IN THE SUPREME COURT OF FLORIDA

JERRY STOKES,

Appellant,

v. CASE NO. 71,485

STATE OF FLORIDA,

Appellee,

_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In this brief, the defendant in the trial court will be referred to as the "Appellant." The State, which was the prosecuting authority, will be referred to as "Appellee." Reference to the record will be by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of Procedural Progress of the Case with the following additions.

1. The jury found Appellant guilty as charged after two hours of deliberation (R 1047, 1066).

2. After twenty minutes of deliberation the jury returned a penalty recommendation of death. The vote was 12-0 (R 1117, 1120, 1121).

3. Judge Lawrence stated in his sentencing order that he would have imposed the death penalty under these facts and circumstances if only one of the aggravating and no mitigating factors had been present (R 1416).

Appellee contests Appellant's factual characterization that Mr. Brown gave an inconsistent description of the vehicle under hypnosis (Appellant's Brief, p. 6). Appellee asserts that under hypnosis Mr. Brown added details to a consistent description of the car.

Appellee also contests Appellant's characterization of his statement to Lowell Woodson as an alleged statement (Appellant's Brief, p. 9).

Further Appellee adds the following facts:

1. Mary Lynn Hinson, a microanalyst, stated although she had examined thousands of tires, she had never seen tires worn that badly (R 869).

2. Appellant told Lowell Woodson that he needed to make the call because "they had my gun and it could lead to me." (R 875).

3. Appellant characterized State witnesses as liars (R 965, 966).

4. Appellant denied being in the store (R 949) but admitted describing the money pan to the police (R 962).

5. Appellant denied being in the store (R 949) but accurately described the store and the surrounding area to police (R 749-759, 792-794).

6. Willie B. Thomas was searched for in Valdosta, Georgia, Perry, Florida, Lima, Ohio, and Terre Haute, Indiana, without success (R 681-682).

SUMMARY OF ARGUMENT

1. The prosecution articulated reasons for the use of his peremptory challenges on black jurors. His reasons were race neutral, were applied to white and black jurors, and are supported by the record, No racial discrimination has been shown and the trial court correctly denied the Appellant's motion.

2. The trial court properly excluded the portion of Mr. Brown's testimony which was developed by hypnosis. The court properly admitted Mr. Brown's pre-hypnosis testimony and his post-hypnosis identification of the vehicle because it was shown not to be tainted by hypnosis,

3. The trial court did not improperly restrict Appellant's cross-examination of witness Brown because Appellant originally filed the motion to exclude the testimony and was given the option to withdraw his motion and use the statement for cross-examination purposes. Further, the issue invokes the use of a witness's testimony and therefore is not controlled by Rock v. Arkansas, 483 U.S. ___, 97 L.Ed.2d 37 (1987), which deals with restrictions on a defendant's testimony.

4. William Brown was a State witness whose observations were critical in leading the police to the defendant but only one small portion of the evidence at trial. His statements to the

police were admissible as they were not hearsay or if hearsay, fell within exceptions to the hearsay rule.

5. The State's circumstantial evidence was sufficient to prove Appellant was the perpetrator of the crimes. Appellant's inculpatory statements, his inconsistent exculpatory statements, and the physical evidence, all link him to the crime.

6. The trial court properly instructed the jury on robbery as an underlying felony. Sufficient evidence exists in the record to establish a robbery took place.

7. A personal waiver of lesser included offenses is not required for non capital offenses. Further, there is no requirement for instructions on lesser included offenses which are not supported by the evidence.

8. The prosecutor properly questioned the defense witness as to the basis of her opinion. Further, the trial court gave an apropriate curative instruction, especially in light of the fact that the Appellant did not want the facts corrected.

9. Appellant's death sentence is appropriate because two valid aggravating factors and no mitigating factors exist.

10. Appellant's deth sentence is appropriate because of the execution style murder and the heightened premeditation of using a weapon that must be cocked prior to firing.

11. The trial court properly instructed the jury as to its advisory role and did not diminish the role of the jury in the sentencing process.

12. In sentencing the Appellant for robbery, the trial court departed from the recommended range based on the capital conviction. This is a valid reason for departure and the Appellant suffered no harm by the use of the wrong scoresheet.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY RULED THAT NO PRIMA FACIE SHOWING OF RACIAL DISCRIMINATION OCCURRED.

The Appellant alleges that the jurors were excluded for racial reasons. He is wrong.

A careful look at the record supports the State's position that Appellant's allegations are merely trial counsel's attempts to misuse the Neil v. State, 457 So.2d 481 (Fla. 1984) and State v. Slappy , 13 F.L.W. 184 (Fla. 1988) decisions. Trial counsel's invocation of these decisions was not designed to prevent racial discrimination in jury selections, but to deprive the Appellee from the lawful exercise of his peremptory challenges.

