions, the State submits the evidence of the two crimes did indeed establish the entire context out of which appellant's criminal conduct arose.

Even if this Court were to conclude the trial judge abused his discretion in consolidating the information and indictment, the State submits a reversal would not be mandated. Improper consolidation or joinder, is not a basis for reversal per se, but rather requires reversal only if it results in a miscarriage of justice or has injuriously affected the substantial rights of the defendant, i.e., it is not harmless error. Taylor v. State, 455 So.2d 562 (Fla.1st DCA 1984), cause dismissed, 459 So.2d 1042 (Fla.1984); Harris, supra. In Taylor, supra the defendant was tried on sexual battery and possession of weapon charges. The defendant had allegedly used a knife in committing a sexual battery in prison. The knife found outside the defendant's cell, however, was determined not to have been used in the sexual

battery. The district court held that the charges should have been tried separately. While finding it necessary to reverse the sexual battery charge, the court upheld the possession of weapon charge. Citing to Harris, supra and this Court's opinion in Palmes v. State, 397 So.2d 648 (Fla.) cert.denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981), the court held since the evidence of guilt on the weapon possession charge was overwhelming, there was no purpose in requiring a new trial. In Palmes, this Court held a judgment would not be reversed unless error prejudiced the substantial rights of the defendant. The inquiry is generally whether, but for the erroneous ruling, it is likely the result would have been different. See also State v. Diguilio, 11 F.L.W. 339 (Fla.July 17, 1986) wherein this Court recently stated that the focus in determining harmless error was the effect the error had on the trier of fact. The question is whether there is a reasonable possibility that the error affected the verdict. Further, Diguilio notes that Section 924.33 of the Florida Statutes provides that the harmless error analysis is applicable to all judgments regardless of the type of error involved and that no errors are presumed to be reversible unless it can be shown that the errors are indeed harmful. In light of appellant's confession to each of these crimes and in light of the eye-witness testimony and physical evidence linking appellant to each of the crimes, the State submits it is clear beyond a reasonable doubt that there is no reasonable possibility that the

consolidation affected the verdicts.

ISSUE II (Restated)

THE TRIAL COURT DID NOT ERR IN LIMITING CROSS-EXAMINATION OF TERRY BAKER; EVEN IF IT DID, SUCH ERROR WAS HARMLESS.

Appellant argues in Issue II that the court prevented him from developing a specific reason why Terry Baker might lie or slant his testimony at trial. Terry Baker's testimony on direct examination basically repeated statements made to Officer Robertson and Jimmy Lee Molden minutes after the robbery and murder. (T 702-714) Both Robertson and Jimmy Lee repeated at trial the statements Terry had made to them. (T 727, 776) All of this testimony focused on appellant's admission to Terry immediately after the robbery that he had shot Ms. Hill, attempted to shoot Ms. Evans and had robbed the store. After establishing on cross-examination that Terry had been convicted of crimes, appellant's counsel asked Terry whether he had a case pending against him as of the date of trial. The State objected. At a bench conference appellant's attorney argued he could cross-examine Terry as to any matters that might show bias or prejudice. To establish the relevance of this question, appellant informed the judge that Terry had a case pending against him for grand theft or trafficing and that it might very well be that Terry hoped by testifying favorably for the State that he was going to win some concessions in his own case. The State responded by clarifying that Terry had only been arrested,

not formally charged. Moreover, the "charges" were not relevant to show bias in testifying at trial because Terry had given several sworn statements prior to his arrest, and appellant's counsel knew of that fact. Appellant's attorney replied the matter of bias was one for the jury to determine. Based on these arguments the court sustained the objection to the question. (T 715-717).

Appellant essentially argues he had an absolute right to ask the question because it might have established that Terry Baker had a motive to lie because of his pending charges. It is well recognized that the decision as to whether a particular question properly goes to interest, bias or prejudice lies within the discretion of the trial judge. Pandula v. Fonseca, 145 Fla. 395, 199 So. 358, 360 (1940) cited in Ehrhardt, Florida Evidence §608.4 at 317 (2d Ed 1984). "If the relevancy of the questions going to bias are not apparent from the question itself, counsel has a duty to advise the court of the relevancy." Id. Initially, appellant's counsel made a showing of relevancy of the question by informing the court Terry had charges pending against him and that by testifying favorably for the State at trial he may have thought it would help his own case. Had nothing else transpired at the bench conference, appellant arguably would have demonstrated relevancy. His showing of relevancy, however, was refuted when the State clarified that the testimony Terry had given at trial had previously been given by Terry in sworn

statements. These sworn statements were given prior to Terry's arrest at a time when Terry had no motive to lie or slant his testimony in order to win concessions from the prosecutors. The trial court was correct in sustaining the objection because due to these unique facts appellant did not demonstrate how these "pending charges" nevertheless could be probative of bias.

