IN THE FLORIDA SUPREME COURT

CLINTON JACKSON,

Appellant,

vs

STATE OF FLORIDA,

Appellee.
_____/

APPEAL NO. 71564

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, PINELLAS COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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I. STATEMENT OF THE CASE AND FACTS

This is the retrial of a case in which convictions for first degree murder and armed robbery were reversed by this Court. Jackson v. State 498 So.2d 906 (Fla. 1986). Upon retrial, defendant was again convicted of both charges. He was sentenced to death on the murder charge and to 99 years incarceration on the armed robbery charge. R.1-2, 45-46, 75-76, 93, 126-34.

In a separate trial, defendant's brother was also convicted of these two charges and sentenced to death. The brother's convictions and sentence were affirmed by this court. Jackson v. State 502 So.2d 409 (Fla. 1986), cert. denied 107 S.Ct. 3198 (1987).

A. GUILT PHASE

The victim of both crimes was the owner of a small hardware store. He was found lying on the floor of his store one afternoon about 5:00 p.m. He had been shot once in the chest. He was alive when found, but he died within minutes. The wound was such that his death probably occurred within minutes of the shooting. R.519-23, 527-29, 531-34, 543-48, 581-82, 592.

The cash register was open. A dollar bill was found in the register. Small change was scattered on the floor. The victim had a five dollar bill in his hand. R.519-23, 527-29, 543-48.

No gunpowder residue was found on the victim, which indicates the shooter was at least three feet away. The victim's body was about eight feet from the cash register. There was no blood on the floor, nor any other evidence to show exactly where the victim was standing when shot; his head was not facing

towards the cash register. The State's expert opined the victim could have moved some distance after being shot. R.543-48, 554-55, 582, 595-96.

Two ladies were at a church near the store that afternoon. Sometime between 4:00 p.m. and 5:00 p.m., they saw two young men running through an alley away from the direction of the store. One was running slightly ahead of the other. The two men entered a small black pickup truck and drove away. The ladies later identified the truck as one belonging to defendant's mother's boyfriend. Neither actually saw the two men in the store; they could not see the store from their location. R.611-27, 827-30, 844.

Defendant's brother's palm print was found on the cash register in the store. The brother's fingerprints were also found in and on the truck. Defendant's fingerprints were found on the steering wheel. The boyfriend said he saw defendant in the truck about noon on the day of the shooting. Someone was with him, but he did not know who it was. R. 685-715, 826-30.

Defendant was arrested at his home about eight hours after the shooting. He denied any knowledge of or involvement in the shooting. He said he had been with his brother in the truck during the day. He had dropped his brother off at about 4:00 in the afternoon, the brother walked away, and they had no further contact. R.844-45, 853-55, 871-72, 878-81.

Defendant's mother and the boyfriend came to see defendant at the jail later that evening. At that time, at that facility, inmates and visitors were physically separated by glass and wire

mesh partitions. Conversation occurred through the wire mesh. R.808-14, 821-24.

At the time of this visit, four to six other inmates had visitors present. The inmates were all in the same room. It was noisy; the conversants often had to yell to be heard. R.729-31, 740-41, 808-24.

An inmate named Freddy Williams was next to defendant. Williams' girlfriend was visiting. Although he heard none of what defendant's visitors said, Williams heard defendant tell them "we had to do it because he had bucked the jack". Williams said this latter phrase meant a robbery victim resisted the robbery. However, he later admitted "Jack refers to money . . . and a lot of different things." Williams also said defendant also told his visitors "to tell Nate, if they picked [him] up . . . he hadn't been nowhere around the hardware store and get rid of the gun". R.729-33.

Williams admitted the room was crowded and noisy at the time. He admitted he was conversing with his girlfriend while he overheard defendant's statements. He said this presented no problem because he could "talk and hear at the same time." R.740-43. He could not remember anything said by any of the other inmates also present at the time. R.745. He admitted each inmate visitation cubicle was separated by a one foot wide metal wall. He also admitted that, because of the noise, "you had to put your mouth a couple of inches away . . . right close to that grate . . . to yell to somebody you are trying to talk to." R.776-77. However, he was sure defendant said "we" rather than "he" when

talking to his visitors. R.748-49.

Williams at that time was facing five felony charges and a violation of life parole. He contacted the State Attorney's Office the next morning. It was established Williams testified as a State witness (to jailhouse confessions) in several other murder cases. He denied expecting or receiving any leniency from the State for his efforts; however, he did admit to being "frustrated" when he was sentenced to an eight year prison term on the five pending felonies (which included one life felony). R.750-60, 770-72, 782-83.

1. The State's Predicate For The Admission Of Melvin Jones' Prior Testimony

Over defendant's objection, the State was allowed to introduce the prior testimony (given at defendant's first trial) of one Melvin Jones. This prior testimony was introduced pursuant to Florida Statute Section 90.804(1)(e) and (2)(a)(1987), which provide as follows:

> (1) DEFINITION OF UNAVAILABILITY - "Unavailability as a witness" means that the declarant:
>
> . . .
>
> (e) Is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means.
>
> . . .
>
> (2) HEARSAY EXCEPTIONS - The following are not excluded [as hearsay], provided that the declarant is unavailable as a witness:
>
> (a) Former testimony - Testimony given as a witness at another hearing . . . if the party against whom the testimony is now offered . . . had an opportunity to develop the testimony by cross examination.

To establish the predicate of unavailability, the State

presented testimony from one of its investigators. The investigator testified on two occasions. He first testified after the jury was sworn but before opening statements. At that time, he said he began looking for Jones about two months before the trial. He "checked the post office, the utilities, the welfare [and] unemployment" without success. Neither Jones' aunt, his wife, nor his probation officer knew his whereabouts. There were warrants out for his arrest for violation of probation. Defendant's mother and her boyfriend did provide some information; indeed, Jones had been living with the boyfriend until "two, three weeks ago". The mother said Jones had been seen recently driving the boyfriend's car. The investigator obtained the license plate number of this car but it did not result in any information on Jones. R.488-89.

The boyfriend told the investigator Jones was living in St. Petersburg. He provided a voice pager number. Although initial efforts to contact Jones through this pager were unsuccessful, Jones later called and said to leave a number where the investigator could be reached with his (Jones') aunt. Jones called the investigator the following morning and said that he would call later in the day to find out when he had to testify. This occurred "last Sunday or this Monday." (Presumably, June 21 or 22; this testimony was given on June 24). R.487-90, 492.

Jones would not tell the investigator his location. He did not call back. The investigator called the aunt again. She said she did not know where Jones was; however, Jones had been calling her. R.490.

When asked if he had staked out the aunt's house or Jones' wife's house, the investigator said that would be useless because he was white and he would have been immediately spotted as a police officer in the black neighborhoods. He said his staff had no black investigators and he did not ask for the assistance of any black St. Petersburg police officers. R.491-93.

