IN THE SUPREME COURT OF FLORIDA

RODNEY TYRONE LOWE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 77,972

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Rodney Tyrone Lowe, was the defendant in the trial court and will be referred to herein as "Appellant." Appellee, the State of Florida, was the prosecution in the trial court and will be referred to herein as "the State." References to the pleadings (motions, orders, etc.) will be by the symbol "R," references to the supplemental record containing depositions and pretrial statements of various persons will be by the symbol "SR," transcripts of the motion hearings and voir dire of the first trial will be by the symbol "ST," and references to the transcripts of the motion hearings and second trial will be by the symbol "T" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The State cannot accept Appellant's incomplete and argumentative statement of the case and facts, and cannot coherently merely point to the discrepancies. Consequently, the State offers the following:

On July 3, 1990, Donna Burnell was working at a Nu-Pack convenience store in the Sebastian area of Indian River County when she was shot three times in front of her three-year-old adopted son and died on the way to the hospital. One week later, Appellant was questioned regarding the murder and made incriminating statements to the police. That same day, Dwayne Blackmon also gave a sworn statement to the police indicating that Appellant told him he shot the victim twice in the head and once in the chest. (SR 20). Based on these statements, and other evidence which linked Appellant to the murder, Appellant was arrested on July 10, 1990, for first-degree murder, attempted robbery with a firearm, and possession of a firearm by a convicted felon. (R 1329). The following day, John Unruh of the Public Defender's Office was appointed to represent Appellant. (SR 1881). On July 25, 1990, Appellant was indicted for the first-degree murder and attempted robbery of Donna Burnell. (R 1326-27).

On October 16, 1990, Dwayne Blackmon was arrested on an unrelated charge of grand theft and probation violations. While in jail, Dwayne was visited by John Unruh, who wanted to talk to Dwayne about Appellant's case. (T 108-10; SR 1744-48). The following day, the public defender's office was appointed to

represent Dwayne. (SR 1745). On October 23, 1990, Mr. Unruh again visited Dwayne at the jail to tell him that he (Unruh) may have to withdraw from his case. They again talked about Appellant's case. (T 134-36; SR 1749-52). For a third time, Mr. Unruh visited Dwayne at the jail on October 26, 1990. At this meeting, Mr. Unruh represented himself as Dwayne's attorney and persuaded Dwayne to sign an affidavit which was used to support a motion for protective order. The motion claimed that Dwayne and his wife, Vickie, were being threatened and harassed by the police. (R 1371-74; T 138; SR 1752-53). On October 30, 1990, the State filed a Motion to Disqualify the Public Defender's Office, claiming that a conflict of interest had developed because the public defender's office was representing both Appellant and Dwayne Blackmon, a key witness in Appellant's case. (R 1380-81).

On November 13, 1990, John Power was appointed as a special assistant public defender to represent Dwayne Blackmon. (R 1403). The following day, with counsel present, Dwayne Blackmon gave a sworn statement to the assistant state attorney trying Appellant's case. In his statement, Dwayne asserted that the allegations in the affidavit supporting the motion for protective order were either untrue or misrepresented. He claimed that he told Mr. Unruh that certain allegations were untrue and that Mr. Unruh assured him that they would be corrected. Dwayne signed the affidavit believing that Mr. Unruh was his attorney and was filing the motion in his best interests. (SR 1742-71). The following day, at the hearing on the motions for protective order and for disqualification of the public defender's office, Mr.

Unruh maintained that Dwayne signed the affidavit voluntarily and never indicated any inaccuracies, but nevertheless withdrew the motion for protective order and moved to withdraw from Dwayne Blackmon's case "because of the appearance of impropriety." (T 143, 146-47).[1]

On January 2, 1991, Appellant filed a Motion to Disqualify the trial judge based on Dwayne Blackmon's affidavit, which alleged that Judge Wild was biased in favor of the State. (R 1448-53). Appellant also filed a Motion to Transfer the case to a circuit court judge, claiming that Judge Wild, a county court judge, was improperly appointed to hear his case. (R 1455-56). Both motions were denied. (R 1467, 1711; T 36-50).[2]

On January 15, 1991, Appellant filed a Motion to Suppress his pretrial statements to the police. (R 1620-24). On January 17, 1991, the State filed a Motion in Limine, seeking to exclude the hearsay statement of Danny Butts, the victim's three-year-old adopted child, to Debra Brook, a friend of the victim, that "two peoples" argued with and shot his mother. (R 1650-51). Jury selection was begun the following day on Friday, January 18, 1991. (ST 9).

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[1] The transcripts of this motion hearing were not made a part of the record on appeal. Record references are to a later hearing on the State's second motion to disqualify the public defender's office wherein Mr. Unruh testified to his representation of Appellant and Dwayne.

[2] Both motions were set to be heard on January 10, 1991. Apparently, since the Motion to Disqualify was denied by written order on January 4, 1991, it was not discussed at the motion hearing.

The following Monday, the State moved to disqualify the public defender's office based on their dual representation of Appellant and Dwayne Blackmon, which created a substantial conflict of interest and the possibility that his attorney would have to testify in his case. (R 1665-69). A hearing on the motion was postponed to the next day. That Monday, however, the trial court heard the State's motion in limine which sought to exclude Danny Butts' testimony. Michelle Burnell, a friend of the victim, testified that Danny could barely speak and could not count at the time of the murder, and has a brain disorder. (SR 207-13). Richard Burnell, the victim's husband, and the child's father, also testified that Danny did not know his colors or numbers and had a learning disability. (SR 219). The trial court took the motion under advisement until it viewed a videotaped interview of Danny and read Debra Brook's deposition. (SR 223). The trial court later granted the State's motion on April 3, 1991, finding that the child was incompetent to testify. (T 402).

On January 22, 1991, the trial court heard the State's motion to disqualify the public defender's office. John Power, Dwayne's special assistant public defender, testified that he thought it was improper for Mr. Unruh to interview Dwayne regarding Appellant's case. (T 87-106). Lynn Park, the prosecutor assigned to Appellant's case, testified that she expressed her concerns to Mr. Unruh when Dwayne was arrested regarding a conflict of interest, and again when he filed the motion for protective order, but Mr. Unruh did not believe a conflict existed. Because she was hindered in talking to Dwayne

due to his representation by counsel, she moved to have the public defender's office disqualified. Eventually, Mr. Unruh withdrew from Dwayne's case. (T 108-16).

Mr. Unruh then testified that he went to see Dwayne at the jail on October 16, before the public defender's office was appointed to represent him, because Dwayne's wife, Vickie, had called him and told him that she and Dwayne had lied about Appellant's involvement in the murder and that the police were harassing them about testifying for the State. (T 121-23). He went to see Dwayne again on October 23, but informed Dwayne that he was Appellant's attorney. At that meeting, Dwayne indicated that he wanted Mr. Unruh to file a motion for protective order to stop the police harassment. (T 134). Consequently, he went to see Dwayne again on October 26 for Dwayne to sign the affidavit. (T 138). According to Mr. Unruh, Dwayne read the affidavit, but did not indicate any inaccuracies in it. (T 145-46). When Mr. Unruh discovered that Dwayne and Vickie had changed their stories, he withdrew the motion for protective order. (T 143). Although he did not believe that a conflict of interest had arisen, he nevertheless withdrew from representing Dwayne "because of the appearance of impropriety." (T 146-47).

The trial court found that Mr. Unruh had acted improperly in interviewing Dwayne regarding Appellant's case. As a result, it appointed James Long to counsel Appellant about the conflict of interest and his ability to waive the conflict or obtain another attorney. After a short recess, during which Mr. Long spoke with Appellant, Appellant indicated that he wanted other counsel. As a result, the trial court granted the State's motion to

disqualify the public defender's office. (T 181-94; R 1688-92). Mr. Long was later appointed to represent Appellant for trial. (T 1692).

On February 1, 1991, defense counsel moved for the appointment of co-counsel for the penalty phase. (R 1718-19). Just prior to the hearing on March 6, 1991, Appellant told the trial court that he had asked Mr. Long to withdraw, but that Mr. Long refused. When asked why he wanted Mr. Long to withdraw, Appellant indicated that he did not believe Mr. Long would fully represent him because Mr. Long had told Appellant that he thought Appellant was guilty. When pressed for specifics about Mr. Long's alleged inadequate representation, Appellant said, "Forget it." (T 200-04). Mr. Long's motion for co-counsel was subsequently denied. (T 210-16). Shortly thereafter, the trial court renewed discussions with Appellant regarding Mr. Long's representation. Appellant indicated that he did not believe Mr. Long was working on his case. Since counsel would get paid regardless of his representation, Appellant believed that he would not work diligently on his case. (T 216-21).

On March 22, 1991, the trial court heard Appellant's motion to suppress his statements. Specifically, Appellant challenged all statements made after he invoked his right to counsel, claiming that his girlfriend was made an agent of the State who then coerced his statements regarding his involvement in the murder. (T 223-26).