Compare, for example, Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In Davis, the defense counsel sought to show the existence of possible bias and prejudice of a key prosecution witness. The witness was crucial because he picked out the defendant's picture in a photospread as the person he had seen near the location where a stolen safe was ultimately discovered. At the time of the trial and at the time of the events the witness testified to, the witness was on probation. The defendant wanted to bring this fact to the jury's attention to show that improper motives may have caused the witness to make a faulty initial identification of the defendant, which in turn could have affected his later in-court identification. The case sub judice is distinguishable from Davis for two reasons. First, Terry's arrest did not affect his testimony at trial because he merely repeated statements he made at a time when he had no motive to please the State. Second, Terry was simply not a key prosecution witness. The prosecutor told the jurors in his closing argument they could completely ignore Terry Baker's testimony in reaching a verdict in each charge. The wealth of

physical evidence against appellant, the confessions given in the presence of Officer Robertson, and Deveda Wagner's and Ms. Evan's identification of appellant as being the person who committed the robbery, murder and attempted murder support the State's position that Terry was not a key witness. Thus, contrary to appellant's assertion, Terry's credibility was absolutely not a key issue in this case. These two significant factual distinctions support the State's contention that the trial court did not abuse its discretion in determining the question was not relevant or probative of bias. See also, Delaware v. Van Arsdall, 475 U.S. ____, 106 S.Ct. 1431, 89 L.Ed.2d 674, 684 (1986) wherein the Supreme Court held that a violation of the confrontation clause was established only where the defendant showed that a reasonable jury might have received a significantly different impression of the witness' credibility had the defendant's counsel been permitted to pursue his proposed line of cross-examination. Under this test, the State contends a violation has not been demonstrated by appellant because if the jury had known Terry gave sworn statements prior to ever being arrested and that his testimony at trial was identical to his sworn statements, they would never have received any different impression of Terry's credibility due to the pending arrest.

Even where a key prosecution witness is involved, this Court has held that the trial court did not abuse its discretion in suppressing the fact that the witness faced a pending murder

charge. In Frances v. State, 473 So.2d 672 (Fla.1985), the defendant alleged that the trial court improperly prohibited him from questioning a witness in regards to her pending murder charge which was separate and distinct from the defendant's case. The defendant argued that the jury should have been given the information so they could decide whether the witness was testifying in such a manner as to gain favor from the State. The State argued no deal was ever made with the witness and that the witness was ultimately convicted. Thus, absent a showing of relevance, the evidence was inadmissible. This Court recognized that the defendant did not proffer what answer the witness would give or how her answer would be relevant to prove a material fact other than her bad character or propensity towards violence. Under this circumstance this Court held the trial court did not abuse its discretion to control the scope and manner of cross-examination of the witness. Id. at 674-675. See also Watts v. State, 450 So.2d 265 (Fla.2d DCA 1985), a case relied upon by appellant. In Watts the defendant made a proffer of what two of the state key witnesses would have testified had cross-examination been permitted. The appellate court held the trial court abused it discretion because relevance had been established in the proffer. In the case sub judice no proffer was made of Terry Baker's testimony to establish relevance. In fact, the prosecutor's comments to the judge effectively refuted any implication that the question was probative of bias. Based on

the information before him, the trial judge did not abuse his discretion in sustaining the State's objection to appellant's question.

In the event this Court determines the trial court abused his discretion in prohibiting the question, the State submits the error is harmless beyond a reasonable doubt. The only instances where error of this type has been considered reversible error is where a witnesses's testimony at trial is crucial to the state's case, thereby making the omission of any evidence relating directly to that witness' credibility prejudicial to the defense. See Alvarez v. State, 467 So.2d 455 (Fla.3d DCA 1985) (conviction which was not based on physical evidence and rested entirely on testimony of accomplice and accessory reversed where the trial court prohibited the defendant from demonstrating that the only witness who could link him to the crime had received a lesser term of imprisonment by agreeing to testify for the state); Russo v. State, 418 So.2d 483 (Fla.2d DCA 1982) (conviction of witness tampering reversed where the court restricted cross-examination of the only witness who could say that the defendant offered to pay him to testify falsely); Kelly v. State, 425 So.2d 81 (Fla.2d DCA 1982) (denial of cross-examination reversible error where the witness's testimony was crucial to State's case inasmuch as this witness was the only one who identified defendant as being at the scene of the crime). On the other hand, error of this type has been held to be harmless