Defendant objected to the use of Jones' prior testimony and moved to continue the trial until Jones was found. Defendant asserted the State had not made a diligent effort to locate Jones. Defendant further asserted there had been a substantial change of circumstances since the prior trial. At the prior trial, Jones testified he expected no benefit from his testimony. However, he had in fact benefited from his testimony. Defendant asserted Jones lied in his earlier testimony, but he could not prove that without Jones being present. Defendant noted that, after his testimony at the first trial, Jones pled to the "eighteen pending charges and violations of probation" he was facing at that time. He received a sentence of "two years, credit for 329 days served" when the guidelines showed a recommended sentence of seven to nine years. Defendant asserted he would be prejudiced by the use of the prior testimony because he would not be able to confront Jones with these facts. The trial court denied defendant's motion to continue and ruled the State could use the prior testimony. R.493-502. Following a lunch recess, defendant moved for a mistrial on the same grounds. The motion was denied. R.509-11.

Later that afternoon, Jones called the investigator again;

in fact, he called twice. He promised to be in the next morning. He said he was "on the other side of Plant City someplace", but he would not be more specific. R.633, 638-39, 646.

The next morning, Jones did not show. Defendant renewed his prior motions. The investigator testified again. Defense counsel asked if a BOLO (be on the lookout) had been put out on Jones. The investigator said that was not necessary because of the outstanding warrant for Jones' arrest. Counsel noted a BOLO would be more effective because "the only way the police would arrest someone with a warrant is if [they] happen to come in contact with them." The investigator responded "for a BOLO, you have to have very specifics. What do I put a BOLO out for? A black male, Melvin Jones, along with the several hundred other black males?" Counsel then noted Jones had an extensive criminal record and the investigator agreed local police agencies would have his picture. The investigator admitted he could have obtained a picture of Jones but did not. He said he had "never heard of anyone putting a BOLO out for a witness." Defendant again argued the State had not made a diligent effort to find Jones and the trial court again ruled against him. R.645-49. Jones' prior testimony was then read to the jury, with an assistant state attorney (described by defense counsel in closing as "a handsome articulable [sic] almost movie star kind of looking guy") reading Jones' words. R.996.

2. Melvin Jones' Prior Testimony

Jones said he was working with defendant several days prior to the shooting. Defendant went to the hardware store to buy

some items. Upon returning, defendant said to Jones "I'm going to knock your buddy over down at the store." Jones said he understood this to mean defendant was going to "rob it . . . rip it off . . . take what's not yours." He admitted on cross-examination that the phrase "could [also] mean a burglary . . . and a host of different things." He said he had previously seen a .32 caliber handgun under the front seat of the truck. R.664-67.

Jones said defendant had the boyfriend's black truck on the morning of the shooting. Around lunch time, he saw defendant and his brother in the truck. About 4:45 p.m., he saw defendant driving the truck in the direction of the hardware store. About a half hour later, he saw defendant driving away from the direction of the store. Another person was with defendant at the time, but he could not identify him. R.659-63.

On cross-examination, Jones said he did not expect to receive any benefit from his testimony. Defense counsel noted Jones had previously testified for the State in another murder case at a time when he had eighteen felony charges outstanding and, after that testimony, he received a five year suspended sentence and spent no time in prison. Counsel pointed out that Jones had recently been arraigned on seven violations of probation and another felony charge and he was facing possible prison time again. Jones still denied he was expecting any benefits from his testimony. R.667-69.

On redirect, over defendant's objection, Jones testified that he had received numerous threats for testifying against

defendant. The threats did not come from defendant and were not linked to defendant in any way; rather, they were admitted to reflect on Jones' motive or bias in testifying. R. 669-82.

3. Closing Argument

In closing argument, the State discussed Freddie Williams' testimony and cross-examination, during which defendant brought out the fact that Williams did not know what defendant's visitors said to him that night. The State then said:

> [The mother], who was available as a witness, wasn't called to the stand. The defendant has no burden of proof. That rests with the State, but when a witness is available to one side, because of parental relationship, and not available to the State because of bias, you can't consider the fact if [the mother] could have aided, she would have been brought to the stand. R.979-80. (Emphasis added).

Defendant objected, asserting the State was attempting to shift the burden of proof to defendant. The State argued such comments were permissible on the authority of State v. Micheals 454 So.2d 560 (Fla. 1984). R.980-81. Defendant's objection was overruled and the State continued as follows:

> As I was saying, the defense has no burden of proof, but it is a fact you can consider, particularly when they are suggesting why wasn't this witness -- why wasn't that in the State's case? This man -- they have the same ability to call witnesses to the stand and subpoena people like [the mother]. They have that ability. They don't have an obligation to prove the elements or disprove the elements, but it makes sense that a man in such circumstances, serious circumstances, that they suggest that Clinton Jackson is facing, that if [the mother] had been helpful to his case, that his mother would have been called to the stand. What more damaging indictment can there be of the defense position and of their accusations that Freddie Williams misunderstood or construed the conversation, than the fact that the defendant's mother, who was an eye-witness, who was a participant,

was not called to elucidate the inquiry? That is a fact you are entitled to consider.

Now, ordinarily if witnesses are available to both sides and they aren't called to the stand, then you shouldn't infer anything about their testimony except principles. They don't have anything to add, but when that relationship exists, because I can't cross-examine or impeach witnesses that I put on the stand, when that relationship exists, then it is appropriate consideration for you, and for all the facts on Freddie Williams as well as his testimony remains uncontradicted. R.981-87. (Emphasis added).

In his rebuttal closing argument, defendant attempted to reply to this argument:

-- let's not throw a smoke screen here. Where is the burden? The burden is right at that table. According to Detective Feathers, he saw [the mother] today, outside. If the State was going to corroborate Freddie Williams' testimony and Freddie Williams was, according to him, I'm sorry, according to Freddie Williams, he was talking to his mother. R.1002

The State objected and, in the jury's presence, asserted "that is improper because of the relationship. She is not equally available." The objection was sustained. Defense counsel noted "she was outside." The trial court sustained the objection again and told the jury to "ignore that." R.1002.

4. Jury Instructions

Over defendant's objection, the trial court instructed the jury on flight, as follows:

Flight. If you find that the defendant, in any manner, endeavored to escape or evade threatened prosecution, by flight, concealment, resistance to a lawful arrest or other indications of a desire to evade prosecution such fact may be considered by you as one of a series of circumstances indicating a consciousness of guilt and from which guilt may be properly inferred. You may also consider that any such flight was from the immediate vicinity of the crime charged. Any such evidence of flight or concealment raises no presumption of guilt, but it is, nevertheless, a circumstances which you might rightfully consider together with all

> other circumstances, and give such weight thereto as you see fit in light of all the other evidence in the law as given to you by the Court. R.1021-22.

Defendant asserted there was no evidence of flight. In response, the State noted the evidence of "two people fleeing the scene." R.915.

Defendant's request for instructions on category II lesser included offenses was denied. R.902-03. The jury was instructed on the category I lessers of first degree murder: second degree murder and manslaughter. R.1015-16. Prior to being instructed on the specific elements of these three degrees of homicide, the jury was told "murder in the first degree includes the lesser crimes of murder in the second degree, murder in the third degree and manslaughter." R.1011. The jury was also told:

> If you find [the victim] was killed by Clinton Jackson, you will then consider the circumstances surrounding the killing in deciding if the killing was murder in the first degree or was murder in the second degree, murder in the third degree, manslaughter, or whether the killing was excusable or resulted from justifiable use of deadly force. R.1011.