Steve Kerby, an investigator with the State Attorney's Office, testified that he and Sergeant Green learned that Appellant was supposed to be at the Vero Beach Sheriff's Office

regarding some worthless check charges. After Appellant waived his Miranda rights, Kerby and Green questioned Appellant about the murder. (T 259-64). Initially, Appellant denied any involvement in the murder and attempted robbery, but eventually invoked his right to counsel. (T 264). Kerby and Green left the interview room and spoke with Patty White, Appellant's girlfriend, who was in an adjacent interview room. Patty had overheard the interview with Appellant and asked Kerby and Green if she could talk to Appellant. (T 266-74). Kerby and Green agreed and asked Patty if she would consent to having her conversation with Appellant recorded, to which she agreed. (T 275-76, 291-94). Detective Frank Divincenzo, who operated the recording equipment, confirmed that Patty asked to talk to Appellant after she overheard Appellant's discussions with Kerby and Green. (T 306-07).

The following day, Patty White testified that she overheard Kerby and Green talking to Appellant about the murder and wanted to talk to him. She agreed to have their conversation recorded. (T 320-24). During their discussion, Patty pleaded with Appellant to tell her the truth while confronting him with evidence of his involvement. After awhile, Appellant told her that Dwayne Blackmon and Lorenzo Sailor came out of the store and jumped in the car. After Appellant drove off, they told him that they had killed the clerk. (SR 1805-16). Appellant agreed to tell the police what he told her. (SR 1815-16).[3]

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[3] Citation is to the supplemental record because the court reporter could not completely and accurately transcribe the audio tape of the conversation between Patty and Appellant which was played at the suppression hearing.

Investigator Kerby returned to the interview room when their conversation was concluded, and Appellant asked Kerby to come inside. (SR 1816). Kerby questioned Appellant extensively about his previous request for an attorney. Appellant indicated that he no longer wanted an attorney and that he would talk to them about the murder. (SR 1817-18). During this second interview, Appellant stated that he left work during the morning of July 3 and drove to Dwayne Blackmon's house in Wabasso. He picked up Dwayne and Lorenzo Sailor and drove to the Nu Pack and parked by the side of the store. Lorenzo had Appellant's .32 and Dwayne had his own .38. Appellant sat in the car, which was Patty's white Mercury Topaz, while Lorenzo went inside and Dwayne stood at the corner of the store. After awhile, Dwayne jumped in the car. When Lorenzo did not come out, Appellant drove around front and waited for him. Lorenzo got in, and Appellant drove off. He took Dwayne and Lorenzo home, then went to his house and put the .32 inside, and had Patty drive him to work. (SR 1818-22).

After arguments by counsel, the trial court took the motion under advisement. (T 340-98). It later denied Appellant's motion by written order on April 5, 1991. Specifically, it found (1) that Patty White was not acting as an agent of the State when she spoke to Appellant about the murder after he had invoked his right to counsel, (2) that Appellant thereafter initiated further discussions with the police, (3) that Appellant freely and voluntarily waived his previously asserted right to counsel, and (4) that Appellant had no reasonable expectation of privacy in the interview room at the police department. (R 1794-1801).

At this motion hearing, the trial court also heard Appellant's motion in limine, which sought to exclude portions of the audio tape of Appellant's statements relating to prior crimes and his request for an attorney. (R 1790; T 399). The State agreed to redact from the tapes and transcripts those portions objected to by defense counsel. (T 400-01).

Appellant's trial began on April 8, 1993. After a day of jury selection and opening statements, the State called Ronald Sinclair, a crime scene investigator with the Indian River Sheriff's Office, as its first witness. Officer Sinclair testified that he responded to the Nu-Pack convenience store on July 3, 1990, around 11:00 a.m. (T 452). Inside the store, he found a 7-Up can laying on a counter with condensation on it and a hamburger still warm inside the microwave, both of which he collected as evidence. (T 464-66). He also collected a bullet which he found behind a radio on top of a file cabinet behind the clerk's counter. (T 469). The cash register had a dent in the drawer consistent with being struck by a bullet and its alarm was sounding. (T 466-67). According to the cash register receipt tape, the last item sold was a cake for $.69 at 10:07 a.m. on the day of the murder. (T 490). The store's general manager later testified that no money was missing from the cash register. (T 590-94).

The State's next witness was Investigator William Render of the Sebastian Police Department, who identified a white Mercury Topaz as registered to the stepfather of Patty White. (T 531-34). Next, the State called Sergeant Eugene Ewert of the Sebastian Police Department, who testified that he was the first

officer at the scene. When he arrived shortly after 10:20 a.m., a man named Steven Leudtke was standing outside and told him that the clerk had been stabbed. Sergeant Ewert found the victim, whom he knew from visiting the store, lying on the floor face up behind the counter with shots to her head and chest. She was still alive, but had a hard time breathing. The wound to her chest had punctured her lung, and she was sucking air through the wound. Sergeant Ewert talked to Ms. Burnell until the paramedics arrived. (T 535-42).

Steven Leudtke testified that he went to the Nu-Pack to get a paper around 10:00 a.m. (T 548). As he got out of his car, he saw a black male exit the store. (T 550). The man was 5'8' to 5'10" tall, weighed 150 to 165 pounds, was wearing light-colored clothing, a dark ball cap, and some type of glasses, and had a scraggly beard. (T 556-57). The shirt was a tan button-up similar to the type worn by employees at Gator Lumber Company. (571). The man was "high-stepping" it to a white car in the parking lot which Mr. Leudtke thought was a Ford Taurus, but which he identified as Patty White's Mercury Topaz. (T 554-56). When he went inside, he found Donna Burnell lying on the floor. Her child was standing over her screaming. No one else was in the store. (T 550-53). Debra Brook, a friend of the victim who arrived on the scene shortly after Mr. Leudtke, identified the victim as Donna Burnell. (T 578-80).

The State's next witness was William Lawrence, a paramedic, who testified that he arrived on the scene at 10:24 a.m. and found the victim lying on the floor of the store with a faint pulse. Within a minute, she went into cardiac arrest, and he and

others performed CPR on the way to the hospital. (T 585-87). At the hospital, Dr. Nasr characterized the victim as dead on arrival, but attempted to stabilize her for ten minutes, although her heart had been penetrated by a bullet. (T 604-07).

The medical examiner, Dr. Hobin, testified that the victim suffered three gunshot wounds: one to the left chest, one to the upper left face just above the eye, and one to the top of the head. (T 615). All three shots came from close range, each was potentially fatal, and all would have been extremely painful. (T 17-33). He also found a blunt, nonpenetrating injury to a finger on the victim's left hand. (T 615, 622).

The State's next witness was Carl Dordelman, Appellant's roommate at the time of the murder. Mr. Dordelman testified that Appellant had a .32 caliber revolver two days before the murder. (T 636). The day after the murder, Appellant did not seem upset. (T 637).

Steven White, Appellant's supervisor at Gator Lumber Company, testified that Appellant asked if he could leave for awhile during the morning of July 3. Mr. White gave him permission to leave and then did not see Appellant for some time thereafter. (T 645-49). Mary Burke, the comptroller at Gator Lumber, confirmed through Appellant's timecards that Appellant clocked out at 9:58 a.m. and clocked back in at 10:34 a.m. on July 3. (T 665-67).

During a break in the testimony, Appellant renewed his motion to suppress his statements, which was denied. (T 673-77). The State provided defense counsel with a copy of the transcripts of the audio tapes which had been edited according to their

previous agreement. After lunch, defense counsel indicated that the State had satisfied his concerns regarding prejudicial material on the tapes. The State indicated that the tapes would be edited accordingly while they were being played to the jury. (T 679-80).

The State's next witness was Investigator Steve Kerby of the State Attorney's Office. Through this witness, the State introduced the audio tapes of Appellant's interviews at the police station, which were played for the jury. (T 681-814). Sergeant Chuck Green then testified that the last sale on the cash register at the Nu-Pack was made at 10:07 a.m. and Steven Leudtke called 911 at 10:13 a.m. (T 819). During his investigation, he videotaped the route that Appellant claimed to have driven: from work to Wabasso, to the Nu-Pack in Sebastian, to Wabasso, to his home in Sebastian, and back to work. It took at least 54 minutes. (T 833). On the other hand, a route from Gator Lumber to the Nu-Pack to Appellant's house and back to work took only 22 minutes. (T 828). Sergeant Green also recovered the murder weapon on July 10 from Dwayne Blackmon. (T 830-31).

The State's next witness was Patty White, Appellant's girlfriend. Patty testified that she owned a white 1988 Mercury Topaz, which Appellant drove to work on July 3. That same day, Appellant picked her up at the house between 10:00 and 11:00 a.m., and she drove him back to work. (T 854-56). She then went to pick up Vickie Blackmon. They were stopped by the police on the way back to her house around 11:00 a.m. because her car matched a BOLO description of the murder suspect's car. (T 856-58, 889-90). Patty then testified that Appellant had a .32

caliber handgun that belonged to Dwayne Blackmon, which he liked to shoot at Wabasso Park. Appellant put the gun under the front seat of Patty's car the day before the murder. After she was stopped by the police, she checked for the gun under the seat, but did not find it. Sometime after the murder, Vickie Blackmon came over to get the gun. (T 859-61, 867).