First, all references to jurors challenged for cause should be struck from Appellant's brief on this issue. The Neil line of cases applies to peremptory challenges only. Any reference to cause challenges are an attempt to mix apples and oranges and make the numbers look better, such obvious ploys should not be condoned.

Appellee used seven peremptory challenges. Six of the seven persons who were excused were black (R 420). Appellee had available at least ten peremptory challenges in this case, Rule 3.350, Florida Rules of Criminal Procedure, but did not use three

of them. If the prosecutor had been removing individuals for racial reasons he could have removed all the black jury members. He did not because he was not excluding for racial reasons and the jury contained two black members and one black alternate (R 420).

Appellant asserts that the State gave reasons for excluding only two of the six excused blacks. He is wrong.

Mr. Robinson was the first black juror peremptory excused. He was twice challenged for cause (R 50, 62); however, the cause challenge was denied (R 63). The reasons were stated by Mr. Blair (R 62) and had support in the record: his views on the death penalty (R 50), his family relationship with the defendant (R 13), his desire not to sit in judgment (R 14, 55, 56). All reasons were race neutral and supported by the record.

Mr. Simmons was also peremptorily excused. Like Mr. Robinson, the State moved to excuse him for cause (R 256, 257). The motion was denied (R 257). The State moved to exclude him for cause because he said he was opposed to the death penalty (R 251) and did not believe he could impose the death penalty even if the law required it (R 252). Further, Mr. Blair indicated that he did feel Neil required him to announce reason "other than already obvious in the record and articulated in my challenge for cause." (R 258). The reasons were race neutral and supported by the record.

The State also peremptorily excused Ms. Aiken (R 205). Mr. Blair stated, "This is perhaps the first juror where there are no apparent reasons on the record," and gave his reasons: her unsureness about sitting in judgment (R 124), combined with the fact that she did not make eye contact with him or Mr. Hunt, the defense attorney, during the entire voir dire process (R 207). Argument was had (R 207, 208) and the defense motion denied (R 208).

The State also peremptorily excluded Ms. Roberson (R 223). Mr. Blair informed the court of information he had which a local black police officer had provided about the juror. The information was that "they (the family) were always into something bad." (R 223). The reason is race neutral and valid. Tillman v. State, 13 F.L.W. 194 (Fla. 1988).

The State also excused Ms. Yulee (R 150). How obvious was the reason? The defense attorney placed the reason on the record in his argument when he said: "She hasn't expressed an opinion that would cause her to be challenged for cause. She does have some reservation about the death penalty." (R 151). Reservations about the death penalty, indeed, When questioned about the death penalty the following took place:

> MR. BLAIR: Mrs. Yulee, I saw you sort of roll your eyes when I asked the

question there. How do you feel about the death penalty?

MRS. YULEE: I don't like it. (R 139).

She did say she could vote to impose it if everybody else was in favor of it. (R 140). In response to the Neil challenge, Mr. Blair said that the reason for the challenge was demonstrated by the record (R 152) and indeed, it is.

The other black juror excused by Mr. Blair was Mr. Robinson. Mr. Robinson was a friend and associate of Leroy Gillyard (R 81), who was to be a State witness in the case. Mr. Gillyard was not your ordinary State witness. He was an incarcerated witness to whom the Appellant made incriminating statements to. Various motions had been filed regarding Mr. Gillyard's testimony including motions to suppress (R 1320, 1321), motions to prohibit the State Attorney from mentioning Gillyard's statements in opening argument (R 417), and motions to transport incarcerated defense witnesses to challenge Gillyard's credibility. These included a witness named Robinson. Further, there were allegations of threats between Gillyard's sister and the Appellant (R 1320, 1321) and the motions to suppress the statements were still pending at this time. For the State not to excuse Robinson was to invite or introduce error and to risk tainting the jury.

The State used its seventh peremptory challenge against Ms. Terrell, a white female (R 274, 275), who expressed reservations

about the death penalty but stated under appropriate circumstances she could vote for it (R 102). Excusing this juror shows that the State's excusal of the other jurors for the same reason was not pretextual.

The purpose of the Neil - Slappy procedures is to ensure that the reasons for peremptory challenges are in the record. In this case, the prosecutor's reasons are in the record and obvious for all but two jurors and for those he placed the reasons in the record. Mr. Blair's reasons were race neutral; (1) friendship with a witness, (2) opposition to the death penalty, (3) involvement in crime, (4) equivocal responses combined with hostile body language. Mr. Blair's reasons are supported by the record and the existence of the record support was not challenged by trial counsel.

The trial court listened to counsel articulate arguments regarding this issue and then ruled. Appellant's trial counsel recognized the specious nature of his own arguments regarding racial discrimination in the jury selection when, with the first juror challenged (R 92), Mr Johnson, counsel noted "You have to start somewhere.'' And with Ms. Yulee he even articulated the race netural reason for excusal, her opposition to the death penalty (R 151).