However, third degree murder was never defined for the jury.

Following the instruction of the jury, defendant renewed his prior objections and they were again denied. R.1032.

B. PENALTY PHASE

At the penalty phase the State recalled the lead detective in the case. He said he talked to defendant's mother about her conversation with the defendant at the jail (the one overheard by Freddie Williams). The detective said the mother admitted defendant had confessed to her, telling her he "had to do it because the guy bucked the jack." The mother also told the

detective she "felt that [defendant's brother] was being held by the victim and [defendant] had to shoot him to gain the release of [the brother]". R.1094-97.

In mitigation, defendant presented testimony from his mother, his two sisters and two former girlfriends, both of whom had born his children. The mother denied making the statements attributed to her by the detective. R.1106-10. The family members said defendant was the oldest of four children. Their father was an alcoholic who did not live with them during their childhood. Defendant quit school at about the age of sixteen and worked to help support the family. For many years he filled the role of father figure in the family and took care of the younger kids while the mother worked two jobs. When he was about twelve years old, he jumped into a neighborhood swimming pool and saved a young boy from drowning. He was twenty one years old at the time of the shooting. R.1099-1103, 1117-21, 1125-27.

The two girlfriends both testified that defendant was a good father to his children, not only supporting them financially, but also helping with their feeding and care. R.1112-15, 1129-32.

Defendant testified and corroborated the testimony of the other witnesses. He stated he was "very sorry" the victim was dead. R.1138. On cross-examination, he denied having any involvement in the crime. R.1138. The State started to ask about his whereabouts that afternoon. Defense counsel objected, saying defendant's guilt had already been decided. The State responded that defendant opened the door to such inquiries by expressing remorse for the victim's death. Defense counsel replied

defendant was merely "expressing basic human sorrow for a human death" and asserted he was not going to argue defendant's remorse to the jury. Defense counsel asserted the State was trying to establish lack of remorse as an aggravator. The trial court sustained defendant's objection. R.1140-42.

The State began it's penalty phase closing argument by asserting defendant was the "triggerman, who planned it, conceived it and executed it, has shown no remorse, nor acknowledgment of guilt and is deserving of the death penalty." R.1148. Defendant objected. Despite defense counsel's repeated assurance he was not planning to argue remorse as a mitigator, the State asserted "anticipatory rebuttal" as a justification for arguing lack of remorse to the jury. R.1148-49. The trial court overruled defendant's objection and the State again argued to the jury defendant had shown "no indication of remorse [nor] indication that he has acknowledged guilt." R.1149-50. The State then asserted defendant saw the victim as "an easy mark, like a wolf following a herd of reindeer, picking out the weakest, the most susceptible victim." R.1153. The State further asserted defendant "carried the major portion of [the crime] and committed the murder himself." R.1153.

In arguing in favor of the aggravator of avoiding arrest, the State noted the victim had "viewed" the defendant on his trip to the store several days prior to the shooting. R.1156. The State misquoted Freddie Williams' testimony, saying Williams testified defendant told his mother "I had to do it. The guy had Nate." R.1157. The State asserted the victim was "not

intimidated", "was fighting back", "would have gone to the police" and "would not have been afraid to go into court and make an identification, to testify." R.1157-58.

The State again asserted defendant was the triggerman. At that point defendant interrupted the proceedings and proclaimed his innocence. R.1162. After order was reestablished the State again addressed the question on remorse (in the context of rebutting the residual mitigator of any other aspect of defendant's character or the circumstances of the offense):

> There are a lot of things - when you say any circumstances of the offense, any aspect of Clinton Jackson's character, you might think it might be mitigating when the question was being asked, aren't you sorry for the death of Herbert Phillibert? Yes, I am sorry Mr. Phillibert is dead. Don't make any mistake about how that was intended, because in cross-examination when I began to explore it, it became apparent it was not intended to establish remorse, and from what has happened in the courtroom in the last few minutes, it is clear that that is simply not the case. R.1165-66. (Emphasis added).

The jury recommended the death penalty by a 10-2 vote. R.93, 1185. The trial court followed the jury's recommendation. R.128. The trial court found two aggravating circumstances. R.150-55.

The first aggravating circumstance was actually a merger of three aggravating circumstances: that the murder occurred during the commission of a robbery; that the murder was committed for financial gain (i.e., robbery); and that defendant had previously been convicted of a violent felony (i.e., the contemporaneous robbery conviction). The court found that defendant was present and participated in the robbery, that defendant intended to kill the victim, and that defendant was the triggerman. R.152-53.

The trial court also found the murder was committed to avoid arrest or effect an escape from custody. Noting defendant and his brother could have overpowered the victim without firing the gun and that defendant had encountered the victim in the store previously, the court found that "avoidance of arrest was a dominant motive in the planning and execution of the crime." R.153-54.

The court found nothing in mitigation. R.154.

II. SUMMARY OF ARGUMENT

A. GUILT PHASE

The evidence was insufficient to support the convictions. The evidence did not establish an armed robbery because it does not show the use of force preceded or was contemporaneous with the taking of any property. Further, there was no showing defendant participated in or aided and abetted the activities inside the store. There is no evidence of premeditation and, since robbery is the only felony which could support a felony murder conviction, the evidence is insufficient under this theory as well.

Alternatively, prejudicial errors were committed at trial. It was error to admit Melvin Jones' prior testimony because the State did not make a good-faith effort to locate him. Further, defendant did not have an opportunity to cross-examine Jones at the first trial about crucial impeachment matters. It was also error to deny defendant's motion to continue the trial to allow Jones to be located. This denied defendant the opportunity to fully cross-examine Jones and deprived the jury of the

opportunity to observe Jones' demeanor.

It was error to admit Jones' testimony about threats made against him when those threats were not linked to defendant. Such testimony is inflammatory and unfairly prejudicial.

It was error to allow the State to argue to the jury it could consider the fact that defendant's mother did not testify as a circumstance indicating guilt. Such comments are improper when (as here) the State itself injects the missing witness into the case and the defendant neither asserts nor implies that the missing witness would provide favorable testimony. No predicate was laid to show the mother was available as a witness and competent to testify about the matters asserted by the State. Further, the State's comments here amounted to impermissible and inaccurate instructions on the law because the State implied it was somehow unable to call the mother as its own witness and defendant had some burden of production or proof in this regard. It was also error to prevent defendant from replying to this line of argument by pointing to that the State could have called her as a witness.

It was error to instruct the jury on flight because it was not clearly established that defendant did in fact flee.

It was error to fail to instruct the jury on third degree murder as a lesser included offense. The evidence supported such an instruction, based on the underlying felony of grand theft. Further, the jury was twice told that third degree murder was a lesser, but no definition of third degree murder was given. The jury was thus not fully advised of its options and the

definitions of the various degrees of homicide was incomplete.