where the jurors had been sufficiently apprised of other evidence elicited on cross-examination enabling them to judge the witness's credibility, Engram v. State, 405 So.2d 428 (Fla.1st DCA 1981) or where the facts indicated the witness had no compelling self-interest or motive to testify so as to please authorities who had some discretion over his status. (Watts, supra) These latter two cases support the State's contention any error was harmless. The jury had been informed of Terry Baker's previous convictions and his testimony repeated only what he had told law enforcement officers prior to ever being arrested and prior to ever possibly expecting favors from the state.

Pursuant to the United States Supreme Court's decision in Delaware v. Van Arsdall, supra, whether the error in this case is harmless depends on: the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of corroborating or contradictory testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. Relying on the preceeding statement of case and facts, the State submits under the Supreme Court's Van Arsdall test and under this Court's Diguilio test any error in restricting cross-examination of Terry Baker was harmless error inasmuch as it is clear beyond all reasonable doubt that the error would not have affected the jury's verdicts.

ISSUE III (Restated)

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING OFFICER ROBERTSON TO TESTIFY AS TO WHAT TERRY BAKER TOLD HIM.

The State contends Terry Baker's response to Officer Robertson's inquiry concerning Terry's knowledge that appellant robbed the SuperTest Station was properly admitted through Officer Robertson for two alternative reasons. First, the State submits the statements were admissible for the non-hearsay purpose of explaining how Robertson was able to determine that appellant was the suspect the dispatcher had informed him would be at Terry's house and for explaining why appellant was ultimately placed under arrest. See Johnson v. State, 456 So.2d 529 (Fla.4th DCA 1984) rev. denied, 464 So.2d 555 (Fla.1984), wherein a police officer was permitted at trial to repeat statements made to him which explained why he was at a particular place, his purpose in being there and what he did as a result. The testimony at issue was not offered to prove that, in fact, appellant had murdered Ms. Hill, but was only offered to show why the officers determined appellant should be arrested. This testimony only enabled the jurors to hear a logical sequence of Robertson's participation in the investigation of the case. See also United States v. Johnson, 741 F.2d 1338, 1340 n.2 (11th Cir. 1984); Barnes v. State, 477 So.2d 6 (Fla.2d DCA 1985) (testimony about prior consistent statements of defendant's former sister-in-law who observed defendant's suspicious behavior and who told

her neighbor were admissible for the non-hearsay purpose of proving that the statements were in fact made to the neighbor, and as such, they constituted a circumstance relevant to the manner in which offenses became known and prosecuted). In making this argument the State acknowledges it was not raised below, however, cites the familiar rule that an appellate court will not reverse when the trial court reaches the right result for the wrong reason. Cohen v. Mohawk, 137 So.2d 222, 225 (Fla.1962); Grant v. State, 474 So.2d 259, 260 (Fla.1st DCA 1985); Savage v. State, 156 So.2d 566 (Fla.1st DCA 1973), cert.denied, 158 So.2d 518 (Fla.1973).

In the alternative, the State submits this testimony was admissible pursuant to Section 90.810(2)(b) of the Florida Statutes. This section provides:

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

Appellant's entire argument fails to acknowledge the insinuation that was developed on Ms. Evan's cross-examination that Terry Baker had a motive to testify at trial the way he did. Ms. Evan's testimony established that Terry Baker was the last person she saw in the store before Ms. Hill was shot. Appellant's

attorney developed this theory of Terry's culpability further by discrediting Ms. Evan's ability to hear and see everything that was going on while she was in the back. Terry's "motive" to testify falsely was inferred from the insinuation that he was involved in the crime, but was placing all the blame on appellant. Due to these implications, the cases appellant cites to on pages seventeen and eighteen of his initial brief are distinguishable inasmuch in each of those cases there was no evidence of "improper influence, motive or recent fabrication." That appellant attempted to discredit Terry's testimony by inferring that he was involved in the crime is further supported by the prosecutor's conduct at trial. The prosecutor tried to refute this implication by establishing that Terry's fingerprints were not on the weapon or in the store and that in all of appellant's confessions, not once did he implicate Terry Baker. The prosecutor even felt it was necessary in closing argument to point out the defense's red herring, i.e. Terry Baker's involvement in the crime. Thus, Terry's prior consistent statements were admissible to rebut an implied charge against him of motive to place the blame on appellant when the evidence to some extent may have implicated him.

