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26 pages

IN THE FLORIDA SUPREME COURT

CLINTON LAMAR JACKSON,

Appellant,

vs

STATE OF FLORIDA,

Appellee.

_____/

APPEAL NO.: 71,564

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

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT:

ISSUE 1 - It is sheer speculation to conclude the victim "was shot by [defendant] as he struggled to retain his last five dollars." There is no evidence of any struggle, nor any evidence defendant did the shooting. There is no evidence concerning the temporal relation between the shooting and the taking of any property. Nor does the evidence establish defendant's guilt as an aider and abettor. Defendant's flight from the scene - even when coupled with prior knowledge the crime would occur - does not establish guilt on this theory.

ISSUE II _ Since the evidence was insufficient to establish an armed robbery, it is insufficient to establish first degree felony murder. As to premeditation, the "we had to do it" statement does not show premeditation, but rather tends more to show a reflexive action. There is no evidence the shot was "aimed at a vital area"; the evidence shows only that the bullet struck such an area. The facts that the gun was loaded and fired from a distance of more than three feet do not show premeditation. The evidence does not show defendant did the shooting, or that he aided or abetted another who had such a prior intent.

ISSUE III - The State failed to check numerous possible leads on Jones' whereabouts, including police records, motor vehicle and driver's license records and probation records. No records were checked in Hillsborough County, despite the fact that Jones himself said that is where he was. The aid of the telephone company (to trace Jones' calls) was not sought. No police

departments were enlisted to aid in the search, even though Jones had outstanding warrants. Such nonaction negates a finding of due diligence.

ISSUE IV - The continuance should have been granted because Jones was clearly in the area and probably could have been found with a little effort. Defendant was prejudiced because the jury was deprived of the chance to observe Jones' demeanor and defendant did not have an opportunity to cross-examine Jones on the break he got on his sentence following his testimony at the first trial.

ISSUE V - This court's opinion in Price is directly on point. The distinctions between Price and the present case argued by the State are irrelevant. Indeed, there is even less reason to introduce the testimony concerning the threats in the present case because the threats do not go directly to the basis of the impeachment (as was true in Price) but only collaterally rehabilitate the witness. Further, the fact that Jones did not testify could lead the jury to conclude the threats were successfully carried out.

ISSUE VI - The State's missing witness argument was improper because the State, not defendant, injected the mother into the case. The Micheals - Buckrem rationale is limited to circumstances where the defendant asserts the missing witness' testimony would be favorable to the defense. Further, the State's comments implied to the jury that defendant was the only one who could call the mother as a witness, a fact that is simply not true (since the State could have subpoenaed the mother). It

was also error to deny defendant the right to point this out to the jury.

ISSUE VII - The flight instruction was improper because there was no evidence to support it other than the alleged flight itself (i.e., two unidentified individuals running through an alley, and defendant's driving away from the direction of the store).

ISSUE VIII - The jury should have been instructed on third degree felony murder because the evidence supported the instruction and the jury was told (twice) that third degree murder was a lesser included offense, but was not told the elements of that offense. The "two-steps-removed"/harmless error rationale is inapplicable on these facts.

ISSUE IX - The evidence does not show defendant was the triggerman, or that he was a major participant in the felony with the requisite state of mind. Mere participation in the robbery (which, at best, is all the evidence show) is insufficient under Endmund - Tison.

ISSUE X - The death penalty is disproportionate. The cases cited by the State are distinguishable.

ISSUE XI - The evidence does not show the victim could have identified defendant or that that was the reason for the shooting. The only evidence on this point indicates the shooting was a reflexive action at best. The cases cited by the State are distinguishable.

ISSUE XII - Defendant specifically disavowed any intention to argue lack of remorse to the jury. Such arguments are improper

even if they can be reasonably inferred from defense testimony. The State clearly argued lack of remorse and failure to acknowledge guilt as aggravators. In any event, defendant opened no doors to the failure to acknowledge guilt argument.