B. PENALTY PHASE

The death penalty cannot constitutionally be applied in this case. To do so would violate the principles of Enmund and Tison because the record does not sufficiently establish that defendant killed, attempted to kill, intended to kill, or exhibited a reckless indifference to human life while acting as a major participant in a felony. At best the record merely establishes that defendant helped perpetrate an armed robbery during which a killing occurred. Such facts are insufficient to warrant a death sentence.

Alternatively, the death penalty is unconstitutionally disproportionate to the facts in this case. This Court has vacated death sentences in several cases with similar facts.

Assuming arguendo the death penalty can be constitutionally imposed here, errors were committed during the penalty phase which violated defendant's state and federal constitutional and statutory rights to a fair and impartial sentencing determination. It was error to allow the State to argue and to instruct the jury on the aggravator of avoiding arrest. The evidence was insufficient to establish this aggravator. It was also prejudicial error to allow the State to argue defendant's lack of remorse to the jury. Lack of remorse is not an aggravator and defendant did not open the door to anticipatory rebuttal of remorse as a mitigator because he specifically waived reliance on this mitigator.

III. ARGUMENT

A. GUILT PHASE

1. The Evidence Was Insufficient To Support The Armed Robbery Conviction

There was no direct evidence that any property was taken from the victim. Assuming arguendo the empty cash register can be said to have established this fact beyond a reasonable doubt, there is no direct evidence that the property was obtained "by force, violence, assault, or putting in fear." Florida Statute Section 812.13(1)(1987). Although the evidence could indicate an armed robbery occurred, it is also reasonable to infer a theft occurred, with the shooting taking place during the escape. In those circumstances no robbery is committed because, to establish that offense, "the violence or intimidation must precede or be contemporaneous with the taking of the property." Royal v. State 490 So.2d 44, 46 (Fla. 1986) (quoting Montsdoca v. State 84 Fla. 82, 93 So.157 (1922) (emphasis deleted); Williams v. State 516 So.2d 975 (Fla. 5th DCA 1987), pet. for rev. denied 525 So.2d 881 (Fla. 1988) (defendant grabs cash from store cash register, knocks down security guard during escape; armed robbery conviction reduced to grand theft).

The testimony of Melvin Jones ("I'm going to knock your buddy over") and Freddie Williams ("he bucked the jack") does not establish an armed robbery. Such imprecise slang (which, both Jones and Williams admitted, could mean many different things) does not establish the requisite precedent or contemporaneous violence beyond a reasonable doubt. It was not shown that either Jones or Williams, when defining these phrases, fully appreciated

the significance of the timing of the use of force as determined in Royal. More importantly, it was not established that defendant was fully cognizant of this distinction when he used these phrases. In short, it is not clear exactly what type of factual scenario defendant, Jones or Williams was describing by such slang. To allow the crucial element of this crime to be established by such testimony is in effect to allow Jones' and Williams' unqualified opinions to determine the nature of defendant's crime. (Note that the lead detective in the case, an experienced homicide investigator, said the phrase "buck the jack" was "new to me . . . I had heard it only once before"; he had to ask defendant's mother "what she thought [it] meant." R.1096. Note also that Williams admitted he did not know exactly what defendant meant by the phrase. R.748). It is well-settled a witness may not offer an opinion on a defendant's guilt or whether a crime occurred. Mills v. State 367 So.2d 1068 (Fla. 3rd DCA 1979), cert. denied 374 So.2d 101 (Fla. 1979) (error for State witness to opine defendant did not kill in self-defense); Gibbs v. State 193 So.2d 460 (Fla. 2d DCA 1967) (error for State witness to opine defendant "murdered my nephew").

It is the State's burden to prove the elements of the crime charged beyond a reasonable doubt. Jones' and Williams' speculation on the relationship between casual street slang and the elements of armed robbery does not carry this burden.

Assuming arguendo a robbery occurred, there is no evidence defendant directly participated in it or knowingly and intentionally aided and abetted another commit it. The evidence

does not establish how many people were inside the store; one person alone could have committed the crime. R.562-63, 598. It is well-settled that defendant's mere presence at the scene - even when coupled with knowledge the crime would be committed and flight after its commission - is, standing alone, insufficient to support a conviction. See, e.g., Smith v. State, 502 So.2d 77 (Fla. 3rd DCa 1987); J.H. v. State 370 So.2d 1219 (Fla. 3rd DCA 1979), cert. denied 379 So.2d 209 (Fla. 1979); Douglas v. State 214 So.2d 653 (Fla. 3rd DCA 1968).

The evidence against defendant was circumstantial. "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State 351 So.2d 972, 976, N.12 (Fla. 1977). The evidence here leaves open several hypotheses of innocence regarding both the events leading to the shooting and defendant's role in these events. It was error to deny defendant's motion for judgment of acquittal on the robbery charge.

2. The Evidence Was Insufficient To Support The Murder Conviction

The jury was instructed on both premeditated murder and felony murder. R. 51-53, 1011-14. It returned a verdict of guilty as charged, without specifying which theory it accepted. R.45. The evidence was insufficient to support either theory.

There is no evidence of premeditation on defendant's part. Nor is there any evidence defendant aided or abetted someone with such intent. See Hegstrom v. State 388 So.2d 1308 (Fla. 3rd DCA

1980), aff'd in part, rev'd in part (on other grounds), 401 So.2d 1343 (Fla. 1981).

As argued above, the evidence is insufficient to sustain the armed robbery conviction. Therefore, the evidence is insufficient to sustain a conviction for first degree felony murder.

It was error to deny defendant's motions for judgment of acquittal on the murder charge.

3. It Was Error To Admit Melvin Jones' Prior Testimony Because It Was Not Established The State Made A Diligent Effort To Locate Him And Defendant Had No Opportunity To Cross-Examine Jones On Crucial Impeachment Matters At The First Trial

To admit prior testimony as a hearsay exception, the proponent must show the declarant is unavailable. In this case, to establish unavailability the State must show it exercised due diligence in attempting to procure Jones' presence at trial. The showing of due diligence is required, not only by the Evidence Code, but by the Sixth Amendment Confrontation Clause as well. Ohio v. Roberts 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

The burden of making "a diligent, good-faith effort to obtain the witness' presence at trial . . . is a substantial requirement." People v. Dye 427 N.W.2d 501, 505 (Mich. 1988). The State must make "a thorough, painstaking and systematic attempt to locate the witnesses." Fresneda v. State 483 P.2d 1014, 1017 (Alaska 1971). "[T]he State must meet a higher standard when it reports that it cannot find the witness, than when it has found him but in a place beyond the court's jurisdiction." Green v. State 579 P.2d 12, 17 (Alaska 1978).

"[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." Roberts, infra, 448 U.S. at 74. "The fact that an attempt may prove unsuccessful does not justify the prosecution's failure to make that attempt." People v. McIntosh 204 N.W.2d 135, 137 (Mich. 1973).