Vickie Blackmon then testified that her husband, Dwayne, traded cocaine for a .32 caliber handgun which he gave to Appellant. (T 893). Vickie got the gun from Patty after the murder because Appellant told Patty to give it to her. (T 900-01). Dwayne Blackmon confirmed that he traded cocaine for a .32 caliber handgun for Appellant. (T 918). He also testified that about a week before the murder, he and Appellant and Lorenzo Sailor went by the Nu-Pack to check it out for a possible robbery. Appellant went in side, came out and got a gun, went back inside, then came out and said someone was in the cooler, so they left. (T 923-24). The next day, they went back to the Nu-Pack. Appellant and Lorenzo got out of the car that Dwayne was driving, but a car pulled up at the store, so they left. (T 926-29). On July 3, Appellant came over to his house after work and appeared upset. Appellant told Dwayne that he went to rob the store. Dwayne asked him if he got anything, and Appellant said, "No, I shot the whore three times." (T 933-34). Appellant said he shot her twice in the head and once in the chest. (T 934). Vickie brought the .32 home with her one day after going to Appellant's to collect some belongings. Vickie told Dwayne that Appellant gave her the gun for Dwayne to hold. (T 938).

Next, the State called Gary Rathman, a firearms examiner for FDLE, who testified that two of the three bullets recovered from the victim's body and the bullet recovered from the store came from the .32 caliber handgun given to the police by Dwayne Blackmon. The third bullet from the victim's body had similar class characteristics but was too badly damaged for a positive match. (T 969-70). Mr. Rathman also testified that the bullet impact damage to the cash register drawer was consistent with a .32. (T 972).

The State's final witness, Deborah Fisher, a latent print examiner from FDLE, testified that two prints taken off of a cellophane wrapper that was found with the hamburger in the microwave at the Nu-Pack matched Appellant's left index finger and right thumb print. (T 991-92).

The State rested, and Appellant moved for a judgment of acquittal, which was denied. (T 1000). Thereafter, Appellant rested without calling any witnesses. (T 1001). Appellant indicated that he was satisfied with his attorney's representation up to that point. (T 1003).

At the charge conference, the State requested a special instruction on inconsistent, exculpatory statements as inferring a consciousness of guilt. Over defense counsel's objection, the request was granted. (T 1030-31). During the State's closing argument, defense counsel raised several objections and motions for mistrial, all of which were denied. (T 1070-71, 1078, 1097-98). After the lunch recess, defense counsel made another motion for mistrial based on the State's closing argument. It too was denied. (T 1103-04). Following jury instructions, the jury

returned a verdict of guilty to first-degree murder as charged and attempted armed robbery with a firearm as charged. (T 1135).

At the penalty phase on April 22, 1991, the State introduced a certified copy of judgement and sentence indicating a plea of no contest to robbery without a weapon and burglary of a conveyance, entered on May 3, 1988. (T 1152-53). The State also offered the testimony of Thomas Crosby, who testified that, on December 21, 1987, he had driven his van home from the library and parked in his driveway when a man grabbed him from behind and held what he believed to be a knife to his throat. The man, whom Mr. Crosby could never positively identify, then took his wallet, ordered him out of the van, and drove off. Appellant was stopped thirty minutes later driving the van. (T 1155-57). Deputy Michael Scully testified over defense objection that Appellant attempted to flee in the van upon seeing the officer, but crashed into a tree. Appellant was subdued at gunpoint. (T 1163-65). Although Deputy Scully recovered a piece of plastic with a sharp edge, which was thought to be the object held to the victim's throat, the piece of plastic was subsequently misplaced. (T 1165-66).

After the State rested, Appellant called Jo Lynn Burke as a witness on his behalf. Ms. Burke testified that she was the principal at the Indian River Correctional Institution when Appellant was an inmate. Appellant got his GED in 1988 through the institution's program and was a teacher's aide. (T 1169-71). She knew of only one disciplinary report involving Appellant. (T 1175-76).

Gordon Hine, a pastor at the Indian River Correctional Institution, testified that Appellant stayed in a halfway house for five months after his release. Appellant was one of the better residents. He attended Bible studies and had a job at Gator Lumber Company. When the lease expired on the house, Mr. Hine lost touch with Appellant. (T 1178-81). Five people, including the owner of Gator Lumber, then testified that Appellant was a reliable, friendly, hard-working employee. (T 1188-89, 1200, 1205, 1227, 1234). Mark Porter, a classifications officer at the correctional facility where Appellant was awaiting trial, testified that Appellant was an "average" inmate with only one disciplinary report for trying to get an extra plate of food. (T 1222-23).

Appellant's paternal aunt, Mae Daniels, also testified on his behalf. Ms. Daniels testified that Appellant was born on June 2, 1970, and was twenty years old. He had had a normal childhood, but his father was a strict disciplinarian, who would physically punish Appellant and would not allow him to date as a teenager. She believed that Appellant rebelled against his father, who became a Jehovah's Witness and required his children to go to church meetings and sell magazines door-to-door. His father never showed Appellant any affection. (T 1212-17). On cross-examination, Ms. Daniels admitted that Appellant got into a lot of trouble as a teen, which upset his parents and resulted in punishment. (T 1218-19).

After Appellant rested, a charge conference ensued. Defense counsel requested a special instruction that the presence of the victim's child at the scene of the murder should not be

considered in deliberations. His request was denied. (T 1239, 1249). Defense counsel also objected to the instructions on the aggravating factors of "heinous, atrocious, or cruel," and "cold, calculated, and premeditated," claiming that they were unsupported by the evidence. (T 1243-57).

In rebuttal, the State called Appellant's father, Charlie Lowe, as a witness. Mr. Lowe testified that he showed his children love, but he would discipline them when necessary. He believed that as long as Appellant was living at home, he would follow his parents' rules. He would not allow Appellant to date until he was seriously contemplating marriage. He would also require his children to hand out religious literature unless they were sick or had other obligations. He and Appellant's mother had been married for twenty-two years. His sister, Mae Daniels, lives 250 miles away and visits only once or twice a year. (T 1265-69). Mr. Lowe raised Appellant "the best [he] knew how," but has vowed never to speak to him again. (T 1270-72).

After closing arguments, the trial court instructed the jury on four aggravating factors--"prior violent felony," "felony murder," HAC, and CCP--and on age as a statutory mitigating factor. (T 1303-07). The jury returned a recommendation of death by a vote of nine to three. (T 1309). After an independent evaluation of the evidence, the trial court sentenced Appellant to death, finding the existence of two aggravating factors--"prior violent felony" and "felony murder." In mitigation, the trial court found that Appellant functioned well in a strict environment, that he was a responsible employee after his release from prison, that he had a strict home environment as

a child, and that he participated in Bible studies after his release from prison. The trial court rejected Appellant's age as a mitigating factor. It also found no evidence that Appellant was merely an accomplice in the robbery/murder whose participation was minor or that Appellant was punished disproportionately to his accomplices. Ultimately, the trial court found that the evidence in mitigation was not sufficient to outweigh the evidence in aggravation. As a result, it sentenced Appellant to death for the first-degree murder, and to a consecutive fifteen years in prison for the attempted robbery. (R 1851-56). The State nol prossed Count III relating to the possession of a firearm by a convicted felon. (T 1866).

SUMMARY OF ARGUMENT

Issue I - Appellant's motion to suppress was properly denied. Patty White was not an agent of the State. Moreover, because Appellant initiated further conversation with the police and voluntarily, knowingly, and intelligently waived his previously invoked right to counsel, his statements were admissible against him. If their admission was error, however, it was harmless beyond a reasonable doubt.

Issue II - The admission of Appellant's initial taped statement to the police did not constitute fundamental error. Defense counsel moved before trial to exclude portions of the tape, which the State agreed to redact. Appellant made no other objections to the tape. If the tape's admission was error, however, it was harmless beyond a reasonable doubt.

Issue III - Appellant failed to raise a prejudice claim below to the contents of a box of personal belongings admitted into evidence; thus, he cannot make it now for the first time on appeal. Appellant's relevancy objection, however, was properly overruled, since the box was relevant to show that a pair of sunglasses and a newspaper article on the murder belonged exclusively to Appellant. If it was erroneously admitted, however, such error was harmless beyond a reasonable doubt.

Issue IV - The trial court did not abuse its discretion in denying defense counsel's motion for co-counsel under the circumstances of this case.

Issue V - Because Appellant refused to provide specific facts underlying his motion for substitution of counsel, and

because his generalized complaints indicated a lack of trust rather proof of ineffectiveness, no Nelson inquiry was required. Regardless, the trial court conducted an inquiry and properly determined that Appellant's complaints did not support the withdrawal of counsel. To the extent the trial court's inquiry was inadequate, any error was harmless beyond a reasonable doubt where Appellant accepted defense counsel and later expressed his satisfaction with his representation.

Issue VI - The trial court properly denied Appellant's motion to recuse since Appellant's allegations would not place a reasonably prudent person in fear of not receiving a fair and impartial trial.

Issue VII - While maintaining county court duties, Judge Wild was temporarily assigned to circuit court while one circuit court judge recuperated from a heart attack and the other judge served compulsory military duty. Under these circumstances, Judge Wild's assignments were proper, and Appellant's motion to transfer was justifiably denied.

Issue VIII - The State's special requested instruction has previously been approved by this Court and others. Thus, the trial court did not abuse its discretion in giving it. Even if it were error, however, it was harmless beyond a reasonable doubt.

Issue IX - Appellant failed to properly preserve for review any of the allegedly erroneous comments made by the State during its guilt-phase closing argument. Regardless, the comments were either fair comments on the evidence or were harmless beyond a reasonable doubt. Thus, no mistrial was warranted.