The State further contends appellant was not prejudiced by the admission of the testimony. This Court has held that questions concerning the admissibility of extrajudicial statements for the purposes of rehabilitating witnesses impeached by

inferences of recent fabrication or motive are largely addressed to the sound discretion of the trial court and are not to be reversed in the absence of a prejudicial abuse of discretion. Kelley v. State, 486 So.2d 578, 583 (Fla.1986); Sosa v. State, 215 So.2d 736, 744 (Fla.1968). To support the contention that no prejudice exists, the State first emphasizes the fact that Jimmy Lee Molden was permitted to testify to these same statements without any objection by appellant. (T 727) Officer Robertson's repetition of these statements certainly did not make matters worse for appellant. Second, if the statements testified to by Robertson tended improperly to bolster Terry Baker's credibility, the State submits that too would not have prejudiced appellant. The prosecutor admitted to the jurors in closing argument that Terry was not a model citizen and had prior convictions. Further, the prosecutor argued the jury could totally discredit Terry Baker's testimony and, based on the other evidence, reach a guilty verdict on each and every crime. The State submits there is absolutely no reasonable probability that the admission of these statements affected the jury's verdict. Based on the overwhelming physical evidence (fingerprints on the cash register and murder weapon, bloody shoe prints, blood on appellant's clothes), Ms. Evan's identification, Deveda Wagner's identification and finally, appellant's voluntary confessions, the State submits that this Court can conclude beyond a reasonable doubt that the error, if error at all, did not affect

the verdicts. Diguilio, supra at 1143.

ISSUE IV (Restated)

THE COURT DID NOT ERR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT APPELLANT COMMITTED THE MURDER FOR THE PURPOSE OF PREVENTING OR AVOIDING LAWFUL ARREST.

Appellant argues that this aggravating circumstance was not proven beyond a reasonable doubt due to the fact that there was no evidence that: 1) Ms. Hill begged for her life; 2) Ms. Hill was a policeman; 3) Appellant moved, hid or buried her body; 4) the murder was an execution-style killing; 5) Ms. Evans had specific knowledge of why appellant killed Ms. Hill; 6) Appellant said why he killed Ms. Hill; and 7) there was a co-defendant to testify as to why appellant committed the murder. The State agrees with appellant that none of that evidence is present in the record. The State disagrees, however, with appellant's assertion that the record lacks any evidence that Ms. Hill or Ms. Evans could have identified appellant. Furthermore, the State submits the following evidence is sufficient to support the judge's finding that the dominant motive for killing Ms. Hill was to avoid detection amd arrest.

Ms. Evans testified at trial that she was not an employee at the Supertest Station but that she helped her friend, Ms. Hill, in the store every night. She would go by there when Ms. Hill was working and mop the floor for her. (T 668-669). Ms Evans also testified that appellant had been in the store before the

date of the shooting and that she had seen him. (T 670). Since Ms. Evans was there only when Ms. Hill was, there can be no doubt that Ms. Hill had also seen appellant when he had previously been in the store. In fact, Ms. Hill would have waited on appellant rather than Ms. Evans. There is also evidence that appellant did not just run into the store, rather he waited outside the store until it was clear. This obviously exposed appellant to more positive identification, especially since there was no evidence that he tried to disguise himself. Despite the statement on page twenty-two of appellant's initial brief, that appellant fired two "rapid" shots at Ms. Hill, the State submits the evidence indicates otherwise. Appellant's own confession refutes this. Appellant stated that he told Ms. Hill to give him the money. Ms. Hill bent over and screamed. There is absolutely no evidence that Ms. Hill was armed or that a weapon was within her reach. Appellant shot Ms. Hill one time and she fell to the floor. Appellant then reached across the counter and deliberately shot Ms. Hill again while she was lying on the floor. (T 778) Appellant immediately made the statement, "Now, I'm going to get the one in the back." Ms. Evans stated when appellant came back towards her and pointed the gun at her she closed the door. As the door was closing the bullet rang out and the door caught the bullet. (T 673-674) The bullet just missed Ms. Evans. Appellant certainly could not eliminate Ms. Evans at that point because the door locked from the inside and could not be opened

from the outside. (T 985) The next best option for appellant at that point was to grab the money and run. The longer he stayed in the store trying to kill Ms. Evans the more likely it was that he would be caught.