Appellant is arguing for a standard that would convert the State's peremptory challenges into challenges for cause; such is not the rule of Neil or Slappy and such a result is not warranted.

No racial discrimination occurred and the trial court's ruling should be affirmed.

ISSUE II

THE TRIAL COURT DID NOT ERR IN ALLOWING WILLIAM BROWN TO TESTIFY REGARDING HIS IDENTIFICATION OF THE GRAND PRIX AUTOMOBILE.

Appellee asserts that Bundy v. State, 455 So.2d 330 (Fla. 1984) (Bundy I), controls this case, not Bundy v. State, 471 So.2d 9 (Fla. 1985) (Bundy II). In Bundy I this Court found that a witness's identification of the fleeing assailant of three sorority sisters was not tainted by the hypnosis. The court recognized that the session did not change the way the witness recalled the events, and any suggestiveness was without significance since the defendant was not a suspect at the time.

The issue is not the use of tainted testimony obtained by the use of suggestions or unreliable hypnosis (Compare Bundy II). Rather the issue presented here is whether a witness who gave a description of an automobile, prior to being hypnotized, should be allowed to testify about his subsequent identification of a vehicle discovered by police investigation using only the initial description given by that witness.

The answer to this inquiry should be yes. Just as in Bundy I, this case involves a pre-hypnosis identification and, just as in Bundy I, the witness testified that he was not relying on details uncovered during the hypnotic session in making the identification. In the instant case the record shows that the

original description did not change; and that the details added during hypnosis (a Florida tag, **28G 2**, and vertical lines in the tail lights) (R **415**), could not have played a part in the identification because the car found by the police did not have those characteristics.

Since the identified vehicle did not have the hypnotically suggested characteristics, it cannot be said that the identification was based on the hypnotically recalled facts. As in Bundy I, the witness said the identification was based on his initial memory (R **403**) and the hypnosis details played no part in the identification (R **391, 392**). Therefore no error occurred.

Assuming arguendo, that an error occurred it was harmless. Rule **924.33**, Florida Statutes. The Georgia police were operating under the initial description of the vehicle given by Mr. Brown. They focused in on the defendant without any information from the hypnotic session (R **311,312**, 514, **525, 546, 580**). Likewise, the defendant in his own statements, admitted the gun was used by Willie B. Thomas to commit a shooting in Florida (R **680**) and that the car could have been involved in this crime (R **748**). Thus, the testimony of witness Brown was at best cumulative of Appellant's own admissions.

Finally, suppressing the post-hypnotic identification would not have resulted in the suppression of the critical facts that the defendant had access to a vehicle fitting the description, a

vehicle whose tires matched the tire marks left at the crime scene, and a vehicle which the Appellant admitted could have been used to commit the crime (R 679-680) and a vehicle he tried to get rid of (R 875).

In summary, the identification of the car was harmless (1) as the linking of the car to the crime was admitted by the defendant; and (2) the identification of the car was based on initial descriptions of Mr. Brown, and the identification did not directly implicate the Appellant. It only established one circumstance to be considered by the jury.

Appellee requests this Court affirm the ruling of the trial court admitting the identification as no error was committed, or if error exists, find it harmless beyond a reasonable doubt.

ISSUE III

THE TRIAL COURT DID NOT ERR IN LIMITING APPELLANT'S CROSS-EXAMINATION BY PRECLUDING THE USE OF EVIDENCE FROM THE HYPNOTIC SESSION.

Appellant argued in his motion to preclude the testimony that under Bundy II this testimony was unreliable and had no probative value and that Mr. Brown was incompetent to testify (R **409).** Based on that argument, he won. If the testimony was not reliable for direct examination it does not change its coat for cross-examination purposes, The testimony was unreliable and properly prohibited.

Appellant argues that he was deprived of the fundamental right of cross-examination by the court's refusal to allow him to use inconsistent details given by Brown under hypnosis to impeach him. He argues that the trial court's action violated his right by applying a per se exclusionary rule of the type condemned by Rock v. Arkansas, **483** U.S. **__, 97** L.Ed.2d **37 (1987).**

In Rock supra, the defendant could not remember the events of the day of the crime. In order to improve her recall hypnosis was used. The trial court, by excluding her testimony (which had been enhanced by hypnosis), effectively precluded her from raising a defense at all. The United States Supreme Court's reversed holding that Arkansas' procedural rule could not be applied to preclude a defendant from testifying to matters critical to her defense,

Florida law is in accord with Rock on this point as this Court has previously ruled in Coxwell v. State, 361 So.2d 148 (Fla. 1978), that the exclusion of evidence, which directly affects the defendant's ability to present a defense, was error.

The Rock and Coxwell cases are factually distinguishable from the instant case. The defendant in this case was not precluded from testifying or raising a defense. He was not denied the right to cross-examine the witness who described the vehicle. In fact, he established on cross-examination: (1) the limited opportunity of the witness to view the vehicle; (2) the fact that the witness's initial description was incomplete; and (3) that the witness did not remember seeing tinted windows on the car at the crime scene (R 465).