Issue X - Because Appellant failed to seek admission during the trial of Danny Butts' hearsay statements to Debra Brook, he has failed to preserve this issue for review. Nevertheless, any error in the trial court's exclusion of her testimony was harmless beyond a reasonable doubt.

Issue XI - The instructions as read adequately channeled the jury's discretion in finding and weighing applicable aggravating factors. Thus, the trial court did not abuse its discretion in denying Appellant's requested penalty-phase jury instruction.

Issue XII - Contrary to Appellant's assertion, the evidence supported jury instructions on HAC and CCP. Even if it did not, however, any error in so instructing the jury was harmless since it must be presumed that the jury did not use them in determining their recommendation where there was no evidence to support them.

Issue XIII - Appellant failed to object to any of the allegedly erroneous remarks made by the prosecutor during his penalty-phase closing argument. Even if he had, however, they would have properly been overruled since the State's comments were fair comments on the evidence. Even were they not, they were harmless beyond a reasonable doubt.

Issue XIV - The circumstances underlying a prior violent felony conviction can be considered in assessing the weight to be given this aggravating factor. Thus, the trial court did not improperly consider evidence that Appellant was armed during a previous robbery even though he pled to robbery without a weapon.

Issue XV - This Court has previously held that the details of a prior violent felony conviction are admissible in the penalty phase. Even if erroneously admitted, however, such error was harmless beyond a reasonable doubt.

Issue XVI - The trial court did not err in failing to sua sponte inquire into Appellant's decisions not to call certain witnesses on his behalf during the penalty-phase proceeding. This Court has never required such an inquiry and should not do so now.

Issue XVII - The sentencing order makes clear that all of Appellant's evidence in mitigation was considered by the trial court. None of it, however, was considered to be sufficient to outweigh the evidence in mitigation. The record supports such a finding.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS (Restated).

Prior to trial, defense counsel filed a Motion to Suppress Statements, claiming that (1) he never validly waived his rights initially, (2) once he asked for an attorney, one was not provided, and instead his girlfriend was purposefully placed in his presence to elicit incriminating statements, and (3) all statements thereafter were involuntarily made. (R 1620-24). At the hearing on the motion, defense counsel abandoned his claim that there was no valid waiver of rights initially: "[J]ust before [his request for an attorney] we are not objecting to that part of the statement because he did agree to talk to the police." (T 226). He maintained, however, that all statements made after his request for counsel were inadmissible because they were involuntarily made: Investigator Kerby made coercive remarks after Appellant requested an attorney and then sent in Patty White as an agent of the State to elicit incriminating remarks and to coerce Appellant to talk to the police, which he did after being coerced to waive his previously invoked right to counsel. (T 340-57).

The State responded that all questioning ceased once Appellant requested an attorney, and Investigator Kerby left the room. Patty White, who had overheard the interview with Appellant wherein the officers had confronted Appellant with the evidence against him, pleaded with Kerby and Green to let her

talk to Appellant. Although they hoped Appellant would confess to her, they did not send her in as an agent of the State to coerce a confession. When Patty and Appellant's conversation was over, Kerby opened the door to let Patty out and Appellant initiated further conversation. Kerby made sure, however, that Appellant did not want an attorney. Because his waiver was voluntary and intelligent, his subsequent statements were admissible. (T 357-66).

After a lengthy discussion with the parties, the trial court took the motion under advisement (T 366-98), but entered a written order two days later. (R 1794-1801). Ultimately, the trial court denied the motion to suppress, finding (1) that Patty White was not acting as an agent of the State when she spoke to Appellant about the murder after he had invoked his right to counsel, (2) that Appellant thereafter initiated further discussions with the police, (3) that Appellant freely and voluntarily waived his previously asserted right to counsel, and (4) that Appellant had no reasonable expectation of privacy in the interview room at the police department. (R 1794-1801).

In this appeal, Appellant renews his claim that his statements made to Patty White and Investigator Kerby after his request for counsel were the result of coercion and thus involuntary. As a result, he asserts that the trial court abused its discretion in denying his motion to suppress. **Brief of Appellant** at 34-44. The State disagrees.

When Appellant requested an attorney during the initial interview with Investigator Kerby, the interrogation immediately ceased as required, and Kerby left the room. His intention at

that point was to go on to something else: "My intention at that point in time was that I was leaving the room and that was the end of my interview with him. . . . I went on to something else. I went on to interview Patty White at that point." (T 268). Patty White, who was in an interview room across the hall, was upset and pleaded with Kerby and Green to let her talk to Appellant. She had suspicions before she got there that Appellant was involved in the murder, but after overhearing much of the interrogation of Appellant, her suspicions were piqued. She wanted to know for herself whether Appellant was involved. Before allowing her to talk to Appellant, however, Kerby and Green interviewed her as a suspect in the murder. During this interview, they discussed the evidence against Appellant. Then, when they finished questioning her, they allowed her time to talk to Appellant. When asked whether he thought Patty was going to try to get Appellant to confirm his involvement to her, Investigator Kerby stated, "That was a good possibility that she was gonna do that. I -- at that point I didn't -- I honestly didn't know what she was gonna do. I didn't tell her what to do, but I knew what she had on her mind. . . . For all I knew at that point she could have gone in there and -- and done anything." (T 279-80). As a result, they decided to tape the conversation and procured her consent to do so.

In asserting that Patty White became a state agent who then coerced him into making incriminating statements, Appellant focuses on the fact that the police told Patty of the details of their investigation before allowing her to go in and then insisted on tape recording their conversation without informing

him of such. Neither fact, however, constitutes the type of overreaching condemned by Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981). As noted previously, Patty already suspected that Appellant was involved, and only by accident overheard Kerby and Green confront Appellant with the evidence against him. Regardless, Investigator Kerby testified that they related the evidence against Appellant to Patty during their interview of her as a suspect in the murder,[4] not because she was about to talk to Appellant. (T 267-72). Thus, contrary to Appellant's assertion, Kerby and Green did not "instigate[] an already upset White to question Lowe about the crime by telling her of the details of their investigation." **Brief of Appellant** at 36.

As for Kerby and Green's decision to tape record the conversation, this fact is of no import. There is no question that Patty would be able to testify to any statements made to her by Appellant, regardless of whether or not they were tape-recorded. The fact that they were does not make her an agent of the State.[5] Moreover, contrary to Appellant's assertion, the police did not foster an expectation of privacy between Appellant and Patty. Appellant was in an interrogation room at the police station, which ordinarily does not engender a reasonable expectation of privacy. See State v. Calhoun, 479 So.2d 214

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[4] Patty's car was used in the murder, and she gave the murder weapon to Vickie Blackmon to hold for Appellant.

[5] Had the conversation not been recorded, defense counsel undoubtedly would have used that fact to discredit the investigative skills of the police department, and would have been better able to impeach Patty's testimony regarding the accuracy of her recollection of the conversation.

(Fla. 4th DCA 1985). Unlike in Calhoun, however, which is cited to by Appellant, Appellant did not ask to speak to Patty privately and was not led to believe that their conversation was secure and private.

Appellant cites to several cases to support his position that Patty was a de facto agent of the State, but those cases are easily distinguishable. There, either the police, the victim, or a codefendant used threats and/or promises to exact a confession. See, e.g., Peoples v. State, 612 So.2d 555 (Fla. 1992) (codefendant agreed to obtain incriminating information against defendant); Walls v. State, 580 So.2d 135 (Fla. 1991) (correctional officer purposefully engaged the defendant in allegedly confidential conversations in order to elicit incriminating information); Brewer v. State, 386 So.2d 232 (Fla. 1980) (police threatened defendant with death penalty, indicated they had ability to effect leniency, and suggested that defendant would not be given fair trial unless he confessed); State v. Kettering, 483 So.2d 97 (Fla. 5th DCA) (defendant was told by employer that if he confessed to stealing merchandise the police would not be contacted), rev. denied, 494 So.2d 1153 (Fla. 1986); Howard v. State, 515 So.2d 430 (Fla. 4th DCA 1987) (victim surprised defendant and, at gunpoint, exacted a confession even though codefendant claimed he committed burglary by himself and only got defendant to retrieve stolen goods with him). But see Frazier v. State, 107 So.2d 16 (Fla. 1958) (pre-Miranda case wherein court found confessions admissible even though defendant claimed he was threatened with lynching if he did not confess). Here, on the other hand, there was no undue coercion. Patty

White was not conducting the functional equivalent of police interrogation, nor was she making threats or promises which affected the outcome of Appellant's case. The fact that she would not come see him or remain loyal to him unless he told the police the truth is not the type of coercive conduct for which the exclusionary rule was created.

As the trial court noted in its written order, this case is most closely controlled by Arizona v. Mauro, 481 U.S. 520 (1987). In Mauro, the defendant invoked his right to counsel when questioned at the police station regarding the murder of his son. His wife, who was being questioned in another room, asked to speak with the defendant. For security reasons, an officer accompanied her with a tape recorder into the office in which the defendant was being questioned. Statements made to her by her husband were used at trial to rebut the defendant's defense of insanity.