The evidence here does not establish due diligence. The State sent one investigator to look for the witness. The investigator started looking for Jones about one week before the scheduled trial date of May 5. R.24, 486-87. (This trial date was continued to June 23. R.31. The reason for the continuance is not clear). After the May 5 trial was continued, the investigator demurred to a request from defendant's mother that she be allowed to find the witness. The mother told the investigator "not [to] get involved" because that "would inhibit her efforts"; "the ball", the investigator said, "was basically in their court." R.488. The investigator thus delegated the task of finding a crucial State witness in a murder trial to the defendant's mother.

The investigator did not consult or enlist the aid of any local police agencies, although they were apparently well-acquainted with the witness. Although readily available, no photos of the witness were obtained or distributed. No BOLO was put out; no stakeouts were initiated. Although the investigator freely admitted he was having trouble crossing the white-authority-figure/black-street-people barrier commonly encountered in such circumstances, he sought no help from any black police

officers (with possible keys to doors closed to him).

Upon learning the witness was in Hillsborough County, the investigator made no records check in that county. Although there was ongoing telephone contact with the witness (both to the investigator and to the witness's aunt) the aid of the telephone company was not sought. There is no indication the investigator checked with any of Jones' other family members or friends, or possible employers. Although the witness had had substantial contact with the criminal justice system, no records or files were checked. There was no attempt to trace the witness through his social security number.

Numerous cases in other jurisdictions have consistently held that such perfunctory efforts are insufficient to establish due diligence. State v. Greer 552 P.2d 1212 (Ariz. App. 1976); People v. Payne 332 N.E.2d 745 (Ill. App. 1976); Higgins v. State 396 A.2d 311 (MD. App. 1979); People v. Reed 78 Cal. Rptr. 368 (Cal. App. 1969); Hewell v. State 221 S.E.2d 219 (Ga. App. 1975); Green, infra; Dye, infra.

"[I]t is [the State's] duty to supervise and coordinate the efforts to locate the witness known to be missing." Greer, infra, 552 P.2d at 1217. "The prosecution's obligation to make a diligent good-faith effort is nondelegable." Dye, infra, 427 N.W.2d at 510. The "approval of introduction of the former testimony under these facts would encourage laxity rather than diligence and desultory searches rather than systematic and coordinated efforts . . . ." Payne, infra, 332 N.E.2d at 750. The State did not act with due diligence here.

Further, prior testimony is admissible only if the opponent "had an opportunity to develop the [prior] testimony by cross examination." Florida Statute Section 90.804(2)(a)(1987). This too is a constitutional requirement as well. Roberts, infra, 448 U.S. at 69-70. Defendant had no such opportunity in the present case because he had no opportunity to develop a crucial aspect of Jones' impeachment: that Jones had lied in his prior testimony about his expectation of benefit from his testimony, and that he had in fact benefited.

Thus the predicate for admitting Jones' prior testimony was doubly deficient. It was error to admit this testimony.

4. It Was Error To Deny Defendant's Motion For Continuance To Allow Him Time To Find Melvin Jones

The trial court erred in denying defendant's motion for continuance. Jones was a crucial witness for the State. He was in the geographic area and it was only a matter of time (and diligent effort) before he was located. As noted above, the use of the prior testimony in place of live testimony denied defendant the opportunity to cross-examine on crucial impeachment matters. Further, the use of a handsome, articulate assistant State attorney to play the role of a convicted felon and fugitive denied the jury (to defendant's prejudice) the opportunity to observe the demeanor of this crucial witness. The State would suffer no prejudice by a continuance; by contrast, the effect of its denial on defendant cannot be measured. It was error to deny this motion.

5. It Was Error To Admit Melvin Jones' Testimony About

Threats Made Against Him For Testifying When The Threats Were Not Linked To Defendant

Over defendant's objection, Melvin Jones testified to threats made against him by defendant's family. The threats did not come from defendant and were not linked to him in any fashion. R.669-76, 679, 681. This testimony was admitted to reflect on Jones' motives or bias in testifying. R.670-73.

It was error to admit this testimony. Such evidence "is inadmissible on the issue of the defendant's guilt unless the defendant has authorized the third party's action." State v. Price 491 So.2d 536, 537 (Fla. 1986). No such predicate was laid here. Although the testimony may have some relevance on the question of Jones' credibility, "the probative value of [the] third-party threats . . . is far outweighed by its prejudicial impact." Id.

Price is directly on point. Although disapproving in part the reasoning employed by the Fifth District (Price v. State 469 So.2d 210 (Fla. 5th DCA 1985)), this Court approved the District Court's holding that the introduction of such testimony is "highly prejudicial and harmful and . . . constitutes reversible error." 469 So.2d at 212, app'd at 491 So.2d 536. The facts in Price are substantially identical to those in the present case: a crucial State witness testified she had lied at the defendant's first trial because a third party (not linked to defendant) had threatened her physical safety. As in Price, the introduction of such testimony at defendant's trial is reversible error.

6. It Was Error To Allow The State To Argue To The Jury That It Could Infer From The Fact That Defendant's Mother Did Not Testify That Her Testimony Would Be Harmful To Defendant And To Preclude Defendant From Responding To This Argument

The State improperly commented in closing argument on defendant's failure to call his mother to the stand to testify about the conversation overheard by Freddie Williams. Further, the trial court erred in preventing defendant from responding to these comments.

The State asserted at trial that State v. Micheals 454 So.2d 560 (Fla. 1984) authorized such comments. However, Micheals cannot be read so broadly. Assuming arguendo Micheals applies here, the State failed to lay a sufficient predicate for such comments. Further, the comments in the present case went well beyond those allowed in Micheals and amounted to a (misleading) jury instruction on the law delivered by the State.

In Micheals the defendant was convicted of manslaughter for killing his daughter's ex-boyfriend in a barroom brawl. The defendant claimed self-defense and defense of another (his daughter). The daughter was present at the time of the killing. "The daughter was available but was not called to testify." 454 So.2d at 561. During closing, the State noted the failure of the daughter to testify and "infer[red] she was not called because her evidence would not support the defense." Id.

This Court held such comments were proper. Buckrem v. State 355 So.2d 111 (Fla. 1978) was cited and quoted with approval. Buckrem held that the State may properly comment on a defendant's failure to call witnesses whom, he asserts, could support his alibi defense. Micheals held the Buckrem rationale was equally

applicable to the defenses of self-defense and defense of others. Noting "the trier of fact is entitled to hear relevant evidence from available and competent witnesses", Micheals held the comments were proper for the following reason:

> The daughter was at the center of the dispute between respondent and victim and was present at both altercations on the day in question. Her evidence was highly relevant as to the reasonableness of respondent's claim that he was protecting her and equally relevant as to whether respondent's argument of self-defense was justified. Id at 562.