The State submits that this evidence, in its entirety, meets the "strong proof" test required by this Court in Riley v. State, 366 So.2d 19 (Fla. 1979). In Menendez v. State, 368 So.2d 1278 (Fla. 1978) this Court was unable to conclude that use of a silencer meant the defendant intended to eliminate an eye-witness. The only evidence available in that case was that the defendant brought a weapon in the jewelry store and the jeweler was found dead from gunshot wounds. In refusing to assume motive, this Court noted that the record did not indicate what events preceded the actual killing. This Court noted in a subsequent opinion that the motive for the murder in Menendez, supra, could have been based on any number of reasons. "For example, the victim may have resisted the robbery either physically or by attempting to attract attention." Routly v. State, 440 So.2d 1257 (Fla. 1983). See Carruthers v. State, 465 So.2d 496 (Fla. 1985) wherein the defendant stated in his confession that he did not want to hurt the convenience store clerk, but that she jumped and he just started firing, shooting her three times. Id. at 498.

Unlike the facts in Menendez, the record sub judice does

contain an explanation of the circumstances surrounding the actual shooting such that this Court is not in the position of having to speculate intent. Similar to the facts in Herring v. State, 446 So.2d 1049 (Fla. 1984), the evidence in this case is uncontroverted that appellant shot Ms. Hill once, watched her fall to the floor, reached over the counter and shot her again while she was on the floor. This evidence refutes any implication that appellant simply panicked and started firing. Cf. Caruthers, supra at 498. In all of appellant's confessions, not once did he suggest that Ms. Hill offered any resistance or posed any threat to his escape. Further, the manner in which the bullet to the chest area traveled through the body indicates Ms. Hill was shot first in the head and was shot in the chest while lying down. Clearly, Ms. Hill posed no threat to appellant's escape after the first shot. The second shot solely prevented identification. In Kokal v. State, 11 F.L.W. 348 (Fla. July 17, 1986), the defendant beat his victim with a pool cue until he was unconscious. While the victim at that point posed no threat to the defendant's escape, he did pose a threat to later identification. Thus, the defendant subsequently shot the victim. In Herring, supra at 1049, the defendant shot the convenience store clerk while standing behind the counter and shot him again after he had fallen to the floor. Those facts influenced this Court in upholding a finding that the defendant had murdered to avoid lawful arrest. When the facts surrounding the actual shooting

are present in the record, as they were in Kokal, Herring, and as they are in the case sub judice, a conclusion that the victim was killed to avoid identification can be reached without having to assume or speculate. Menendez, supra.

In addition to the facts preceeding the actual shooting, the record contains evidence of appellant's subsequent actions that are probative of his intent to eliminate Ms. Hill as a witness. Appellant concedes that his statement, "Now, I'm going to get the one in the back," shows that he may have intended to kill Ms. Evans to eliminate her as a witness; however, he is asking this Court to ignore that statement as evidence of his motive only seconds earlier. To do so would be inconsistent with this Court's opinions in Oats v. State, 446 So.2d 90 (Fla.1984); Burr v. State, 446 So.2d 1051 (Fla. 1985) and Routly, supra. In Oats, supra, the defendant shot a clerk in the head during the course of a robbery of the Little County Store in Martel, Florida. Appellant admitted robbing and killing the Martel clerk but claimed the gun discharged accidentally. Appellant also admitted robbing and shooting a clerk at the ABC Liquor Store the day before the Martel shooting. This Court held that the State had proven elimination of witnesses as an aggravating factor in the Martel shooting by the similar fact evidence of the ABC crime. Id. at 95. In Burr, supra, the defendant was found guilty of first degree murder of a store clerk during a convenience store robbery near Tallahassee. Three convenience store clerks