On appeal, the Supreme Court found "no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements." Id. at 528. In other words, the decision to allow the defendant's wife to see him did not constitute "the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." Id. at 527. The Court doubted "that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way." Id. at 528. Although the officers in Mauro, like the officers here, believed there was a possibility that the defendant would make incriminating statements to his wife, the Court found that

"[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." Id. at 528-29. Moreover, the Supreme Court cautioned that "[p]olice departments need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private." Id. at 530.

Appellant attempts to distinguish Mauro based on the fact that "the police neither briefed the wife for her visit with her husband by informing her of the incriminating evidence against him nor hid the recording device nor secretly eavesdropped on the conversation. There was no indication that Mrs. Mauro wanted to see her husband to find out what happened. Also, Mauro had advance warning that his wife was coming and was fully informed that the officer would be present and taping their conversation." **Brief of Appellant** at 36. As the opinion makes clear, however, Mrs. Mauro knew what had happened; she had tried to stop her husband from killing her son. See 481 U.S. at 522-23 & n.1. As for Appellant's ignorance that the police were listening to and recording the conversation, this fact is of no significance. The focus is on the perceptions of the suspect, not the intent of the police, when determining whether the actions of the police were reasonably likely to elicit an incriminating response. Id. at 526-27. Here, Appellant had no reasonable expectation of privacy in the police interview room and was not led to believe that he could have one. Calhoun; Brown v. State, 349 So.2d 1196, 1197 (Fla. 4th DCA 1977) (It appears to be the general rule that a prisoner in jail has no reasonable expectation of privacy and that the custodians of such a detention center have the right to

exercise constant surveillance of inmates, including eavesdropping on their conversations. This rule has been held to include electronic surveillance while a person is under detention in a police building and not yet formally imprisoned."), cert. denied, 434 U.S. 1078 (1978). Thus, under the circumstances, he could not have perceived that the police were trying to elicit incriminating statements. Finally, Appellant was told that Patty wanted to talk to him and was asked if it was alright: "She wanted to talk to you for a minute, so I'm going to give her a few minutes to talk to you, okay. All right?" (SR 1805). Although he said to Patty, "I told you to go on out" (SR 1805), apparently meaning that he had told her to leave earlier, he did not in any way indicate that he did not want to talk to her. Thus, contrary to Appellant's implication, he was not forced to talk to her.

Another case relied upon by the trial court was Z.F.B. v. State, 573 So.2d 1031 (Fla. 3d DCA 1991). In Z.F.B., a juvenile was being questioned at his home regarding several burglaries. His mother, who consented to the interview outside of her presence, told the police that the defendant had a guardian ad litem. After giving an initial statement at the house, the defendant was taken to the police station, where he requested counsel after being read his Miranda rights. The police contacted the guardian, who spoke to the defendant privately and then indicated that the defendant wanted to speak to the police. After waiving his Miranda rights in writing, the defendant gave a confession. On appeal, the district court held that his waiver was knowing and voluntary, and his statements properly admitted.

Similarly, in Stewart v. State, 549 So.2d 171 (Fla. 1989), another case relied upon by the trial court, the police were given permission by the defendant's grandmother to listen in on a telephone call between the defendant and his grandmother wherein the defendant admitting killing two people. This Court found no Fifth or Sixth Amendment violations under the United States Constitution, and no Article I, section 12 violation under the Florida Constitution. Id. at 172-73.

While assuming for argument's sake that Patty was not an agent of the state, Appellant next claims that he did not initiate further questioning. Rather, once Appellant indicated to Patty that he would talk to the police, Investigator Kerby came to the door to take Patty out and then initiated further questioning in violation of Edwards after Appellant asked him to come in. **Brief of Appellant** at 40. The record reveals, however, that Kerby opened the door to let Patty out when he thought the conversation between Patty and Appellant had ended. (T 287). When he did so, Appellant said, "Hey, come inside, man." (SR 1816). Kerby wanted Patty to leave, but Appellant wanted her to stay: "But I want her to stay while we .. while I talk to you. If that's all right, please." (SR 1816). Kerby relented and then said, "All right, you remember what we talked about about your rights and your . . . . [Y]ou telling me that you want to talk to me?" Appellant responded, "Yeah, I want to tell you. Yeah, yeah, yeah." (T 1817). Clearly, Appellant initiated further conversation with Kerby regarding the murder.

Appellant complains, however, that even were that so, his subsequent waiver of rights was not voluntary, knowing, and

intelligent. To support this contention, Appellant points to several gratuitous remarks made by Kerby after Appellant initially requested an attorney. **Brief of Appellant** at 41-44. At the end of the initial interview between Appellant and Kerby (before Appellant's conversation with Patty), it is evident that the frustration level between the two men was escalating. Appellant adamantly maintained his innocence while Kerby persisted with accusations of his involvement. Finally, Appellant sought to end the discussion by invoking his rights. When he did so, the following comments were made:

> SK [Steven Kerby]: I honestly believe that you didn't mean to, RODNEY. I honestly believe that you didn't go in there meaning to do it. I'm tell him that for the truth. I really don't believe you went in there intending to do that ...
>
> RL [Rodney Lowe]: I want to talk to me a lawyer.
>
> SK: ... until you saw her.
>
> RL: I want to talk to me a lawyer because I know I didn't do it. You know I didn't do it. I want to talk to me a lawyer, man.
>
> SK: Okay.
>
> RL: Because this is bull shit, you know.
>
> SK: All right. I'm not hard timing you.
>
> RL: No, you know, you're not hard timing me. You jus' know you was there already, but I know I .. I know did and know I didn't do, man [sic].
>
> SK: Okay. I'm not hard timing you. I'm just trying to give you a chance, but that's fine.

(SR 1803). Under the circumstances, it is obvious that Kerby's statements were in response to Appellant's attitude and demeanor

and were not intended to coerce Appellant to change his mind. As noted earlier, Kerby believed his interview of Appellant was over at that point and he intended to move on to something else. See Zerquera v. State, 549 So.2d 189 (Fla. 1989) (defendant re-initiated conversation after invoking rights and was not coerced to do so by police leaving codefendant's confession on table with defendant upon exiting interview room).

Appellant also complains that Kerby coerced Appellant's waiver of rights during the second interview (after Appellant's discussion with Patty) when he informed Appellant that he could not talk to him unless he waived his previously invoked right to counsel. This was the truth. Once a defendant invokes his right to counsel, all questioning must cease until counsel has been provided, unless the accused initiates further communication and waives his previously invoked right to speak to counsel or have counsel present during the interrogation. Edwards, 451 U.S. at 484-85; Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983). Investigator Kerby could not engage Appellant in conversation--as opposed to merely listening to spontaneous statements--without a waiver of his rights. Thus, he had to confirm that Appellant understood what his rights were, the effect of his previous request for counsel, and that they could not converse without a waiver.

Appellant asserts, however, that he maintained his request for counsel when he asked how long it would take to get one, and that Kerby "deliberately gave Lowe wrong information as to when a lawyer would be available." **Brief of Appellant** at 42-43. Kerby's response of "I have no idea" was not "wrong information."

Nor was it intended to discourage Appellant from seeking the advice of counsel. As the record reveals, when Kerby said he did not know how long it would take to get an attorney there, Appellant said, "Don't worry about it." But Kerby did not leave it at that. Instead, he made absolutely sure that Appellant did not want an attorney:

> SK: No, I have to worry about it. If you're telling me you want to do it without a lawyer, I'll talk to you.
>
> RL: I'll go without a lawyer.
>
> SK: Is that what you want to do?
>
> RL: It's what I want to do.
>
> SK: Okay. I can get you a lawyer if that's what you want.
>
> RL: Huh uh.
>
> SK: But you have to tell me that's the way it is. Because I've got to have you tell me.
>
> RL: That's the way it is. I do not want a lawyer at present while I'm talking to you.

(SR 1817-18) (emphasis added). Appellant was unequivocal in his responses. He knew he could have a lawyer if he wanted one, but he voluntarily, knowingly, and intelligently waived that right. As a result, his subsequent statements were admissible against him.

Even if, however, Appellant's statements, in whole or in part, should have been suppressed, any error in there admission was harmless beyond a reasonable doubt. Appellant left from work between 9:58 a.m. and 10:34 a.m. (T 665-67). The murder occurred between 10:07 a.m. and 10:13 a.m. (T 819). Steven Leudtke saw a black male walking out of the store just before he

found the victim shot. He also identified Patty White's car as the car in which the black male left the scene. (T 550, 555-56). Appellant's fingerprints were found on a hamburger wrapper in the store's microwave oven. (T 991-92). The bullets removed from the victim's body were fired from the gun Appellant had been using just prior to the murder. (T 636, 830-31, 859, 900-01, 969-70). Finally, Appellant told Dwayne Blackmon that he "shot the whore three times." (T 933-34). Based on this evidence, there is no reasonable possibility that the verdict would have been different absent the admission of Appellant's statements to the police. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also Pericola v. State, 499 So.2d 864, 868 (Fla. 1st DCA 1986) ("[C]onstitutional error may be treated as harmless where the evidence of guilt is overwhelming."), rev. denied, 509 So.2d 1118 (Fla. 1987). Consequently, Appellant's conviction should be affirmed.

ISSUE II

WHETHER THE ADMISSION OF APPELLANT'S FIRST TAPED STATEMENT TO THE POLICE CONSTITUTED FUNDAMENTAL ERROR (Restated).