II. ARGUMENT

ISSUE I:

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE ARMED ROBBERY CONVICTION

The State does not address defendant's argument that the unqualified opinions of Jones' and Williams' as to the meaning of the phrases "knock your buddy over" and "buck the Jack" do not establish an armed robbery. Rather, the State asserts the physical evidence establishes that crime. Ans. Br., P.12. The state notes 1) the victim was found approximately eight feet from the register, clutching a five dollar bill and 2) the cash register was open and held only one dollar, with small change scattered on the floor. Id. From this the State concludes the victim "was shot by [defendant] as he struggled to retain his last five dollars." Id at 13.

Such a conclusion is sheer speculation. The evidence does not show where the victim was when the cash register was opened. The cash register could have been opened and emptied in a "smash and grab" - type scenario, with the perpetrator(s) trying to take quick advantage of an untended till. There was no evidence of any struggle between the victim and the shooter, nor any evidence the victim was trying "to retain his last five dollars." That scenario makes no sense at all: are we to conclude the cash register was emptied, the victim started to struggle and somehow

ended up holding only one bill? How does he get possession of one bill not the others? While it may be conceivable to hypothesize such a situation, that hypothesis alone is not enough to sustain the conviction. The standard of reasonable doubt requires more than a mere hypothesis. The physical evidence provides no clue at all as to how and when the victim obtained possession of the five dollar bill, nor how and when (in relation to the taking of any property) the shooting occurred.

With respect to defendant's participation in the events inside the store, the State asserts "[defendant's] statement 'we had to do it . . ., coupled with evidence of [the brother's] palm print on the cash register and the nature of the bullet would clearly indicate that [defendant] held a gun on [the victim] while the brother robbed the till." Ans. Br., P.13. As argued above, such conclusions are speculative at best. Recognizing as much, the State asserts the evidence establishes defendant's guilt as an aider and abettor. Id. at 13-14. However, to establish guilt under that theory, the evidence must show defendant "intended[ed] that the crime be committed and [did] some act to assist [in its commission]." Staten v. State 519 So.2d 622 (Fla. 1988). The evidence here is insufficient to establish either element. As noted in Staten:

> [M]ere knowledge that an offense is being committed is not the same as participation with criminal intent, and mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is not sufficient to establish participation. Id at 624.

Numerous Florida courts have found evidence similar to that introduced in the present case to be insufficient to support a

conviction. Valdez v. State 504 So.2d 9 (Fla. 2d DCA 1986); Gains v. State 417 So.2d 719 (Fla. 1st DCA 1982); Pack v. State 381 So.2d 1199 (Fla. 2d DCA 1980). See also cases cited at Int. Br., P.20.

The State cites Hall v. State 403 So.2d 1321 (Fla. 1981) to support its aider and abettor argument. Ans.Br., P.13. Hall is clearly distinguishable. The defendant there confessed that he had personally abducted the victim, forced her into her car and drove the car to a wooded area. The co-defendant (who had followed in his own car) then beat, raped and shot the victim. Later (apparently the same day) the two defendants drove (in the victim's car) to a convenience store, where they ended up shooting a police officer whose supsicions had been aroused. The two defendants then feld together (again in the victim's car), then abandoned the car and fled on foot. Upon these facts this Court affirmed Hall's murder conviction because the acts of the two defendants "were the result of a common scheme." 403 So.2d at 1323.

We have no such facts in the present case. There is no evidence defendant was even inside the store, much less that he knew what was going to happen there and did something to further it.

The evidence was insufficient to support the armed robbery conviction.

ISSUE II:

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE MURDER CONVICTION

As argued above, the evidence does not support the robbery

conviction and thus defendant cannot be convicted of first degree felony murder.

As to premeditation, the State first asserts defendant did not preserve this issue for review. This point is without merit. Florida Rules of Appellate Procedure 9.140(f).

Addressing the merits of the premeditation issue, the State notes Williams' testimony that defendant said "we had to do it." The State also notes 1) the gun was loaded; 2) it was aimed at a vital area of the victim's body; and 3) the shooter was at least three feet from the victim. Ans. Br., P.16.