testified at trial that this defendant had shot at them during robberies within a nineteen day period after the murder. This Court agreed with the trial judge's conclusion that the pattern of shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses. Id. at 1054. Finally, in Routly, supra, this Court held the fact that a defendant did not kill an eyewitness to the crime did not weaken the finding that the defendant killed the victim to eliminate him as a witness to his crimes. The record in that case, however, indicated that the defenant had no reason to fear that the eyewitness, his girlfriend, would later report him. Id. at 1264. If leaving witnesses alive for no apparent reason indicates a defendant did not murder his victim in an effort to eliminate a witness, then the converse must be true. Killing an eye-witnes to avoid identification certainly is probative in determining the victim's death was also motivated by the defendant's fear of identification, particularly where no other reason seems apparent. Simply because appellant was unsuccessful in killing Ms. Evans should not weaken a conclusion that Ms. Hill was deliberately shot twice to prevent detection. In light of appellant's express statement of intent, the only logical reason why Ms. Evans survived as a witness was because the door to the storage room was not capable of being opened from the outside. Furthermore, with only two bullets remaining in the revolver (T 820) and the chance that anyone could walk in at any time, it

would have been foolish of appellant to do anything but take his money and leave. Compare Rembert v. State, 445 So.2d 337 (Fla. 1984) wherein no obstacles were evident in the record to explain why the potential witness was left alive.

Finally, the fact that appellant had previously been in the store increased the possibility that Ms. Hill could have identified him. Ms. Evans recalled that she had seen appellant in the store on a previous occasion, and Ms. Evans would have been in the store only if Ms. Hill was there. In Carruthers, supra at 498, this Court stated that the victim's recognition of defendant as a customer spoke to the question of whether he killed to prevent lawful arrest, but without more, this fact could not constitute an aggravating circumstance. As indicated above, this case certainly has more than just evidence of Ms. Hill's ability to identify defendant. Moreover, all of the evidence considered in its totality supports a conclusion that appellant murdered Ms. Hill to avoid subsequent identification and arrest. Therefore, this Court should conclude the trial court did not err in considering this as an aggravating factor supporting a penalty of death.

ISSUE V (Restated)

THE TRIAL COURT DID NOT ERR IN CONCLUDING APPELLANT'S AGE AND UPBRINGING DID NOT OUTWEIGH THE THREE AGGRAVATING CIRCUMSTANCES.

Appellant argues that his youth, precisely seventeen years

and eight months at the time of the crime, mitigates the two aggravating factor despite the jury's death recommendation and he trial judge's reasoned judgment that death is the appropriate penalty. Of course, appellant makes this argument on the assumption that only two aggravating circumstances are proper (See Issue IV). Thus, if this Court resolves Issue IV in the State's favor, appellant presumably must concede the sentence of death was properly imposed.

Appellant correctly notes that this Court affirmed a sentence of death on a seventeen year old in Magill v. State, 428 So.2d 649 (Fla. 1983) despite the fact that there were three mitigating circumstances and only four aggravating circumstances. One of those mitigating circumstances was that Magill lacked a significant prior criminal record, a circumstance clearly not present in this case. (See R 762-763). Appellant suggests on page thirty-one of his brief that this Court has been extremely relunctant to impose death against a person under eighteen years of age, implying this Court has given great weight to age as a mitigating factor. Appellant's list of cases allegedly supporting this proposition is, to say the least, misleading. In Simpson v. State, 418 So.2d 984 (Fla. 1982), Morgan v. State, 392 So.2d 1315 (Fla. 1981) and Anderson v. State, 420 So.2d 574 (Fla. 1982) this Court reversed convictions with no discussion concerning the appellants' age. In Ross v. State, 386 So.2d 1191 (1980) and Peavy v. State, 442 So.2d 200

(Fla. 1983) this Court remanded due to the fact that aggravating circumstances were stricken and this Court did not feel comfortable in reweighing for the trial judge. In Taylor v. State, 294 So.2d 648 (Fla. 1974), this Court reversed a death sentence because the defendant had no prior criminal history and it was possible his co-defendant actually fired the murder weapon. In Thompson v. State, 328 So.2d 1 (Fla. 1976) (17) three justices upheld the conviction but reversed the trial judge's imposition of death becaus the defendant had no prior record, the evidence was questionable as to whether the defendant or victim attacked, and the jury unanimously recommended a life sentence. Three justices would have reversed the conviction and two justices concurred only because they could not convince two more justices to affirm the sentence. The same thing occurred in Vasil v. State, 374 So.2d 465 (Fla. 1979), that is, this Court was simply unable to put together a majority vote for the sentence. Finally, in Brown v. State, 367 So.2d 616 (Fla. 1979) the jury recommended life, perhaps because the defendant was only sixteen and this Court felt no reasonable men would disagree.