It is axiomatic that cross-examination, although essential to the trial process, can be limited. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The situation in the instant case is very similar to the situation in Mills v. State 476 So.2d 172 (Fla. 1985). In Mills, some prior inconsistent statements were used by the defense to impeach a state witness. However, other statements were ruled inadmissible. This Court affirmed that decision holding that cross-examination was critical but, that once the confrontation clause has been satisfied, cross-examination can be limited.

The facts of this case present two additional distinctions from Rock, supra. In Rock, the State moved to exclude the testimony revealed by hypnosis. In this case the defendant was the moving party. Further, in Rock, the United States Supreme Court distinguished the Arkansas Rule from the rule of other states when it said:

> Other states that have adopted an exclusionary rule, however, have done so for the testimony of **witnesses** not for the testimony of the **defendant.** (Emphasis supplied by the United States Supreme Court). Rock, **97** L.Ed.2d at p. **50.**

Therefore, Rock does not compel admission of witness Brown's hypnotized testimony.

Further, any error regarding the vehicle is totally harmless because from the first interview of the defendant by the Georgia police, the defendant admitted his vehicle might have been there. He claimed only that someone else using the vehicle (R **748).**

Further, any error is harmless because the trial judge gave Appellant an option. Since Appellant was the moving party on the motion in limine which caused the hypnosis testimony to be excluded, the trial judge twice offered to allow them to withdraw their motion in limine. He would then allow the cross-examination. The defense made the tactical choice not to do so (R **416, 473).** This action waived any objection. You cannot

cause testimony to be excluded and object to its exclusion at the same time. See Sullivan v. State, 303 So.2d 632 (Fla. 1974). Invited error is not the basis for reversal.

The trial court's ruling was not error and should be affirmed.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY REGARDING STATEMENTS WILLIAM BROWN MADE ABOUT THE GRAND PRIX AUTOMOBILE.

Appellant challenges on hearsay grounds the admission of testimony of state witnesses regarding the description of the vehicle given by eyewitness Brown. The Appellant is wrong because the remark is subject to admission under both the hearsay rule and certain of its exceptions.

A hearsay statement is defined as "an out of court statement offered to prove the truth of the matter asserted." Section 90.801(2), Florida Statutes. In the instant case, Mr. Brown testified at trial that he saw a blue Grand Prix with a white top and unusual wheel covers with the centers blotted out (R 456-457). Brown's prior consistent statements were not offered to prove that a vehicle of that description was present at the scene. Rather, it was offered to establish (1) that the witness gave a prior consistent description of the vehicle, and (2) that the police found the car based on the original identification given by Mr. Brown and (3) that the discovery of the car led the police to the Appellant (R 311, 312, 514, 525, 546, 580).

Further, the statements were not hearsay because Section 90.801(2), Florida Statutes, states that

> **(2)** 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. . .

Prior to the time of the trial, this witness's identification of the vehicle had been challenged through a pretrial motion in limine, and a hearing was held on the testimony's admissibility. The witness's identfication had been directly challenged and the clear implication of that challenge was that improper influence had been supplied by the sheriff while hypnotizing the witness **(R 409).**

The prosecutor correctly anticipated that this identification would continue to be challenged and sought to rebut that claim by the use of this evidence. Thus, under Section **90.801(2)**(b), Florida Statutes **(1985),** the witness's consistent statements were not hearsay and were properly admitted into evidence by the trial court.

Appellant also attacks the introduction of statements Brown made when he viewed the car in Georgia. When he saw the car in Georgia, Brown said:

> "I never thought I would see it again." (R 675).

"I told you the hub caps were different." (R 675).

These statements were not offered to prove the truth of the matters asserted (i.e., whether he ever saw the car again or whether the hubcaps were different) thus, they were not hearsay. But even if the statements were hearsay, they were admissible under Section 90.803(1), (2), and (3), Florida Statutes, as excited or spontaneous utterances and statements establishing Brown's state of mind.

Therefore, the trial court's ruling should be affirmed.

ISSUE V

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE **WAS** LEGALLY SUFFICIENT TO ESTABLISH APPELLANT'S GUILT.

The Appellee acknowledges that like many murder cases this is a circumstantial evidence case. The Appellant's argument on legal sufficiency is wrong because it is based on a flawed legal analysis. Appellant ignores that in a circumstantial evidence case it is the totality of the circumstances taken together which have to be legally sufficient. In his analysis Appellant takes the major items in evidence and evaluates them separately from each other,

Further, he ignores that on a motion for judgment of acquittal he admits not only the facts but every inference that a jury might reasonably infer from the facts. Lynch v. State, 293 So.2d 44 (Fla. 1974).