The Buckrem - Micheals rationale is not applicable here. "The rationale which emerges from these cases is that a prosecuting attorney may comment upon the failure of the defense to call a witness who has been demonstrated to be competent and available where the defendant's own presentation relies upon facts which could only be elicited from such witness, whose testimony consequently is assumed to be relevant, material and favorable to the defense." Romero v. State 435 So.2d 318, 320 (Fla. 4th DCA 1983), pet. for rev. denied 447 So.2d 888 (Fla. 1984) (emphasis added). Prosecutorial comments are permitted on the defendant's failure to call witnesses only when the defendant himself injects the significance of such witnesses into the trial, such as by raising an affirmative defense such as alibi or self-defense. See Daughtery v. State 325 So.2d 456 (Fla. 1st DCA 1976), cert. denied 336 So.2d 600 (Fla. 1976). (State can comment on failure to call alibi witnesses because "alibi is an affirmative defense in which the defendant is supposed to carry the burden of proof"). However, when the State injects the missing witness into the case, such comments are improper. In

such circumstances comments on the failure to call witnesses improperly suggest to the jury that the defendant carries some burden of production or proof on the disputed point. Brown v. State 524 So.2d 730 (Fla. 4th DCA 1988); Trinca v. State 446 So.2d 719 (Fla. 4th DCA 1984); Bayshore v. State 437 So.2d 198 (Fla. 3rd DCA 1983); Dixon v. State 430 So.2d 949 (Fla. 3rd DCA 1983), pet. for rev. denied 440 So.2d 353 (Fla. 1983); see also Kindell v. State 413 So.2d 1283 (Fla. 3rd DCA 1982) (Pearson, J., concurring).

Further, such comments are permitted "only when it is shown that the witnesses are peculiarly within the defendant's power to produce and the testimony of the witnesses would elucidate the transaction, that is, that the witnesses are both available and competent." Kindell, infra, 413 So.2d at 1288. (Pearson, J. concurring) (emphasis in original); Bayshore, infra, 437 So.2d at 199. It is the State's burden to lay this predicate. Id.

In the present case, it was the State, not defendant, who injected the mother into the case. Defendant did not assert - either directly or indirectly - that his mother's testimony would contradict Freddie Williams. Further, unlike Micheals the mother here was not an eye-witness "at the center of the dispute" and she could offer no testimony "highly relevant as to the reasonableness of [any] claim [raised by defendant]." Nor did the State lay a predicate to show the mother was both available and competent. It was not shown the mother could "elucidate the inquiry." Thus the State's comments were improper.

Further, the comments here went well beyond those permitted

in Micheals and Buckrem. The State here did not simply note the mother's absence to the jury. Rather the State instructed the jury that the mother was "not available to the State because of bias" and asserted "I can't cross-examine or impeach witnesses that I put on the stand." R.982. Such assertions go beyond mere comments on the failure to call a witness; they amount to instructions on the law. Further, the assertion the mother is "not available to the State" is inaccurate. The State has the same subpoena power as the defendant. The comments here implied the State is somehow precluded from calling the mother as a witness. This in turn further implies defendant has some burden in this regard.

The error in allowing such comments was compounded when the trial court refused to allow defendant to respond. The State objected when defendant started to argue the State could have called the mother as its own witness. In the jury's presence the State again instructed the jury in a manner indicating the defendant had the burden of producing the mother because the State was precluded from doing so. It is well-settled that a party may properly respond to a "missing witness" argument by pointing out that both sides have subpoena power. Williamson v. State 459 So.2d 1125 (Fla. 3rd DCA 1984); Romero, infra; Dixon v. State 206 So.2d 55 (Fla. 4th DCA 1968). The trial court's sustaining of the State's objection to defendant's reply and instructing the jury to ignore that reply only further implied that defendant carried some burden on this point and that the State could not call the mother itself.

It was error to permit such comments and to preclude defendant's reply.

7. It Was Error To Instruct The Jury That Defendant's Flight Could Be Considered A Circumstance Indicating A Consciousness Of Guilt

"An instruction on flight [is] permitted in the limited circumstance where there is significantly more evidence against the defendant than flight standing alone." Whitfield v. State 452 So.2d 548, 549 (Fla. 1984). "Flight alone would not support an instruction that such flight is evidence of consciousness of guilt, as it would be no more consistent with guilt than with innocence." Id at 550.

In the present case, there is no evidence of flight other than the testimony that 1) two young black males were seen running from the direction of the hardware store within an hour of the shooting, and 2) defendant was seen driving away from the direction of the hardware store shortly after the shooting. Neither circumstance is sufficient to justify a flight instruction. At best, such evidence merely establishes that defendant left the scene of the crime. If that were sufficient to justify a flight instruction, such instructions would be given in almost every criminal case. For, except in limited circumstances (crime occurs in defendant's home; defendant arrested at scene), the defendant always leaves the scene of the crime. To allow a flight instruction on facts such as these "would allow the exception to swallow the rule", Id., and authorize flight instruction in the great majority of criminal prosecutions.

Further, it was not established it was defendant who was running through the alley. Flight must be clearly established before the instruction is proper. Williams v. State 378 So.2d 902 (Fla. 5th DCA 1980). In the present case, defendant was not clearly identified as one of the individuals running through the alley. Thus the jury was in effect instructed that they could consider the fact that someone was seen running in the alley as a circumstance from which defendant's guilt may be inferred. In such circumstances the instruction given becomes an impermissible comment on the evidence.

It was error to instruct the jury on flight.

8. It Was Error To Fail To Instruct The Jury On Third Degree Murder Because The Evidence Supported The Charge And The Instructions Given Failed To Adequately Define The Various Degrees Of Homicide

The trial court denied defendant's request for jury instructions on the category II lessers of first degree murder. It was error to fail to instruct the jury on the elements of third degree murder. A defendant charged with first degree murder is entitled to such an instruction if the evidence supports it. Green v. State 475 So.2d 235 (Fla. 1985). There is evidence in this case to support a third degree felony murder occurring during a grand theft. As argued above, the evidence could support a hypothesis that the murder occurred during an escape from a theft. At the time of this crime, the monetary dividing line between grand theft and petty theft was $100.00. Florida Statute Section 812.014(2)(c).1 (1983) (amended to $300.00 by Ch.86-161, Laws of Florida (effective July 1, 1986)). There was evidence the amount taken could have been at least

$100.00. R.724-25. Thus the evidence supported the requested instruction and it was error to fail to give it.

Generally, the failure to instruct on a lesser two steps removed from the degree of the crime of which defendant is convicted is harmless error. See Herrington v. State 14 FLW 73 (Fla. Feb. 23, 1989). However, the error was not harmless here. The jury may have believed the shooting occurred because defendant and his brother were interrupted by the victim in the course of an attempted taking of his property. However, the only conviction option given to the jury on this theory was first degree murder. The jury may have concluded that they had to find the taking was by force in order to convict defendant for the killing. Had they been instructed on third degree felony murder they could have opted to hold defendant accountable on that theory. See Beck v. Alabama 447 U.S. 625, 65 L.Ed.2d 392, 100 S.Ct. 2382 (1980) ("when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense - but leaves some doubt with respect to an element that would justify conviction of a capital offense - the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.")