Prior to trial, Appellant filed a motion in limine, seeking to exclude "that portion of Defendants' July 10 1990 statement given to Detective Chuck Green and State Attorneys' office investigator Steve Kerby which refers to prior crimes of the Defendant." (R 1790). At the hearing on the motion, the State agreed to redact that portion of the tape to which Appellant objected. (T 399-401). Just prior to playing the tape for the jury, the State gave defense counsel a copy of the edited transcript of the tape. Defense counsel indicated that the State had satisfied his complaints by deleting the objected-to portions of the interview. (T 679-80). No other objections to the content of the taped interviews were made.

In this appeal, Appellant now claims that the initial interview with Appellant is "rife with improper references to collateral crimes and other irrelevant evidence such as to require a new trial." **Brief of Appellant** at 44. In support of this assertion, Appellant relies principally upon Pausch v. State, 596 So.2d 1216 (Fla. 2d DCA 1992). In Pausch, the police questioned the defendant on charges of aggravated child abuse before the child died from his injuries. Prior to trial, the defendant apparently tried to exclude the tape of the interview based on "some kind of relevancy problem and some Williams Rule problem," id. at 1218, but the motion was denied. During the trial, when the tape was being played, the defendant "protested

any further disclosure of its contents." Id. The trial court noted its discomfort with the contents of the tape and berated defense counsel for not bringing the tape to the court's attention before it was admitted into evidence, but nevertheless allowed the tape to be played in its entirety. Id. On appeal, the defendant claimed that the tape's admission denied her a fair trial. The State responded that she had not properly preserved the issue for review. The district court held "that Pausch should have advanced a more specific objection to the tape recording, but . . . that the error fundamentally undermined the fairness of her trial." Id.

The State submits, however, that Pausch is distinguishable from the facts of the present case and should not be used to excuse Appellant's failure to raise an objection to his taped interview. Here, unlike in Pausch, the trial court heard the tapes prior to trial during the hearing on Appellant's motion to suppress. In addition, Appellant made a motion in limine prior to trial based on the tape's alleged prejudicial nature. The State agreed to, and did, in fact, redact those portions noted by defense counsel. After doing so, defense counsel was satisfied:

> [DEFENSE COUNSEL]: As the Court knows I filed a Motion in Limine which the Court granted and I think that the -- the motion -- the Court's ruling has been satisfied by the deletions made in the statement.
>
> THE COURT: Okay. Is there any other parts of the tape that you're objecting to at this time? Look's like there's -- you know, there's deletions throughout the entire --
>
> [DEFENSE COUNSEL]: I don't object to the deletions. You know.
>
> * * * *

> THE COURT: But at this time it appears the transcripts are -- are okay.
>
> [DEFENSE COUNSEL]: Yes, they've been sanitized.
>
> THE COURT: And if they -- if the tape is played in accordance with the transcript there won't be any objection then as far as --
>
> [DEFENSE COUNSEL]: Not as far as my Motion in Limine goes. Now there may be an objection as to admissibility.[6]

(T 679-80). To now claim fundamental error after approving the "sanitized" version is quite disingenuous.

Regardless, even if erroneously admitted, the taped interview was not so egregious so as to vitiate the entire trial.

> The doctrine of fundamental error should be applied only in rare cases where jurisdictional error appears or where the interests of justice present a compelling demand for its application.
>
> * * * *
>
> [Appellate courts] should be cautious in opening the door wider than is absolutely necessary in the area of fundamental error. Overzealousness in attempting to right every wrong by ordering a new trial, notwithstanding the failure to raise timely objection, may have erosive consequences upon our criminal justice system.[3]

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[3] [Appellate courts should not] encourage the creation of "gotchas" whereby the defense is allowed to sit on its rights, saying nothing until after it sees whether the jury returns an adverse verdict. These kinds of situations can occur just as easily early in protracted trials with enormous consequences

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[6] Defense counsel did, in fact, renew his objection to the admissibility of the tapes based on his Fifth and Sixth Amendment claims. (T 673-77).

> of an inordinate waste of judicial time and resources.

Jones v. State, 571 So.2d 1374, 1376 (Fla. 1st DCA 1990). Here, the evidence of guilt was overwhelming and did not rest to any great degree on Appellant's taped statements. As noted in Issue I, Appellant's fingerprints were found inside the store, the murder weapon was in Appellant's possession at the time of the murder, and Appellant confessed to Dwayne Blackmon that he shot Donna Burnell three times. Based on these facts, the fundamental error doctrine should not be applied to this case, especially since the trial court heard the tape prior to trial, defense counsel challenged certain portions of the tape, and the State agreed to excise from the tape all of the objected-to portions. Appellant was not denied a fair trial, and even if the taped interview should not have been admitted into evidence, there is no reasonable possibility that the verdict would have been different had it not been admitted. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, Appellant's conviction should be affirmed.

ISSUE III

WHETHER THE ADMISSION OF A BOX OF PERSONAL ITEMS BELONGING TO APPELLANT CONSTITUTED FUNDAMENTAL ERROR (Restated).

After Appellant was arrested, the police searched his home for various pieces of physical evidence. During the search, they seized a box that Patty White had taken out of the closet containing personal items belonging to Appellant. (T 522-24, 863-64). In this box was, among other things, a pair of sunglasses and a newspaper article on the murder. Because Steven Leudtke, the man who saw Appellant walk out of the store just after the murder, described the man as wearing glasses, the State admitted the sunglasses into evidence. (T 509-10). The newspaper article was admitted to show Appellant's interest in the murder.

During Patty White's testimony, the State moved to admit the entire box of personal belongings into evidence. (T 864). At that point, defense counsel made the following objection: "Your Honor, I -- I object to the introduction of the entire box. There's things like a Big Ben clock. There's a -- there's a Bible. There's a birthday cards. I don't see any relevance and I object to the introduction of the entire box." (T 864). The State responded, "It goes to prove that the items that came out of the box -- this box contained his personal items and his alone." (T 865). The trial court overruled the relevancy objection and admitted the box. (T 865).

In this appeal, Appellant renews his claim that the contents of the box, which apparently also contained a prior PSI and

letters from his mother, were "irrelevant and impermissibly attacked [his] character." Brief of Appellant at 50. To the extent that Appellant claims unfair prejudice from the admission of such evidence, he has failed to preserve this claim for review since it was not the basis for his objection below. See Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to preserve for review an issue arising from a trial court's ruling on a question of admissibility of evidence, the specific ground to be relied upon must be raised before the court of first instance."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

As for Appellant's claim that the contents of the box were irrelevant, the State submits that they were relevant to corroborate Patty White's testimony that the items in the box, which included the sunglasses and newspaper, belonged exclusively to Appellant. Assuming for argument's sake, however, that the contents of the box should not have been admitted, such error was harmless beyond a reasonable doubt. First, it cannot be presumed that the jury considered the evidence for anything but its intended purpose. Second, given the overwhelming evidence of guilt in this case, as detailed in Issues I and II and elsewhere, there is no reasonable possibility that the verdict would have been different absent the erroneous evidence. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Therefore, Appellant's conviction should be affirmed.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION FOR THE APPOINTMENT OF CO-COUNSEL (Restated).

Prior to trial, defense counsel filed a "Motion for Court Appointed Co-counsel." (R 1718-19). At the hearing on the motion, defense counsel claimed that he needed an assistant solely to prepare for and present the penalty-phase evidence since his credibility with the jury would be lost upon a guilty verdict:

> THE COURT: [T]he co-counsel that you're requesting, is it for any specific purpose other than the fact to --to have someone do guilt phase and someone do penalty phase.
>
> MR. LONG: No, that's the purpose. That's --that's the purpose.
>
> THE COURT: In other words, it's not there's so much work to do on the initial guilt phase that I can't handle it myself. It's not that.
>
> MR. LONG: No, it would certainly be nice to have help, but I can do it.

(T 210-15). Based upon this Court's decision in Stewart v. State, 558 So.2d 416 (Fla. 1990), the trial court denied the motion. (T 215-16).

In this appeal, Appellant claims that the trial court abused its discretion in denying his motion for appointment of co-counsel. **Brief of Appellant** at 51-55. While there is some authority for the appointment of more than one attorney for one defendant in a capital case, see **Fla. Stat. §** 925.035(1) (1991); Schommer v. Bentley, 500 So.2d 118 (Fla. 1986); but see Board of County Comm'rs of Collier County v. Hayes, 460 So.2d 1007, 1009-

10 (Fla. 2d DCA 1984), "[t]rial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure" from the norm. Makemson v. Martin County, 491 So.2d 1109, 1115 (Fla. 1986). In other words, it is wholly within the trial court's discretion to determine whether additional counsel is warranted, considering both the defendant's right to effective representation and the taxpayer's right to restrict unnecessary fiscal expenditures. While it is this Court's "duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter," id. at 1113, trial courts must be given broad discretion to determine the necessity for multiple counsel.

Contrary to Appellant's assertion in this appeal, defense counsel's motion was not "based on his inability to handle both the penalty and guilt phases of the trial by himself." **Brief of Appellant** at 53. Rather, as noted above, defense counsel asserted that he would lose credibility with the jury upon a guilty verdict; thus a different counsel for the penalty phase was necessary. The trial court rejected this argument, noting that "many people have been found guilty by a jury and not gotten the death penalty" who were represented by only one attorney. (T 216).