Appellant also ignores the leading cases on sufficiency of the evidence. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). In Tibbs, the court set the standard for review when it said

> Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to

> evidentiary weight, is the appropriate concern of an appellate tribunal. (Footnotes omitted). Id. at p. 1123.

Subsequent to Tibbs, this court has repeatedly reaffirmed this ruling, and recently did so in Grossman v. State, 13 F.L.W. 127 (Fla. 1988). Additionally, this court had said it is the jury's duty to review the reasonableness of any hypothesis of innocence. Heiney v. State, 447 So.2d 210 (Fla. 1984); Huff v. State, 495 So.2d 145, 150 (Fla. 1986).

With these standards in mind, a review of the relevant evidence will show the Appellant was properly convicted.

A. SUFFICENCY AS TO THE MURDER

After he was questioned about the murder, the Appellant needed to tell his brother to destroy evidence relevant to his crime. Appellant took a big risk and lost when he confided in Lowell Woodson (R 881). He asked Lowell Woodson to make a call for him (R 875). Appellant wanted Woodson to call his brother and tell him to get rid of the tires or get rid of the car (R 875). He told Woodson there had been a robbery and a lady got shot (R 875). Woodson asked "Where?" and Appellant pointed to his face (R 875, 876, 882). Appellant further said they had his .22 caliber pistol and to be sure to make the call because that could lead the investigation to him (R 875).

Appellant made another error when he was back at the Madison jail. Appellant requested to speak to Investigator Harris (R 611). Appellant asked about his tennis shoes (R 611). Investigator Harris told him he could not have them until after the trial (R 611). Appellant then said:

> "I don't know why you want those shoes. I wasn't wearing them when..." (R 611).

The Appellant stopped himself in mid-sentence. The mid-sentence stop is particularly relevant because the Appellant had, in interviews, previously discussed various farfetched stories about why his personal items, including his gun and shoes (R 680, **749**, 800), could have been involved in the murders **(R 680)**.

The two statements are important because they resulted in an admission to the crime, an admission that his gun could lead the investigation to him, an admission the car and tires were more evidence against him, an admission that a robbery took place, and an admission that the victim was shot in the face. Uniquely, this last fact had not been released to the public (R **508**, 509), therefore it was known to only a select few law enforcement officers and, of course, the killer.

The Appellant had other information of a unique nature for a person who had been in the store once. One lone time customer knew **(R 450)** only that Mrs. Taylor made change and placed money

under the counter (R 451). The Appellant, who had either never been in the store or been in there only once, knew she kept it in a metal box or pan (R 962).

Finally, Appellant recognized the uniqueness of his car, the paint, hubcaps and tires, could link him to the crime. Thus, he tried to dispose of the car. Appellant was correct that the car was unique, as an expert witness, Ms. Hinson, testified that the tracks were made by tires worn in exactly the same way as the tires obtained from the blue Grand Prix (R 856) and in viewing thousands of tires she had never seen other tires worn in that fashion (R 864).

The totality of the circumstances leads to only one conclusion regarding the legally sufficient evidence of guilt. The case had to go to the jury.

B. SUFFICIENCY AS TO THE ROBBERY

Appellant alleges that no evidence of a robbery exists. He is wrong. It is clear that this store's cash register was a cigar box and metal pan that were kept under the counter. It is also clear that Mrs. Taylor conducted her regular business using this cash register set up. She placed her receipts in it and made change including coins and bills (R 476, 477).

Testimony showed that at 7:40 a.m. a customer paid a bill using three one-dollar bills (R 451). About forty minutes (R

477, 478) later no bills were in the cash register, even though Mrs. Taylor regularly kept bills in the box under the counter. This testimony establishes money in the cash drawer just before the murder. The testimony of Ms. Cooper (R 812) establishes that when Mrs. Taylor was found sprawled on the floor dead, the bills were gone. This is sufficient to establish robbery. Ferguson v. State, **417** So.2d **631** (Fla. **1982);** and Herring v. State, **446** So.2d **1049** (Fla. **1984).**

Having established that a robbery occurred the trial court properly admitted Appellant's statement to Lowell Woodson. Appellant told Woodson there had been robbery and a lady got shot **(R 875).** Further, as stated in Part I, Appellant's knowledge of the store and of the metal pan where the money was kept, directly links him to the crime.

The evidence was legally sufficient to establish that a robbery occurred and that the Appellant committed it. Therefore, the trial court properly submitted the case to the jury.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FELONY MURDER AS SUFFICIENT EVIDENCE OF ROBBERY EXISTED.