Clearly this Court has not seen fit to accord a defendant's age, in and of itself, greater significance than any other properly weighed factor. In fact this Court has upheld trial judges' decisions not to instruct the jury on age as a mitigating circumstance and judges' determinations that age is not a mitigating circumstance. Garcia v. State, 11 F.L.W. 251 (Fla.

June 5, 1986), (20); Deaton v. State, 480 So.2d 1279 (Fla. 1985) (18); Cooper v. State, 11 F.L.W. 352 (Fla. July 17, 1986) (18); Peek v. State, 395 So.2d 492 (Fla. 1981) (19). No per se rule pinpoints a particular age as an automatic mitigating factor. Id. at 498. This Court has also stated that if age is to be accorded any significant weight at all, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility. Echols v. State, 484 So.2d 568 (Fla. 1985). Finally, even where age is considered a mitigating circumstance, the weight to be given it rests with the trial judge, not this Court. Lemon v. State, 456 So.2d 885 (Fla. 1984).

Appellant urges that the trial judge erred below in not giving greater weight to his youth when weighing it against the remaining aggravating factors. This Court has not been persuaded by such argument previously. For example, in Woods v. State, 11 F.L.W. 191 (Fla. April 24, 1986) the trial court found that Wood's age of eighteen years, while a mitigating circumstance, did not outweigh the following aggravating circumstances: 1) committed by a person under sentence of imprisonment; and 2) committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws. The jury had recommended death and this Court affirmed the death sentence. In Cooper, supra, the trial court, in following the jury's recommendation of death, found five aggravating circumstances and no

mitigating factors. This Court struck one aggravating circumstance and held that even if the judge had considered the defendant's age of 18, it would not have offset the four proper aggravating factors. Id. at 353. Likewise, in Deaton, supra, the jury voted 8-4 to recommend death for an 18 year old defendant. The trial court found three aggravating circumstances (committed in course of a robbery, heinous, cold and calculated) and one mitigating circumstances (no significant history of criminal activity), and imposed a sentence of death. The defendant argued to this Court that the judge had erred in failing to consider his age of 18 years. This Court disagreed, but went even further and held that even if the defendant's age had been a mitigating circumstance, it would not have offset the three proper aggravating circumstances. These three cases indicate that the weight a trial judge attributes to any mitigating factors, specifically age, should not be altered by this Court unless it appears that the judgment reached by the judge is at a material variance with the evidence or is contrary to law. See Hargrave v. State, 366 So.2d 1 (Fla. 1979). Merely because appellant was four months short of being considered an adult should not make his case any different from the three cited above.

Appellant goes to great lengths in his brief to reargue his unfortunate upbringing. The trial judge allowed the jury to hear this evidence and the jury still recommended death. The judge

regarded appellant's upbringing as a mitigating circumstance along with appellant's youth, however, he concluded the aggravating factors outweighed the mitigating factors. This Court has held that "the primary standard for review of a death sentence is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." LeDuc v. State, 365 So.2d 149, 151 (1978). See also Stone v. State, 378 So.2d 765, 772 (Fla. 1980) (jury recommendation of death is entitled to great weight). Merely because the jury's recommendation was not unanimous should not constitute a strong reason to believe that reasonable persons could not agree that death is the appropriate sentence in this case.

Furthermore, a judge is not limited in sentencing to consideration of only that material put before the jury and he is given the final authority to determine a defendant's sentence. Engle v. State, 438 So.2d 803 (Fla. 1983). In light of the information contained in the PSI and HRS reports and in light of the numerous recommendations of death, the trial judge's decision that the aggravating circumstances outweighed the mitigating circumstances must be upheld. [Note also the trial court's recognition of appellant's sophistication and maturity as determined by his home environment, emotional attitude and pattern of living (R 750)]. In the event one of the aggravating circumstances is reversed,

the State urges this Court to hold the weighing process would have reached the same result. See Bassett v. State, 449 So.2d 803 (Fla.1984); Brown v. State, 381 So.2d 690 (Fla. 1980); Cooper, supra; Deaton, supra.

ISSUE VI (Restated)

THE TRIAL COURT'S DEPARTURE SENTENCE WAS PROPER.