Such facts do not establish premeditation. The "had to do it" language could refer to a spur-of-the-moment, reflexive decision. The fact that the gun was loaded proves too much: if that were sufficient to establish premeditation, all homicides by shooting would be first degree murder (since, by definition, the gun would always have been loaded). There is no evidence the shot was "aimed" anywhere; the circumstances surrounding the shooting are unknown. Even an unaimed shot must strike somewhere; that it hit a vital area could be pure coincidence. The three foot distance is irrelevant as well. A bullet fired accidentally, recklessly or in the heat of passion travels as far as one fired intentionally. The physical facts relied upon by the State are reasonably consistent with a number of hypotheses other than that advanced by the State. "Where, as here, premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference." Wilson v.

State 493 So.2d 1019, 1022 (Fla. 1986). See also Griffin v. State 474 So.2d 777, 780 (Fla. 1985) ("presumption of felony murder when there was no witness to see or hear the atual shooting in a store robbery, thus no evidence of provocation or lack thereof by the victim") (citing Menendez v. State 419 So.2d 312 (Fla. 1982)).

The State cites Griffin, infra, to support its argument here. Ans.Br., P.16. Griffin is clearly distinguishable. In Griffin, defendant's accomplice testified that the shooting occurred during a convenience store robbery while he (the accomplice) was present. Although the accomplice did not actually see the shots fired:

> He had turned his back to leave the store moments before the first shot, turned and saw the clerk falling, then turned again to leave when he heard the second shot. There is no indication in the record that the clerk precipitated an accidental or reflexive shooting which would support a felony murder theory. 474 So.2d at 780.

In holding the facts were sufficient to support a finding of premeditation, this Court noted:

> We find that Griffin used a particularly leathal gun, a 9mm automatic with jacketed bullets having a high penetrating ability; that there was an absence of provocation on the part of the victim; [the accomplice] testified he heard and saw nothing unusual prior to the first shot, and the victim in fact cooperated with the robbery, taking off and giving to [the accomplice] a gold neck chain [the accomplice] had been unable to pull off); and that the wounds, one lethal, the other less serious, were inflicted at close range and thus unlikely to have struck the victim unintentionally. Id.

We have no such facts in the present case. There is no evidence whatsoever concerning the events leading to the shooting.

Further, even assuming premeditation can be shown on such facts, there is no showing defendant did the shooting, or that he aided and abetted another in such an act. There is no evidence defendant was in the store. There is no evidence defendant knew of the shooter's intent or committed any act to further that intent. Again, the State's evidence is speculative at best.

ISSUE III:

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

The State asserts its efforts to find Jones were duly diligent. The State asserts "no bolo was put out and no formal stakeouts were ordered because these actions would have been fruitless." The State asserts "Jones was 'on the run' and . . . any further inquiry regarding his social security number, criminal records and the like were unlikely to prove helpful." Ans. Br., P.19.

There is no record support for such assertions. We do not know what leads might have resulted from those actions. Jones was not "on the run." He had been seen in the area by several people in recent days; he voluntarily called the investigator on several occasions. He was, as the investigator admitted, "around". R.492. Although the investigator did check some local records, he clearly left many stones unturned.

The cases cited in the Initial Brief clearly show the efforts made in the present case are insufficient. See, e.g. People v. Payne 332 N.E.2d 745 (Ill. App. 1975) (failure to check

arrest records, social security records and motor vehicle or driver's license records); State v. Greer 552 P.2d 1212 (Ariz. App. 1976) (failure to check social security records, or telephone, utility or county records in county of witness' last known residence) Hewell v. State 221 S.E.2d 219 (Ga. App. 1975) (failure to check social security records in county of witness' last known residence or adjoining counties); Green v. State 579 P.2d 14 (Alaska 1978) (failure to check post office in county of witness' last known residence, failure to contact witness' last known employer).

The State relies on Stano v. State 473 So.2d 1282 (Fla. 1985) and Outlaw v. State 269 So.2d 403 (Fla. 4th DCA 1972), cert. denied, 273 So.2d 80 (Fla. 1973). Stano is not on point: the witnesses there were not missing, but rather simply refused to testify. The facts in Outlaw are not given in any detail. There is no indication in Outlaw that there was a large number of unchecked sources, as we have in this case.