At the prosecutor's request, the trial court instructed the jury on the felony murder theory for first degree murder (R 1031-1032). Armed robbery was the underlying felony (R 1031-1032). The instruction was proper as a robbery was proven. The Appellee agrees that some evidence of the underlying felony is necessary to justify such an instruction. Washington v. State, 432 So.2d 44 (Fla. 1983) and Middleton v. State, 426 So.2d 548, 552 (Fla. 1983). In the instant case, there was evidence that a robbery occurred (See Issue V) and therefore the instruction was proper.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN ALLOWING APPELLANT'S COUNSEL TO WAIVE THE LESSER INCLUDED OFFENSES OF ROBBERY,

Appellant argues that the trial court erred in allowing Appellant's attorney to waive the lesser included offenses of robbery. He argues that because this is a capital case such waiver is not proper. Appellant is wrong for several reasons.

First, Appellant reads Beck v. Alabama, 447 U.S. 625, 65 L.Ed.2d 392 (1980) much too broadly. Beck requires the instruction for capital offenses only where there is evidentiary support in the record for the giving of the lesser offense instruction. Beck is premised on the need for heightened rationality in death cases. In Hopper v. Evans, 456 U.S. 605, 72 L.Ed.2d 367 (1982), the United States Supreme Court clarified its Beck holding and found no record support for the lesser offense and therefore, upheld the death sentence of another Alabama defendant. The United States Supreme Court went even further in Spaziano v. Florida, 468 U.S. 447, 82 L.Ed.2d 340 (1984), wherein it found that an instruction on offenses barred by the statute of limitations was not required because such an instruction would not enhance the rationality of the decision making process. Appellant also reads Harris v. State, 438 So.2d 787 (Fla. 1983) much too broadly. In Harris, this Court applied the Beck rationale to capital offenses committed in Florida.

In the instant case the defendant obtained all the lesser included instructions of murder. Thus, the jury was given the option of finding the Appellant guilty of a non-capital crime, such as second degree murder. The jury was not forced into a choice between a not guilty verdict or death verdict with a mandatory penalty, they had non death options including jury pardon options with regard to the capital crimes. The jury recommended death by a 12-0 vote after only twenty minutes of deliberation (R 1117, **1120, 1121).**

Therefore, in this case the requirements of Beck, supra, Hopper, supra, Spaziano, supra, and Harris, supra, are all satisfied and the conviction should be affirmed.

Appellant desires that this Court extend the rationale of Harris to other offenses in a capital murder trial. Such an extension is not warranted. Appellant's counsel specifically requested no instruction on lesser included offenses of robbery (R **929).** He knew the elements of robbery were theft and force, §812.13, Florida Statutes. He knew if the jury found no theft, they had to find no robbery. However, if they found theft he knew that no person who had seen the homicide photographs could argue that no force was used. They had to find robbery.

Further, there is no mandatory lesser included offense of felony murder and under the evidence no lesser included offense to robbery existed. Finally, Appellant was charged with Armed

Robbery (R 1140), thus theft, a two step lesser crime, is not required to be given unless the facts support it.

This Court has previously ruled in Jones v. State, 484 So.2d 787 (Fla. 1983), that Harris is not to be extended to non-capital crimes. The Appellant has presented no cognizable reason for modifying that decision.

Finally, Appellant's whole argument is based on a negative inference from silence in the record. The record is equally susceptive of being construed to mean that the defendant was present and did not object to his attorney's request.

ISSUE VIII

THE TRIAL COURT DID NOT ERR IN ALLOWING THE PROSECUTOR TO IMPEACH A CHARACTER WITNESS WHO TESTIFIED DURING THE PENALTY PHASE.

Appellant admits that in the penalty phase some confusion existed about the Appellant's prior criminal behavior. Appellant's witness, on cross-examination, admitted that the Appellant shot his girlfriend and that he was wanted in Augusta, Georgia. She did not know about any escapes (R **1079).**

Appellant objected on the ground that it was conduct which had not resulted in a conviction. He did not object on a factual basis until after closing arguments.

In closing argument, the prosecutor said Appellant was a three time convicted felon (R **1096)** Appellant admitted this on the stand (R **966).** In addition, the prosecutor said Appellant shot his former girlfriend and is still wanted in Augusta, Georgia. The facts are the Appellant was wanted in Augusta for aggravated assault with the intent to commit murder on his girlfriend and for escape (R **1119,** 1120, **1463).** In the altercation, the girlfriend apparently shot the Appellant.

The judge instructed the jury to disregard any reference to the allegation that the defendant shot his girlfriend (R 1101-1102). Appellant's counsel did not object to the instruction as inadequate nor reassert the motion for mistrial until the jury

retired. Appellant now claims the factual error should have been corrected by the trial court. His arguments ignore trial counsel's statement that he did not want the facts out, "The Judge correcting the allegation that he shot his girlfriend by pointing out that he was alleged to have beaten his girlfriend or some other act of violence on her would hardly improve our case." (R 1120).

Appellant admitted being convicted of three felonies. There is no question he was wanted in Augusta for escape and an assault on his girlfriend. The unresolved question of who did what to whom in the Augusta assault was not so prejudicial as to override the curative instruction. Buenoano v. State, no. 68,091, F.S.Ct. (June 23, 1988). If error, it was invited. Sullivan, supra.