Moreover, as the prosecutor noted, witness depositions had already been taken and ninety-five percent of the motions had been heard and decided prior to Mr. Long's appointment. Thus, while certainly not confined to it, defense counsel had the benefit of prior counsel's preparation. Moreover, although

defense counsel may not have been an "expert" in capital litigation, he had previously defended a capital case and had a good reputation in the legal community. (T 215). Thus, based on defense counsel's reason for requesting co-counsel, the trial court did not abuse its discretion in determining that co-counsel was unnecessary. See Stewart, 558 So.2d at 419 (upholding the trial court's denial of defense counsel's motion to withdraw after the guilt phase where counsel claimed that he had lost all credibility with the jury). Consequently, this Court should affirm Appellant's conviction and sentence of death.

ISSUE V

WHETHER THE TRIAL COURT WAS REQUIRED TO CONDUCT A NELSON INQUIRY AND WHETHER IT PROPERLY REFUSED TO APPOINT SUBSTITUTE COUNSEL (Restated).

After the trial court granted the State's motion to disqualify the public defender's office, it appointed James Long on January 24, 1991, to represent Appellant. (R 1688-92). At the next motion hearing, Appellant told the court that he had asked Mr. Long to move to withdraw from his case and that Mr. Long had refused to do so. (T 200-01). When asked for his specific complaint, Appellant responded, "My complaint is I feel that he's not -- he's not -- he's not gonna fully represent me." (T 201). When the trial court pressed for specific facts supporting his claim, Appellant responded, "Well, in regard to the case I feel that he's not doing his best." (T 201). The trial court explained to Appellant that he needed some legal justification for removing a court-appointed attorney, and Appellant remarked, "I don't know anything about the law. If I [knew] anything about law I'd be doing this myself, you know." (T 202). Appellant then explained that Mr. Long had expressed his belief that Appellant was guilty, and thus Appellant did not believe that Mr. Long would "do his best." When the trial court pressed for more specific facts that led him to believe that Mr. Long was not doing his best, Appellant said, "Never mind. Never mind. Just do what you want." (T 203). The trial court tried to explain that a defense attorney's duty was to assess the evidence and give his professional opinion on the strengths and weaknesses of the case, at which point, Appellant stated, "I'm

fine. Just -- just forget everything. Just forget it. Just forget it. Just forget it, man." (T 204).

After attending to some administrative matters and after discussing defense counsel's motion for co-counsel, the trial court sua sponte revisited the issue, noting that Appellant had gotten "real frustrated and just kind of said forget about it and sat down." (T 216). Once again, the trial court explained that it needed legal reasons why Mr. Long should be removed. Appellant responded that, because his attorney knew he was going to get paid regardless of what he did or did not do on his case, counsel did not have to do his best. (T 218-19). When the court explained that counsel got paid by the hour like privately retained attorneys, Appellant remarked, "I don't see where he's doing anything." (T 219). The trial court recognized his frustration at being incarcerated and unable to follow the progress of the investigation closely, but it assured Appellant that Mr. Long was filing motions and was prepared for hearings, etc. (T 219-20). Although not stated explicitly, the trial court ultimately determined that Appellant's dissatisfaction with his attorney did not justify counsel's removal from the case. (T 220-21).

In this appeal, Appellant claims that the trial court abused its discretion in failing to conduct an adequate inquiry pursuant to Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), thereby depriving him of effective assistance of counsel. **Brief of Appellant** at 55-58. In approving Nelson, this Court adopted the following procedure outlined therein:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla. 1988). The State submits that the trial court made a proper inquiry and determined that Appellant had presented no reasonable basis for a finding of ineffective assistance of counsel such as to warrant the dismissal of counsel.

Although Appellant claimed below that he believed Mr. Long was not "doing his best," Appellant could not relate any specific facts which would show Mr. Long to be "ineffective." Rather, Appellant "[felt] he wouldn't be doing his best" (T 201) because Mr. Long was going to get paid regardless of his efforts and because Mr. Long professed a belief in Appellant's guilt to Appellant. However, "[g]eneral loss of confidence or trust standing alone will not support withdrawal of counsel." Johnston v. State, 497 So.2d 863 (Fla. 1986). Rather, Appellant must "voice[] a *seemingly substantial complaint* about counsel" before an inquiry is warranted. Wilder v. State, 587 So.2d 543, 545 (Fla. 1st DCA 1991) (emphasis in original). Here, as in Wilder, Appellant voiced only general allegations, which indicated a lack

of trust rather than proof of ineffectiveness. Thus, the trial court properly denied Appellant's request to dismiss his court-appointed counsel. See Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991) ("Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel."). See also Watts v. State, 593 So.2d 198 (Fla. 1992) (finding Nelson inquiry sufficient where defendant alleged only that counsel had not been to see him in the jail).

Appellant finds significance in the fact that the trial court did not question Mr. Long about the allegations. Appellant's claims, however, were so general in nature that response from counsel was not warranted. As the trial court explained to Appellant, defense counsel would get paid according to the work that he did. Moreover, the trial court was well aware of the procedural history of the case and knew that Mr. Long had filed motions and was prepared to argue them, and was prepared to set a trial date. Thus, Appellant's claim that he did not "see where he's doing anything" was obviously refuted by the trial court's own personal knowledge of the case. As for Appellant's claim that defense counsel was not going to do his best because of his professed belief in Appellant's guilt, the trial court repeatedly tried to get Appellant to explain the context of that conversation and how it affected counsel's performance, but Appellant refused. As a result, the trial court was faced with a generalized complaint that indicated a lack of trust rather than proof of ineffectiveness. Thus, inquiry of counsel was unnecessary. See Johnston; Johnson v. State, 560

So.2d 1239, 1240 (Fla. 1st DCA 1990) ("[A]ppellant's motion to discharge alleged conflict rather than incompetency of counsel and, therefore, . . . the trial court was not obligated to conduct the inquiry set out in Nelson.").[7]

Even assuming for argument's sake, however, that the trial court did not conduct a sufficient Nelson inquiry, such error was harmless beyond a reasonable doubt. As the First District has held:

> [T]he trial court's failure to make a thorough inquiry and thereafter deny the motion for substitution of counsel is . . . not in and of itself a Sixth Amendment violation. In determining whether an abuse of discretion warranting reversal has occurred, an appellate court must consider several factors, in addition to the adequacy of the trial court's inquiry regarding the defendant's complaint, including as well whether the motion was timely made, and if the conflict was so great as to result in a total lack of communication preventing an adequate defense.
>
> In the present case, the record reflects that defendant's motion to dismiss counsel was timely filed before trial. Although the trial court's inquiry as to the grounds stated for discharge was not extensive, the court acknowledged receipt of the motion and gave defendant an opportunity to argue the motion further. When the appellant did not respond, the motion was denied. The most important circumstance militating in favor of affirmance, however, is the fact that the

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[7] Similarly, although "the better course would have been for the trial court to inform [Appellant] of the option of representing himself," as the procedure approved in Hardwick suggests, the trial court did not err in denying Appellant's request to dismiss counsel. Capehart, 583 So.2d at 1014. Appellant at no time asked to represent himself, and at one point indicated that he did not know enough about the law to try. (T 202). But see Perkins v. State, 585 So.2d 390, 392 (Fla. 1st DCA 1991) (finding the error harmful where the state failed to make a harmless error argument).

> appellant proceeded to trial *with his court-appointed counsel*, and made no additional attempt to dismiss counsel or request self-representation. Similarly, there is no evidence in the record of any conflict or lack of communication during the *trial* between appellant and his attorney that would support a finding that the appellant did not receive an adequate defense. Thus, based on the record at bar, we conclude that the trial court's failure to conduct a more extensive inquiry regarding the merits of the motion to discharge did not violate the appellant's Sixth Amendment right to effective assistance of counsel, and was at most harmless only.

Kott v. State, 518 So.2d 957, 958 (Fla. 1st DCA 1988) (italics in original; underline added; citations omitted).

Here, as in Kott, although Appellant's motion was timely made, his alleged grounds for the motion did not present a conflict "so great as to result in a total lack of communication preventing an adequate defense." Id. Appellant proceeded to trial with Mr. Long, and at the close of the evidence in guilt phase, stated that he was satisfied with his representation up to that point. (T 1002-03). There is no evidence in the record whatsoever that Appellant and Mr. Long had such a conflict or lack of communication that Mr. Long could not prevent an adequate defense. In fact, the record reveals that Mr. Long presented as good a defense as was possible given the overwhelming evidence of guilt, which included Appellant's fingerprints inside the store, Appellant's possession of the murder weapon immediately before and immediately after the murder, and his confession to Dwayne Blackmon that he shot Donna Burnell three times. Consequently, Appellant's conviction should be affirmed since there is no reasonable possibility that the verdict would have been different even if the trial court's Nelson inquiry had been more extensive.