The State did not make a diligent effort to find Jones. As to defendant's lack of opportunity to fully cross examine Jones, see discussion at Issue IV, below.

ISSUE IV:

IT WAS ERROR TO DENY DEFENDANT'S MOTION FOR CONTINUANCE TO ALLOW HIM TIME TO FIND MELVIN JONES

The State asserts the continuance was properly denied because defendant "was unable to give the court any indication if or when Melvin Jones might be available." Ans.Br., P.20. From this the State concludes the continuance "would have prejudiced the State by causing an indefinite delay in the trial

proceedings." Id. at 22.

Defendant was not asking for an "indefinite delay"; rather defendant was asking for no more than a reasonable amount of time to check the numerous sources of possible leads on Jones' location that were not explored. The State's investigator did not begin to look for Jones until April 29. R.487. On May 5, the State attorney noted:

> [Defense counsel], had he known Mr. Jones' availability earlier I think probably could have located him prior to trial, but in all cander we were not, didn't communicate that to [defense counsel] so there was nothing that could really reciprocate that type of search or inquiry." A.9-10 (Appendix to Answer Brief).

As to the question of prejudice, the State does not address defendant's contention regarding the use of a handsome State attorney to play Jones' role (thus denying the jury the ability to observe Jones' demeanor on the stand). With respect to defendant's inability to cross-examine Jones regarding the break he got on his own sentence, the State asserts the reasons for the reduction in Jones' sentence "are speculative at best; the sentence may have resulted from factors totally unrelated to the testimony in the instant case." Ans.Br., P.21. But that is precisely why Jones was needed in person: who better than he could explain this fact? The State suggests defendant could have introduced Jones' guidelines scoresheet. Id. However, that document proves nothing. It is no substitute for Jones' live testimony.

It was prejudicial error to deny defendant's motion to continue.

ISSUE V:

IT WAS ERROR TO ADMIT MELVIN JONES' TESTIMONY ABOUT THREATS MADE AGAINST HIM FOR TESTIFYING WHEN THE THREATS WERE NOT LINKED TO DEFENDANT.

The State asserts defendant opened the door to Jones' testimony regarding the threats made on his life by impeaching Jones with respect to his expectation of sentencing leniency in exchange for his testimony. It is difficult to see how testimony concerning threats on Jones' life would reflect on Jones' expectations of leniency. There is no connection between the threats and Jones' expectations.

In any event, State v. Price 491 So.2d 536 (Fla. 1986) clearly shows that, regardless of what doors defendant opened by his inquiry into Jones' expectations, the testimony about the threats still should not have been admitted. The State asserts Price is distinguishable because "[t]he evidence of threats in Price was admitted as anticipatory rehabilitation by the State to explain the witness' prior inconsistent statements and concerned direct threats to kill the witness", while, in the present case, "the threats were overheard indirectly by Jones or made by unidentified persons in jail [and] Jones clearly testified that none of the threats came from [defendant]." Ans.Br., P.23-24. The State's distinction is untenable. Whether the evidence of threats is admitted as anticipatory rehabilitation or following impeachment is irrelevant. Price approved the concept of anticipatory rehabilitation in general; it's holding goes the admissibility of such threats at all, not the timing of their introduction. The witness in Price also "clearly testified that none of the threats came from [defendant]." Price draws no

distinction between "direct threats" and "threats . . . overheard indirectly." Nor does Price indicate that such threats would be admissible to show the witness' motive for testifying even though inadmissible to explain prior inconsistent statements. Indeed, the argument for admissibility was stronger in Price than in the present case: in Price, the threats directly and forcefully explained the witness' prior inconsistent statements. Thus, the threats directly rehabilitated the witness with respect to the basis of the impeachment. We have no such direct connection here. The testimony of the threats may have some collateral rehabilitative effect, but they did not directly address the question of Jones' expectation of leniency. Thus the logic of Price applies with even greater force here.

The holding in Price is not based on the order in which such testimony is admitted, the nature or source of the threats, or the purposes for which the testimony is offered. Price holds, without qualification, that "the probative value of [such] third party threats . . . is far outweighed by its prejudicial impact." Id at 537 (emphasis added).