Appellant alleges that Robinson v. State, 487 So.2d 1040 (Fla. 1986), mandates reversal. This is not so. In Robinson, the State relied on the aggravating factor of previous convictions of violent felonies. The State tried to bolster its position on this aggravating factor by using allegations of crime without the required convictions.

In the instant case the State did not request or argue prior convictions as an aggravating factor. Its arguments went only to the credibility of the testimony that the Appellant was a "good man."

In evaluating the witness's opinion that the Apellant was a good, kind man, the jury is entitled to know the extent of the witness's knowledge of the Appellant and her knowledge of incidents which would relate to her testimony. It is proper in evaluating opinion testimony to determine if the opinion has a proper basis. Parker v. State, 476 So.2d **134** (Fla. 1985).

This jury knew the Appellant robbed and killed people. It was entitled to hear evidence that he was a "good man except that sometimes he kills people." Fead v. State, 412 So.2d 176, 180 (Fla. 1987).

If error occurred it was corrected by the instruction and certainly was not fundamental in any way as this Appellant had no statutory mitigating evidence and minimal nonstatutory mitigating evidence. Appellee would again note that the vote was 12-0 for death and the deliberation took only twenty minutes (R 1117, 1120, 1121).

ISSUE IX

THE TRIAL COURT PROPERLY FOUND TWO AGGRAVATING FACTORS ESTABLISHED BY THE EVIDENCE,

In sentencing the Appellant to death, the trial judge found two aggravating circumstances.

> (1) The homicide occurred during the commission of a robbery. §921.141(5)(d), Florida Statutes.
>
> (2) The homicide was cold, calculated and premeditated. §921.141(5)(i), Florida Statutes,

As both the circumstances were proven beyond a reasonable doubt, the death sentence should be affirmed. Dixon v. State, 283 So.2d 1 (Fla. 1973).

The homicide occurred in the course of a robbery. The State proved that a robbery occurred. The evidence established that property (money) was taken from the murder victim. (See Issue V). Since the standard of proof is the same for a conviction and proof of this aggravating circumstance, the jury conviction establishes guilt beyond and to the exclusion of every reasonable doubt and justified the trial court's finding of this aggravating factor.

The second aggravating factor found was that the killing was committed in a cold, calculated and premeditated manner. On this point the record reflects:

(1) The defendant admitted to the police that he had been in the store previously R **749-759, 792-794).**
(2) The store was located in a rural area (R **476, 477).**
(3) The store was run by Mrs. Taylor, an older widow (R **476).**
(4) The Appellant lived in Valdosta, Georgia at the time of the crime (R **137, 948).**
(5) There was no evidence of a struggle (R **722).**
(6) The shot was fired with the pistol in contact with Mrs. Taylor's face R **718, 719).**
(7) The pistol was placed in contact with her face, next to her nose where she could see it (R **506-507, 719).**
(8) The Appellant's pistol had to be purposely cocked prior to pulling the trigger (R **824).**
(9) Having to cock the pistol prior to shooting. The Appellant either cocked it before going in, thereby establishing heightened premeditation and witness elimination plan, or placed it in contact with her face then cocked it, then fired it, establishing the heightened premeditation or desire to eliminate the witness.

The time to get to the store, the action, and the execution style shooting, placing the gun to the victim's face then, one shot to the head, all support the finding of the trial court that the murder was committed with a heightened sense of premeditation.

The cases cited by the Appellant are factually distinguishable from this killing. In each there was testimony or evidence that supported the conclusion that the homicides lacked the heightened premeditation necessary to support this aggravating factor. In Rogers v. State, 511 So.2d **526** (Fla.

1987), the evidence was that the murder occurred because someone chased the defendants after an aborted robbery. Likewise, in Maxwell v. State, 443 So.2d 967 (Fla. 1984), in Cannady v. State, 427 So.2d 723 (Fla. 1983), and in Jackson v. State, 498 So.2d 906 (Fla. 1986), there was evidence that the victim resisted and it was the resistence that caused the murders. No such evidence exists in the instant case, therefore, the cases cited by the Appellant are not factually controlling.

Appellant told Woodson in jail that the police had his gun and it could lead the investigator to him (R 875). That statement in conjunction with other facts about Appellant's gun and the murder weapon establish his gun was used. Therefore, the execution style killing; the cocking of the gun prior to shooting, the placing the gun to the face, establish this aggravating factor.

This Court should affirm the finding of two aggravating factors, but even if one is rejected, the sentence should be affirmed as one statutory aggravating circumstance is sufficient and the trial court stated he would have imposed the same sentence even if only one existed (R 1416).

ISSUE X

THE TRIAL COURT DID NOT ERR IN SENTENCING APPELLANT TO DEATH AS THE PENALTY IS NOT DISPROPORTIONATE TO THE CRIME.