The error in failing to instruct the jury on this point was compounded by the fact that the jury was told third degree murder was a "lesser crime" and that, if it believed defendant was responsible for the death, it must further examine "the circumstances surrounding the killing" to determine if those

circumstances warranted a conviction for third degree murder. Yet third degree murder was not defined. Thus the jury was not fully apprised of its options. In such circumstances the instructions are "confusing, contradicting or misleading." Butler v. State 493 So.2d 451, 452 (Fla. 1986). It is well-settled the failure to adequately define the elements of the various degrees of homicide is reversible error. See Campbell v. State 306 So.2d 482 (Fla. 1975) (failure to define culpable negligence in manslaughter charge); Anderson v. State 276 So.2d 17 (Fla. 1973) (fundamental error to fail to define premeditation); Hedges v. State 172 So.2d 824 (Fla. 1965) (failure to define excusable and justifiable homicide in manslaughter charge).

It was error to fail to instruct the jury on the elements of third degree murder.

B. PENALTY PHASE

1. The Death Penalty Is Unconstitutional As Applied Because The Evidence Concerning Defendant's Participation In The Crime And His State Of Mind At The Time Is Insufficient Under Enmund And Tison.

In Enmund v. Florida 458 U.S. 782, 73 L.Ed.2d 1146, 102 S.Ct. 3368 (1982), the Court held the death penalty was unconstitutionally disproportionate when imposed on one who did not kill, intend to kill, attempt to kill, or contemplate that an accomplice would kill. In Enmund, the killing occurred during the course of a robbery. Enmund was driving the getaway car; he was not directly involved in the killing and there was no evidence he intended or anticipated it would occur.

Five years after Enmund, the Court revisited the felony murder problem in Tison v. Arizona 481 U.S. 95 L.Ed.2d 127, 109

S.Ct. 1676 (1987). In Tison, death sentences were affirmed on two brothers who aided their father and his cellmate (both convicted murderers) in a prison break. The brothers planned the escape and provided the weapons and the getaway car. Both knew their father had killed someone during a prior escape attempt. When their getaway car broke down, the conspirators flagged down an innocent family, kidnapped and robbed them, then killed them in cold blood. Although the brothers did not do the actual shooting, the Court noted they were major participants in the entire escape, they actively assisted the shooters, and they were fully aware of and prepared for the possibility that lethal force might be employed. The Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." 95 L.Ed.2d at 144.

This Court addressed Enmund in defendant's brother's appeal. This Court held Enmund requires a two-step analysis: "whether an Enmund assessment can be based upon the record [and, if so,] whether the record supports the conclusion that the defendant killed or attempted to kill or intended or contemplated that life would be taken." Jackson, infra, 502 So.2d at 412. Since Jackson was decided before Tison, it seems reasonable to infer the phrase "major participation in the felony committed, combined with reckless indifference to human life" should be added to the second part of the inquiry.

We cannot go beyond the threshold inquiry in the present case. No adequate Enmund assessment can be made on this record.

The evidence does not establish beyond a reasonable doubt that defendant was the triggerman or that he participated in the robbery in a major way with the requisite state of mind. At best, the evidence introduced in the guilt phase establishes only that defendant first thought of the robbery several days in advance, and that he drove the truck to and from the scene. It was not established he was even inside the store, much less that he carried the gun.

The only additional evidence introduced in the penalty phase was the detective's statement that defendant's mother told him she "felt" defendant shot the victim because the victim had grabbed defendant's brother. The mother denied making that statement.

Such evidence is insufficient to establish that defendant's participation in the robbery reaches the level required by Enmund and Tison. What defendant's mother "felt" might have happened is irrelevant. Further, in a similar context, this Court has recently held that the prior inconsistent unsworn statements of a witness who denies the truth of the prior statements cannot, standing alone, establish guilt. State v. Moore 485 So.2d 1279 (Fla. 1986). The Moore rationale is even more compelling in this context because the stakes are higher.

At best, the evidence shows that defendant participated in some way in a robbery during which a shooting occurred. There is no evidence defendant killed, attempted to kill, intended to kill, or contemplated that a killing would occur. It was not established he was a major participant in the robbery or that his

actions evidenced a reckless indifference to human life. Enmund makes it clear that mere participation in an armed robbery does not establish the requisite state of mind because "killings only rarely occur during robberies." 458 U.S. at 799. Under the principles of Enmund, Tison and Jackson, defendant cannot be sentenced to death on this record.

2. The Death Penalty Is Disproportionate To The Facts Of The Case

Assuming arguendo the death penalty is proper under Enmund - Tison, it is nonetheless disproportionateto the facts of the case. It is well-settled that "death is a unique punishment [and] is proper . . . only [for] the most aggravated and unmitigated of most serious crimes." Dixon v. State 283 So.2d 1, 7 (Fla. 1973), cert. denied sub. nom., 416 U.S. 943 (1974). "A high degree of certainty in . . . substantive proportionately must be maintained in order to insure that the death penalty is administered evenhandedly." Fitzpatrick v. State 527 So.2d 809 (Fla. 1988).

This court has previously held that facts such as those in the present case are insufficient to support the death penalty. Lloyd v. State 524 So.2d 396 (Fla. 1988) (victim shot twice in head during robbery at home; one aggravator (during commission of felony) and one mitigator (no significant prior history)); Proffitt v. State 510 So.2d 896 (Fla. 1987) (victim stabbed during home burglary; one aggravator (during commission of felony)) (facts at 315 So.2d 461); Rembert v. State 445 So.2d 337 (Fla. 1984) (victim beaten to death during robbery at victim's store; one aggravator (during commission of felony); trial court

finds nothing in mitigation even though defendant "introduced a considerable amount of nonstatutory mitigating evidence"); Menendez v. State 419 So.2d 312 (Fla. 1982) (victim shot during jewelry store robbery; one aggravator (during commission of felony); in mitigation, court finds no significant prior criminal history and capacity for rehabilitation); see also Banda v. State 13 FLW 709 (Fla., Dec. 8, 1988); Fitzpatrick, infra; Ross v. State 474 So.2d 1170 (Fla. 1985); Blair v. State 406 So.2d 1103 (Fla. 1981).

In the present case only one aggravating factor was established (see argument at 3. below): that the murder occurred during the commission of a robbery. In mitigation, defendant presented uncontroverted evidence that he was a good father and that he had assumed the responsibility of being the "man of the house" at a young age. This shows defendant' prospects for rehabilitation are good. The evidence does not establish premeditation; rather, the only inference to be drawn is that the killing occurred on the spur of the moment when the victim suddenly "bucked the jack". In such circumstances, the death penalty is disproportionate.

3. The Evidence Is Insufficient To Establish The Murder Was Committed To Avoid Or Prevent Arrest Because It Was Not Established That The Dominant Motive For The Killing Was To Eliminate A Witness

In its sentencing order, the trial court noted "defendant is a competent person and the shot was not accidental." Apparently accepting the premise the killing "was not planned in advance" and noting the two brothers "could easily over power the unarmed victim", the court concluded the reason for the killing was the

"prior direct contact between the victim and the defendant." The court then quoted with approval from the State's sentencing memorandum, in which it was noted 1) defendant planned the robbery in advance; 2) defendant picked an easy target and timed the robbery to occur near closing time; 3) the brothers parked the truck in an alley to minimize detection; 4) no warning shots were fired, but rather a single shot was fired at a vital area of the body; and 5) the two brothers conspired to discard the murder weapon and coordinate false alibis. From this, the court (again quoting the State's memorandum) concluded "the avoidance of arrest was a dominant factor in the planning and execution of the crime." R.153-54.