This prejudicial effect is particularly pronounced in the present case because of the facts that 1) some of the threats came from defendant's family and 2) Jones did not testify. The jury could easily infer defendant was involved in the threats if they came from his family; of course, no such link was established. The jury also may well have concluded that Jones' absence was the result of the consummation of the threats (and in turn further inferred defendant was reasonable for that as well).

The testimony of the threats was improper and unfairly prejudicial.

ISSUE VI:

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 asserts State v. Micheals 454 So.2d 560 (Fla. 1984) authorized the missing witness argument in the present case. Defendant reasserts his argument that such comments are impermissible if, "but for the State's introduction of the . .. issue, no testimony [concerning the issue] would have been presented to the jury." Brown v. State 524 So.2d 730, 731 (Fla. 4th DCA 1988) (emphasis in original). This Court has apparently not yet addressed the question presented in the present case. Both Micheals and Buckrem v. State 355 So.2d 111 (Fla. 1978) dealt with witnesses who could allegedly support affirmative defenses (defense of self and another, and alibi, respectively). In both cases the missing witness was specifically injected into the case by the defendant's own testimony. We have no such facts in the present case. Micheals and Buckrem represent the exceptions; the present case calls for the application of the general rule that "[prosecutorial] comment that indicates to the jury that the defendant has the burden of proof on any aspect of the case will constitute reversible error." Romero v. State 435 So.2d 318, 319 (Fla. 4th DCA 1983), pet. for rev. denied 447 So.2d 888 (Fla. 1984).

The comments in the present case clearly conveyed such

indications to the jury. The State told the jury the mother was "not available to the State because of bias [and] parental relationship." R.979-80. The State asserted the general rule that no inference can be drawn from a missing witness "if [the] witness [is] available to both sides" was inapplicable "when that relationship exists" because "I can't cross-examine or impeach witnesses that I put on the stand." R.981-82. When defendant started to respond to this argument in his closing, the State asserted "that is improper because of the relationship." R.1002. Thus the State clearly indicated to the jury that it was somehow foreclosed from calling the mother as a witness and defendant was the only one who cold do so. This in turn shifted the burden of production and proof to defendant. See, in this regard, State v. Brewer 505 A.2d 774 (Me. 1985), in which the court overruled prior cases allowing such comments and held:

> To allow the missing-witness inference in a criminal case is particularly inappropriate since it distorts the allocation of the burden of proving the defendant's guilt. The defendant is no obligated to present evidence on his own behalf. The inference may have the effect of requiring the defendant to produce evidence to rebut the inference. If he fails to do so, the missing-witness inference allows the state to create "evidence" from the defendant's failure to produce evidence. Such a result is impermissible. 505 A.2d at 777.

Even if the Michaels - Buckrem rationale would allow missing witness comments on these facts, the State's argument here went too far. It is one thing to argue to the jury "where is this witness?"; it is quite another thing to assert the State cannot produce the witness and it is defendant's obligation to do so. The "unavailability" rationale of Micheals - Buckrem is something

of a fiction: the missing witness is clearly available to the State in the sense of amenability to service of process. By definition, the Michaels - Buckrem rationale is applicable only if the witness is available to testify. (Otherwise, no unfavorable inference can be drawn from the defendant's failure to call the witness). The Michaels - Buckrem concept of unavailability is part of the predicate for allowing the missing witness argument. However, it is not proper to take that unavailability fiction and use it as a club against the defendant in closing argument, particularly in view of the fact that it is not an accurate statement of the law to say the witness is unavailable to the State in the sense of being beyond the State's subpoena power.

This in turn further illustrates the impropriety of denying defendant the right to respond to the missing witness argument. The State could have called the mother as a witness; defendant is entitled to point this out to the jury in reply to the State's argument.

Limiting Michaels and Buckrem to cases involving witnesses injected into the case by the defendant is particularly important in view of the Florida criminal rules regarding closing argument. If the State can use a missing witness argument regarding witnesses it itself injects into the case, the defendant will be faced with the Hobson's choice of suffering that argument in silence or giving up his rebuttal argument (by introducing the missing witness).