Appellant sets out on pages thirty-two and thirty-three of his initial brief the seven written reasons supporting the departure sentence. (See also R 819-820). In light of Scurry v. State, 489 So.2d 25 (Fla. 1986), the State, without fully agreeing, concedes reason # 3 will be considered improper by this Court. The State submits reason # 7, that appellant is not amenable to rehabilitation, is proper pursuant to the authorities cited in Ballard v. State, 11 F.L.W. 1179 (Fla. 4th DCA May 21, 1986); Chaplin v. State, 11 F.L.W. 902 (Fla. 1st DCA April 16, 1986); Booker v. State, 482 So.2d 414 (Fla. 2nd DCA 1985); McCoy v. State, 482 So.2d 566 (Fla. 2nd DCA 1986), Cassell v. State, 11 F.L.W. 1161 (Fla. 2nd DCA May 16, 1986). Appellant argues this Court's opinion in State v. Mischler, 488 So.2d 523 (Fla. 1986) prohibits reason # 6 because these factors were already taken into account in calculating the guidelines score. The State disagrees inasmuch as the guidelines does not account for the fact that the appellant committed new crimes within a short time period following a previous period of incarceration. See White

v. State, 481 So.2d 993 (Fla. 5th DCA 1986); Swain v. State, 455 So.2d 533 (Fla.1st DCA 1986); Jean v. State, 455 So.2d 1083 (Fla. 2nd DCA 1984). Reason # 4 is valid inasmuch as the vulnerability of the victim due to her advanced age is emphasized rather than the mere fact that threats were made. Hadley v. State, 11 F.L.W. 1144 (Fla. 1st DCA May 15, 1986); Von Carter v. State, 468 So.2d 276 (Fla. 1st DCA 1985); Moore v. State, 468 So.2d 1081 (Fla. 3d DCA 1985). Reason # 5, that the crimes show an utter disregard for human life is proper despite this Court's recent holding in McGouirk v. State, 11 F.L.W. 463 (Fla. 1986). In McGouirk, the defendant was charged with placing and discharging a destructive device "with intent to do bodily harm to any person." This Court held because the legislature has defined the crime as including such intent, a conviction under this statute would necessarily involve a disregard for human life. In the case sub judice appellant was convicted of numerous crimes that do not, by statute, necessarily involve a disregard for human life. Thus, this reason does not violate Mischler, supra. Reason # 2, excessive force, is certainly not an inherent component of armed robbery and has repeatedly been upheld as a valid reason for departure. See Leopard v. State, 11 F.L.W. 1662 (Fla. 1st DCA July 31, 1986); Jefferson v. State, 11 F.L.W. 1276 (Fla. 1st DCA June 6, 1986); Steward v. State, 11 F.L.W. 1232 (Fla. 1st DCA May 29, 1986); Smith v. State, 454 So.2d 90 (Fla. 2nd DCA 1984); Harrington v. State, 455 So.2d 1317 (Fla. 2nd DCA 1984). Reason

8, escalating violent criminal activity, does not violate either Hendrix v. State, 475 So.2d 1218 (Fla. 1985) or Williams v. State, 11 F.L.W. 289 (Fla. June 26, 1986) inasmuch as it does not focus merely on appellant's prior record. See Riggins v. State, 11 F.L.W. 1231 (Fla. 1st DCA May 29, 1986); Smith v. State, 480 So.2d 663 (Fla. 5th DCA 1985); Dohn v. State, 482 So.2d 564 (Fla. 2nd DCA 1986); Booker v. State, 482 So.2d 414 (Fla. 2nd DCA 1986); Patty v. State, 11 F.L.W. 653 (Fla. 1st DCA March 13, 1986); Keen v. State, 481 So.2d 1274 (Fla. 5th DCA 1986). Finally, the court's first reason for departing, an unscored capital conviction, is not accounted for on the score-sheet and has been upheld as a valid departure reason. Davis v. State, 11 F.L.W. 1870 (Fla. 1st DCA August 27, 1986); Leopard, supra; Weems v. State, 469 So.2d 128 (Fla. 1985).

Even if one reason is found to be impermissible, it is clear beyond all reasonable doubt that the trial judge would have imposed the same sentence. Albritton v. State, 476 So.2d 18 (Fla. 1985). Furthermore, the State notes appellant conceded that the circumstances surrounding the offense were such that this Court could go outside the guidelines and impose whatever sentence the Court felt was just. (T 1191) The State submits even if merely one reason is permissible, in light of everyone's agreement at sentencing that departure was appropriate, the judge would have still imposed the same sentence.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court to affirm appellant's convictions and sentences as imposed by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished by hand delivery to David A. Davis, Assistant Public Defender, P.O. Box 671, Tallahassee,FL 32302, on this 1st day of October, 1986.

Norma J. Mungenast

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