Appellant alleges that based on proportionality, the death sentence violates the Eighth and Fourteenth Amendments. He is wrong as the United States Supreme Court has repeatedly stated there is no right under the Federal Constitution to proportionality review. Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29 (1984). Appellee acknowledges that this Court does conduct proportionality as part of its complete review of a death case. Sullivan v. State, 441 So.2d 609 (Fla. 1983).

Appellant then alleges, based on Proffitt v. State, 510 So.2d 896 (Fla. 1987) and Caruthers v. State 465 So.2d 496 (Fla. 1985), that under a proportionality analysis he is entitled to a reduction of his sentence to life. He is wrong. The cases he relies on are distinguishable on the facts.

Appellant's reliance on Proffitt, supra, is misplaced. In Proffitt at resentencing, the trial court found two mitigating factors. The court in the instant case found none. In Proffitt, there was no evidence that Proffitt entered the dwelling armed in any way. The Appellant entered the store armed and, by cocking the pistol, carefully considered the nature of his vile deed. Further, in Proffitt, the defendant had been drinking and had no criminal history.

In Caruthers, one valid aggravating circumstance existed, along with mitigating circumstances and additional nonstatutory mitigating circumstances. Appellant sub judice had no mitigating circumstances whatsoever.

Appellee takes strong exception to Appellant's allegations that he had no history of violence. The record reflects that the Georgia police were questioning him about aggravated assault, stemming from his shooting at a woman after a traffic accident (R **1168, 1172).** Further, the Appellant was wanted for aggravated assault and escape regarding an incident with his former girlfriend in Augusta, Georgia (R **1119, 1120, 1463).** Further during voir dire, a prospective juror identified the defendant as the blue light rapist who had recently assaulted her **(R 187, 188).**

Finally, Appellant was convicted of two counts of possession of a firearm by a convicted felony occurring between the commission of this offense and sentencing (R **1467).** Thus, the facts are in accord with Mason v. State, **438** So.2d **374** (Fla. **1983)** and Herring, supra, not with the cases the Appellant has cited. This court should conduct its proportionality review and affirm the sentence as valid aggravating factors were found and no mitigating factors exist.

ISSUE XI

THE TRIAL COURT DID NOT ERR BY GIVING THE STANDARD JURY INSTRUCTION REGARDING THE JURY'S ROLE IN THE SENTENCING PROCESS.

The Appellee would first assert that Appellant is procedurally barred on this issue as he did not object at trial (R 1117) and did not preserve this issue for review. Combs v. State, 13 F.L.W. 142 (Fla. 1988).

Although Appellant asserts that the reasoning of Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231 (1985), is applicable to the facts in this case, Appellant recognizes that this Court has repeatedly rejected his argument in cases such as Combs, supra, and Grossman, supra. Appellant fails to recognize that Combs was not only a statement of the law in Florida but an instruction to the Eleventh Circuit Court of Appeals that maintaining any other position will not only be wrong but will be a deliberate misstatement of Florida law.

Contrary to the Eleventh Circuit Court of Appeals opinion, the United States Supreme Court has recognized that the jury recommendation in Florida law is advisory. Spaziano, supra. In light of this, cases such as Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted, are neither applicable nor does the reasoning found in those cases have any persuasive force at all. Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988).

Appellant further alleges that instructions were incomplete and misleading and misstates Florida law. He alleges that the jury must be instructed that the sentencing judge will give their recommendation great weight. Just as in Combs, supra, and Grossman, supra. The jury was properly instructed as to how they were to carry out their duties, no error occurred and this Court must affirm.

ISSUE XII

ANY ERROR REGARDING THE GUIDELINE SCORESHEET WAS HARMLESS AS THE TRIAL COURT DEPARTED BASED ON VALID REASONS.

Appellant alleges that the trial court used the wrong scoresheet and he is entitled to resentencing.

Even if the trial court used the wrong scoresheet, the Appellant is not entitled to resentencing. The trial court departed from the 17-22 year range it calculated and imposed a life sentence. The reason for departure, capital murder, is as the Appellant concedes, a valid reason. Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) and Livingston v. State, 13 F.L.W. 187 (Fla. 1988).

Since the reason for departure is valid, it would be ludicrous to remand for resentencing. It is clear beyond a reasonable doubt that a court which departed from a 17-22 year range would certainly depart from a range of three and one-half to four and one-half years. Since the extent of the departure is no longer reviewable, Booker v. State, 514 So.2d 1079 (Fla. 1987), and this offense occurred in September of 1986 after the effective date of the Chapter 86-773 Laws of Florida, any error was harmless. Torres Arboledo v. State, 13 F.L.W. 229 (Fla. May 24, 1988).

CONCLUSION

Based on the foregoing arguments, the opinion of the District Court of Appeal should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Mr. William C. McLain, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 27 day of June, 1988.

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