The State also asserts any error in this regard is harmless.

Ans.Br., P. 28. It is interesting to note that, at the trial level, the State asserted "what more damaging indictment can there be of the defense position . . . than the fact that the defendant's mother . . . was not called . . . ." R.981-82.

It was prejudicial error to allow such comments.

ISSUE VII:

IT WAS ERROR TO INSTRUCT THE JURY THAT DEFENDANT'S FLIGHT COULD BE CONSIDERED A CIRCUMSTANCE INDICATING A CONSCIOUSNESS OF GUILT

The State asserts the flight instruction was properly given because "this is not a case . . . of flight standing alone as evidence of [defendant's] guilt." Ans.Br., P.29. However, the State cites no facts to support the instruction other than "flight standing alone" (i.e., the fact that two unidentified individuals were seen running through the alley behind the store at some time - perhaps as much as an hour - before the victim's body was discovered, and the fact that defendant was seen driving on a public street away from the direction of the store during that same time period). A flight instruction is proper only if "there is significantly more evidence . . . than flight standing alone." Whitfield v. State 452 So.2d 548, 549 (Fla. 1984) (emphasis added). We have no such evidence here.

The State cites Proffitt v. State 315 So.2d 461 (Fla. 1975) and Haywood v. State 466 So.2d 424 (Fla. 4th DCA 1985). Neither case supports the State's position. The facts in Haywood are not given in the court's opinion. In Proffitt, this Court held "that the defendant's leaving at a time which could have been after the crime, although at an unusual hour, is, when standing alone no

more consistent with guilt than with innocence." 315 So.2d at 465-66. This Court found the flight instruction was properly given in Proffitt because of 1) the uncontroverted, unimpeached testimony of a witness who overheard the defendant confess the killing to his wife and "mak[e] hasty preparations for leaving the State" within an hour of the killing; and 2) "the phone call to the police by the defendant's wife." Id at 466. Although no further details are provided regarding this phone call, it is clear that the facts in Proffitt establish "significantly more" than what we have in the present case.

The State also asserts the instruction "did not unduly influence the jury to conclude that [defendant] fled out of a sense of guilt or give undue weight to the fact that he left the scene of the crime." Ans.Br., P.30. There is no record support for such assertions. We do not know what effect the instruction had on the jury. In any event, it is well-settled that such instructions should not be given when based on flight alone. Whitfield, infra.

It was error to instruct the jury on flight.

ISSUE VIII:

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.

On this issue, defendant reasserts the argument contained in his Initial Brief. The State cites Perry v. State 522 So.2d 817 (Fla. 1988). That case is distinguishable and not dispositive. Perry confessed to killing the victim during a robbery attempt; thus there was no evidence to support the instruction. Perry's

two-steps-removed/harmless error statement on this issue is dictum. The two-steps-removed analysis should not be applied to the facts in the present case because of the close relationship between robbery and grand theft (with the timing of the use of force being the crucial distinguishing factor). The two-steps-removed/harmless error analysis is premised on the assumption that the jury, having declined to exercise its pardon power by convicting the defendant of a one-step-removed lesser, would not have dropped down that second step either. State v. Abreau 363 So.2d 1063 (Fla. 1978). Such analysis is inapplicable here. The jury apparently believed the shooting occurred while property was being taken from the victim. However, the jury was given only on conviction option - first degree felony murder - to fit those facts. Abreau does not establish a per se harmless error approach; rather, it held "reviewing courts may properly find such error to be harmless." 363 So.2d at 1064. On the facts of this case, the error was not harmless.

ISSUE IX:

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

The State asserts defendant was the triggerman. Ans.Br., P.34. The State cites no facts in the record to support this assertion. As noted in the Initial Brief, the only evidence on this point was detective Kappel's assertion that defendant's mother "felt" defendant did the shooting. The mother denied making such a statement. Thus, the only evidence supporting this point is hearsay testimony concerning the unqualifed opinion of a

non-eyewitness declarant who denies under oath having offered that opinion. Such evidence is clearly insufficient to establish defendant was the triggerman. State v. Moore 485 So.2d 1279 (Fla. 1986).