It is well-settled that, to establish this aggravator when the victim is not a law enforcement officer, the State must prove "the dominate motive for the murder was the elimination of a witness." Herzog v. State 439 So.2d 1372, 1379 (Fla. 1983). "Proof of the requisite intent to avoid arrest and detection must be very strong . . . ." Riley v. State 366 So.2d 19, 22 (Fla. 1978). "The defendant's motive cannot be assumed and . . . the burden is on the State to prove it." Foster v. State 436 So.2d 56, 59 (Fla. 1983), cert. denied 104 S.Ct. 734 (1986).

The mere fact the defendant and the victim were acquainted is insufficient, even though they had known each other for years. Rembert v. State 445 So.2d 337 (Fla. 1984). Nor is it enough to show the victim might have identified the defendant. Floyd v. State 497 So.2d 1211 (Fla. 1986); Bates v. State 465 So.2d 490 (Fla. 1985), cert. denied 108 S.Ct. 212 (1987). Also

insufficient is the fact that the defendant tried to conceal the crime after the killing. Herzog v. State 439 So.2d 1372 (Fla. 1983).

This Court has found the evidence insufficient to establish this aggravator in numerous cases with similar facts. Most notably, in defendant's brother's appeal, it was said "there is nothing about the facts of this murder which suggests that it was committed solely to eliminate a witness." Jackson infra, 502 So.2d at 411. In the brother's case the State produced, not only evidence similar to that used in defendant's trial, but also a confession from the brother that the victim had grabbed the brother and defendant had to shoot him. See also Livingston v. State 13 FLW 187 (Fla., March 18, 1988) (defendant shoots clerk during convenience store robbery, then says "now I'm going to get the one in the back [of the store]" and shoots at second witness); Rogers v. State 511 So.2d 526 (Fla. 1987), cert. denied 108 S.Ct. 733 (1981) (victim shot trying to escape through back door during grocery store robbery; co-defendant says defendant said victim "was playing hero and I shot the son of a bitch"); Hansborough v. State 509 So.2d 1081 (Fla. 1987) (victim stabbed during robbery of office; killing "more likely a robbery that got out of hand"); Caruthers v. State 465 So.2d 496 (Fla. 1985) (store clerk found shot behind counter; money missing from cash register; "the victim's recognition of [defendant] as a customer . . . does not without more establish this [aggravator]") Rivers v. State 458 S.2d 762 (Fla. 1984) (waitress shot trying to run away from restaurant robbery); Rembert, infra (robbery victim

beaten to death; victim and defendant acquainted for years; court notes "victim was alive when [defendant] left and could conceivably have survived to accuse his attacker. If [defendant] had been concerned with this possibility, his more reasonable course of action would have been to make sure that the victim was dead before fleeing"); Foster v. State 436 So.2d 56 (Fla. 1983) (victims found in car robbed and shot in back); Menendez v. State 368 So.2d 1278 (Fla. 1979) (jeweler found dead in his store; defendant flees after being seen emptying safe).

The fact that "the avoidance of arrest was a dominant factor in the planning and execution of the crime", R.154 (emphasis added), does not establish this aggravating circumstance beyond a reasonable doubt. Presumably, the avoidance of arrest is a dominant factor in any crime. Rather, what must be established is that the avoidance of arrest was the dominant factor in the decision to kill. No such motive was established at trial. As in Foster and Menendez, "we do not know what events preceded the actual killing." 436 So.2d at 58 ; 368 So.2d at 1282. Rather, we are left with "mere speculation" as to the reason for the killing. Bates, infra.

The evidence was insufficient to establish the murder was committed for the purpose of avoiding or preventing lawful arrest. Defendant is entitled to a new sentencing hearing. Nibert v. State 508 So.2d 1 (Fla. 1987); Aldridge v. Wainwright 433 So.2d 988 (Fla. 1983); Elledge v. State 346 So.2d 998 (Fla. 1977).

4. It Was Error To Allow The State To Argue To The Jury Defendant's Lack Of Remorse And Failure To Acknowledge Guilt

Over defendant's objection, the State improperly argued to the jury on three occasions that defendant's apparent lack of remorse and his continued failure to acknowledge his guilt were proper considerations for their sentencing decision.

"Neither the failure of the [defendant] to acknowledge his guilt nor demonstration of remorse is a valid statutory aggravating circumstance." McCampbell v. State 421 So.2d 1072, 1075 (Fla. 1982). "[L]ack of remorse should have no place in the consideration of aggravating factors." Pope v. State 441 So.2d 1073, 1078 (Fla. 1983).

Although it has been said "it is error to consider lack of remorse for any purpose in capital sentencing", Trawick v. State 473 So.2d 1235, 1240 (Fla. 1985) cert denied 106 S.Ct. 2254 (1986), it appears there is a limited exception to this general prohibition: the trial court may consider a lack of remorse in its sentencing order to rebut or discount mitigation evidence introduced by defendant. See Echols v. State 484 So.2d 568 (Fla. 1985), cert. denied 107 S.Ct. 241 (1987) (trial court may note defendant appears cunning, ~~conscienless~~ CONSCIENCELESS and remorseless in contract murder when defendant introduces evidence he is generally a law-abiding, churchgoing, family-oriented, businessman); Agan v. State 445 So.2d 326 (Fla. 1983) cert. denied 105 S.Ct. 225 (1986) (trial court notes defendant coldly executed victim, shows no remorse and seeks chance to kill again; prison revenge murder, defendant asks for life sentence so he can take revenge on another inmate). However, it is error to argue

defendant's lack of remorse to the jury, even if that inference can be drawn from the testimony of defendant's own expert. Robinson v. State 520 So.2d 1 (Fla. 1988).

At trial the State relied on the concept of anticipatory rebuttal to justify its argument. The State apparently believed defendant's relatively innocuous statement - that he was "very sorry" the victim was dead - opened the door to such argument. However, defense counsel specifically and pointedly assured the State and the trial court he would not argue defendant's remorse as a mitigating factor to the jury. In such circumstances there is nothing to rebut. See Maggard v. State 399 So.2d 973 (Fla. 1981), cert. denied 102 S.Ct. 610 (1981) (error for State to introduce defendant's prior non-violent criminal record when defendant expressly waives reliance on mitigator of no significant prior record).

It was error to permit such argument. The error is prejudicial. Robinson, infra; Trawick, infra; Maggard, infra.

IV. CONCLUSION

In the alternative, defendant requests the following relief :

1. Reverse both convictions and remand with instructions to enter judgments of acquittal;

2. Reverse both convictions and remand for a new trial;

3. Vacate the death sentence and remand with instructions to enter a sentence of life with a mandatory 25 years;

4. Vacate the death sentence and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, Eighth Floor, Tampa, Florida 33602 on this the 28 day of March, 1989.

Richard J. Sanders