Alternatively, the State asserts the evidence established defendant was a major participant in the robbery and he evinced a reckless indifference to human life. To support this assertion, the State notes defendant's statements to Jones ("knock your buddy over") "indicated his intent to commit the robbery", and his statements to Williams ("he bucked the jack") establishes defendant's "intent to use lethal force." Ans.Br., P.35. The State also asserts the brother's palm print on the cash register, "combined with the angle and placement of the bullet wound, indicate that [the brother] was rifling the till while [defendant] held the gun on the victim." Id.

Defendant's intent to commit the robbery does not satisfy the Endmund - Tison standard. Endmund makes it clear that intent to participate in a robbery is, standing alone, insufficient to warrant the imposition of the death penalty. See discussion at Int.Br., P.35-36. The "bucked the jack" statement does not establish an intent to use lethal force; rather, it indicates that the shooting was not planned and it occurred on the spur of the moment. As argued above (see discussion at Issue I above), it is sheer speculation to hypothesize that defendant held the gun on the victim while his brother was rifling the till. Such surmise and speculation is insufficient to satisfy Endmund - Tison.

ISSUE X:

THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THE CASE

On this issue, defendant reasserts the argument in his Initial Brief, noting only that the three cases cited by the State - Maxwell v. State 443 So.2d 967 (Fla. 1983), Armstrong v. State 399 So.2d 953 (Fla. 1981) and Sullivan v. State 303 So.2d 632 (Fla. 1974) - are factually distinguishable and inapplicable. While it may be true that "a sentence of death is appropriate [when] an intentional killing is committed during a robbery", Ans.Br., P.37 (emphasis added), there is no evidence the killing here was intentional. See discussion at Issue II, above. The evidence in Armstrong showed the victims were shot several times during a gunfight that erupted when they resisted an armed robbery. The victim in Maxwell was deliberately shot in the chest at close range when he verbally protested to surrendering his diamond ring (a gift from his wife). In Sullivan, the victim was kidnapped, bound, driven to a remote area and shot four times in the back of the head. We have no such facts in the present case. Rather, as in the cases cited at Int.Br., P.36-37, the evidence at best shows the killing was unplanned and occurred on the spur of the moment. In such circumstances, the death penalty is disproportionate.

ISSUE XI:

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

The State asserts this aggravator was established because

defendant "had prior contact with the victim" and thus "the intentional killing was carried out to prevent the victim from capturing [defendant's] brother and prevent the victim from identifying [defendant]." Ans.Br., P.42. The record does not support such conclusions. There was testimony defendant had been in the store several days prior to the shooting. However, there was no evidence to show the victim was there at the time or that he saw defendant. There was no evidence to show the victim could have identified defendant. Even assuming there was "prior contact", there is no indication the victim would have remembered defendant from among the numerous customers who had probably entered the store during this time frame. The only testimony regarding the circumstances of the shooting is detective Kappel's statement that defendant's mother told him she "felt" defendant shot the victim to gain the release of defendant's brother. The mother denied making this statement.

The State is asking this Court to pile inference upon speculation to establish this aggravator. The State asserts "this is not a case where the shooting may have occurred simply to allow the two men to escape the scene with their lives." Id. Yet the only evidence on this point - weak as it is - shows precisely that. The State argues this aggravator is established by the evidence the shooting "was carried out to prevent the victim from capturing [defendant's] brother." Id. Even if this were so, it would not establish this aggravator.

The State does not address or attempt to distinguish any of the cases cited in the Initial Brief. See also Cook v. State 14

FLW 187 (Fla., April 6, 1989) (restaurant robbery; defendant shoots when victim starts screaming and grabs him around his knees as he is leaving; avoiding arrest aggravator not established because the facts "indicate that [defendant] shot instinctively, not with a calculated plan to eliminate [the victim] as a witness"). Rather, the State cites seven cases to support its position. All these cases are clearly distinguishable and provide no authority for establishing the aggravator in this case.

In Riley v. State 366 so.2d 19 (Fla. 1978), the victims "well knew and could identify [defendant], [were] immobilized and rendered helpless [and] then executed after one of the perpetrators expressed a concern for subsequent identification." 366 So.2d at 22. In that case, the killings occurred when defendant and another robbed the store at which defendant was employed. The victims were the owner, his son, and the manager of the store.

In Clark v. State 443 So.2d 973 (Fla. 1983), defendant and another robbed a store, then entered the residential part of the premises and killed the owner's wheelchair bound wife. This Court found this aggravator properly established there because the victim "knew [defendant] from his past employment and had signed past paychecks to him." 443 So.2d at 977. Noting that "[b]ecause of her physical condition she was helpless to thwart further taking of the property", this Court held "no other motive [for the killing] is readily apparent" and thus elimination of a witness was the dominant motive.

In Adams v. State 412 So.2d 850 (Fla. 1982), the defendant "had visited in the home of the victim [, who] knew and could have identified defendant." 412 So.2d at 852, 856. The defendant in Adams kidnapped the victim, sexually molested her, then bound her and took her to a remote area and tried to hide the body in a plastic bag. Griffin v. State 414 So.2d 1025 (Fla. 1982) and Martin v. State 420 So.2d 583 (Fla. 1982) are both similar, in that the victims in those cases (unfortunate clerks on duty at the time of a convenience store robbery) were also kidnapped and taken to remote areas to be killed. The facts in Bolender v. State 422 So.2d 833 (Fla. 1982) and Washington v. State 362 So.2d 658 (Fla. 1978) are also along these lines.

We have no such facts in the present case. There was no evidence to show the victim here knew or could identify defendant. The victim was not taken to a remote area. There was no showing the dominant motive behind the killing was to eliminate a witness; indeed, the only evidence on point clearly indicates otherwise.

ISSUE XII:

IT WAS ERROR TO ALLOW THE STATE TO ARGUE TO THE JURY DEFENDANT'S LACK OF REMORSE AND FAILURE TO ACKNOWLEDGE GUILT

The State asserts defendant opened the door on the questions of lack of remorse and failure to acknowledge guilt by expression sorrow for the victim's death. Ans.Br., P.43. Thus, the State asserts, the argument was "related to an inference reasonably drawn from the evidence." Id. The State further asserts "lack of remorse was not offered as an aggravating factor" and defendant

was not prejudiced by the argument because he could have responded to it. Id. at 43-44.

Defendant did not open the door to this argument. Through counsel, he specifically waived his right to argue such matters to the jury. R. 1148-49. This Court has held that such doors are not opened even if the argument can reasonably be inferred from the testimony of the defendant's own expert. Robinson v. State 520 So.2d 1 (Fla. 1988). This Court has further held "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 (1987) (emphasis added). The jury cannot be expected to make the fine distinctions urged by the State: that this argument was not made to show aggravation, but rather to anticipatorily rebut an expected defense mitigation argument. The State began its closing argument by asserting defendant "was [the] triggerman, who planned it, conceived it and executed it, has shown on remorse, nor acknowledgment of guilt and is deserving of the death penalty." R.1148 (emphasis added). This is plainly an argument designed to show the aggravating circumstances of the case, and to include lack of remorse and failure to acknowledge guilt as among those circumstances. The State argued these factors on two other occasions during its closing. R.1149-50, 1165-66.

Further, there was not even a suggestion from the defense side that acknowledgment of guilt would be argued in mitigation. No doors were opened on this point.

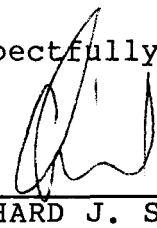
The State's argument unfairly prejudiced defendant and

denied him his statutory and constitutional rights to a fair and impartial sentencing hearing.

III. CONCLUSION

See Initial Brief, Page 42.

Respectfully submitted,



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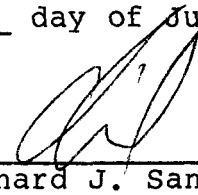
CERTIFICATE OF SERVICE

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, 8th Floor, 1313 Tampa Street, Tampa, Florida 33601 on this the 23 day of June, 1989.



Richard J. Sanders