See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). See also Sweet v. State, 18 F.L.W. S447 (Fla. Aug. 5, 1993) (finding inadequate Faretta hearing harmless where defendant accepted counsel and later professed satisfaction with him); Boynton v. State, 577 So.2d 692 (Fla. 3d DCA 1991) (finding inadequate Nelson inquiry harmless where (1) defendant "proceeded through a several-day trial with his court-appointed counsel without once complaining about or seeking to discharge counsel," (2) counsel mounted a vigorous and partially successful defense, "and, more importantly, (3) the defendant's statement to the court at trial that his court-appointed counsel was doing a 'good job' for the defendant and that 'I trust you [counsel] now.'"); Parker v. State, 570 So.2d 1053, 1055 (Fla. 1st DCA 1990) ("In light of the overwhelming evidence of guilt, the legal insufficiency of the motion, the defendant's failure to pursue the motion although having the opportunity to do so, and a record which reveals no evidence of incompetence, we find that the failure to conduct an inquiry was harmless error."), rev. denied, 581 So.2d 1309 (Fla. 1991).

ISSUE VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISQUALIFY THE TRIAL JUDGE (Restated).

On October 29, 1990, Appellant's original trial counsel, Assistant Public Defender John Unruh, filed a motion for protective order, seeking to protect Dwayne Blackmon from harassment by the state. To support this motion, Unruh attached an affidavit signed by Blackmon, alleging, among other things, that the police told Blackmon they had influence over the presiding judge in this case. (R 1380-81). On November 13, 1990, Dwayne Blackmon gave a sworn statement to the assistant state attorney trying Appellant's case. In his statement, Dwayne asserted that the allegations in the affidavit supporting the motion for protective order were either untrue or misrepresented. Regarding his averment that the police had Judge Wild "in their pocket," Dwayne stated that he thought Detective Green had some influence with the court because Green said he could get Dwayne released from jail on his own recognizance, but neither Green nor anyone else specifically said that they had Judge Wild "in their pocket." (SR 1762).

The following day, at the hearing on the motion for protective order, Dwayne's attorney told Unruh that Dwayne had talked to the State Attorney's Office and that "Dwayne is gonna say all this stuff [in his affidavit] wasn't true" and that "Dwayne was not going to testify the same as he previously had talked about this case." (T 143-44). Based on their conversation, Unruh "knew that [Dwayne and Vickie Blackmon] were

gonna come up and change their stories." (T 143). As a result, Unruh withdrew the motion for protective order. (T 143).[8]

Nevertheless, Unruh used Dwayne's affidavit to support a motion to disqualify the presiding judge, which he filed on January 2, 1991. (R 1448-53). The entire motion, exclusive of affidavits from Appellant and Dwayne Blackmon, consists of the following paragraph: "The Defendant has well founded fear that this judge is prejudiced in favor of the State of Florida and the Indian River County Sheriff's Department, and against Rodney Tyrone Lowe. Two affidavits are attached in support of this Motion, and incorporated herein by reference." (R 1448). The trial court entered an order two days later denying the motion as being "legally insufficient." (R 1467).

In this appeal, Appellant claims that the trial court erred in denying his motion to disqualify because "[t]he affidavits showed enough personal bias or prejudice to require disqualification." **Brief of Appellant** at 61. The State submits, however, that the motion and affidavits were legally insufficient, and thus properly denied.

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[8] Appellant takes comfort in the fact that he was not served a copy of Dwayne Blackmon's taped statement to the prosecutor until after he had filed the motion to disqualify. Unruh's testimony at the hearing on the State's motion to disqualify the public defender's office, however, belies Appellant's assertion in this appeal that "[d]efense counsel had no reason to question the truth of Blackmon's allegation about the judge at the time the motion to disqualify was made and denied." **Brief of Appellant** at 59 n.21. Unruh testified at this hearing that he knew in November, the day after Dwayne gave his statement, that Dwayne had recanted everything in the affidavit. It was precisely this knowledge of Dwayne's recantation that led Unruh to withdraw the motion for protective order. (T 143). Thus, even without a copy of the Dwayne's taped statement, Unruh knew that Dwayne had recanted his averrments in the affidavit.

As this Court has previously stated, the purpose of the disqualification rule is "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983). Thus, a defendant must show "a factual foundation for the alleged fear of prejudice. The movant's subjective fears are not sufficient." Jernigan v. State, 608 So.2d 569 (Fla. 1st DCA 1992). Without passing on the truth of the allegations, the trial court must then determine "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Id. at 1087.

Here, the trial court properly determined that Appellant's allegations failed to meet the objective test required by law. Dwayne Blackmon's allegations, which were used to support a motion for protective order that was ultimately withdrawn, simply did not establish a sufficient factual foundation for Appellant's claim that the trial court was biased against him and in favor of the State. See People Against Tax Revenue Mismanagement, Inc. v. Reynolds, 571 So.2d 493 (Fla. 1st DCA 1990) (finding legally insufficient an allegation by plaintiffs (PATRM) that two unnamed persons told a member of PATRM that their challenge to a newly approved local option sales tax would not be successful with Judge Reynolds presiding). Nor did the order showing the dismissal by Judge Wild of Patty White's traffic ticket support the allegation that the police had influence with the court. As

the order states, "the Uniform Traffic Citation was not deposited with the traffic violations bureau within 5 days after issuance to the defendant pursuant to Florida Statute 316.650(3)." (R 1454). Thus, the citation was dismissed as required by law. Appellant made no allegation that the factual basis for the dismissal was not true. As for Judge Wild's decision to begin the trial on Martin Luther King Jr.'s birthday allegedly over Appellant's objection,[9] "[m]erely receiving adverse rulings is not a ground for recusal." Gilliam v. State, 582 So.2d 610, 611 (Fla. 1991). See also Jackson v. State, 599 So.2d 103, 107 (Fla. 1992).

In sum, Appellant's allegations would not place a reasonably prudent person in fear of not receiving a fair and impartial trial. Thus, the trial court properly denied the motion as legally insufficient. This Court should affirm the trial court's ruling and Appellant's conviction.

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[9] There is nothing in the record on appeal prior to the disposition of this motion which indicates that Appellant raised an objection to the trial being set for January 21st. Perhaps he did so at the hearing on the motion for protective order since the clerk's notes provided in the supplemental record indicate that a motion for continuance was made, but this hearing has not been transcribed and made a part of the record on appeal. The only indication that Appellant objected to this date was a discussion on January 10, 1991, after the motion to disqualify was denied, wherein the trial court moved jury selection to January 18th in response to Appellant's objection regarding the holiday on January 21st. (T 24-34).

ISSUE VII

WHETHER THE TRIAL JUDGE WAS PROPERLY APPOINTED TO PRESIDE OVER APPELLANT'S TRIAL (Restated).

Prior to trial, Appellant filed a motion to transfer the case to a circuit court judge, claiming that Judge Wild, a county-court judge, was improperly authorized to preside over this case. (R 1455-56). At the hearing on the motion, Appellant presented the testimony of the supervisor of the felony division clerk's office, who stated that Judge Wild handles one-half of the circuit criminal docket. (T 37-38). On cross-examination, the witness testified that Judge Wild and Judge Balsiger, another county-court judge, were temporarily assigned for six-month periods to handle the circuit felony docket because one of the circuit judges was called to military duty for Desert Storm and the other one had had a heart attack.[10] (T 39-40). Judge Wild interjected for the record that he also performed county-court duties. (T 42). After argument of counsel, the trial court denied the motion. (T 42-50).

In this appeal, Appellant renews his claim that Judge Wild was improperly assigned to preside over this case. In support of his position, Appellant principally relies upon this Court's decisions in Payret v. Adams, 500 So.2d 136 (Fla. 1986), and Crusoe v. Rowls, 472 So.2d 1163 (Fla. 1985). **Brief of Appellant**

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[10] The first assignment was for a six-month period from July 1, 1990, to December 31, 1990. The assignment was renewed for another six-month period from January 1, 1991, to June 30, 1991. (R 1457-58), during which time Appellant's case was tried.

at 62-66. Payret is factually distinguishable, however, and Crusoe more favorably supports the State's position.

As indicated in Crusoe, this Court promulgated Florida Rule of Judicial Administration 2.050(b)(4), which empowers the chief judge of a judicial circuit to "assign any judge to temporary service for which the judge is qualified in any court in the same circuit." Pursuant to this rule, the chief judge of the Nineteenth Judicial Circuit entered an administrative order assigning Judge Wild, a county-court judge, to circuit court "beginning July 1, 1990 thorough December 31, 1990 to hear, conduct, try and determine all matters presented to him in the criminal division." (R 1457). Just prior to the expiration of this term, the chief judge entered a second administrative order again assigning Judge Wild to circuit court "beginning January 1, 1991 through June 30, 1991 to hear, conduct, try and determine 1/2 of all filings in the criminal division." (R 1458). Appellant's trial was conducted during this latter term of assignment.[11]

As this Court stated in Crusoe and reaffirmed in Payret, if a county court judge is assigned to spend only a portion of his time doing circuit court work, then the assignment could be for six months. However, this time period was merely suggested, and not mandated, by this Court since it "recognized the need for

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[11] Appellant's attempts to bolster his argument with administrative orders entered after his trial is highly improper. The focus of review is on the trial court's denial of Appellant's motion on January 10, 1991. Obviously, these later administrative orders were not yet in effect and could not have formed the basis for Appellant's motion or the trial court's ruling. Consequently, they should be stricken from the appendix of Appellant's initial brief, or at the very least disregarded.

giving the chief judges flexibility in order for them to effectively utilize available judicial labor." Payret, 500 So.2d at 138. Unlike in Payret, wherein the assignment was renewed annually for five years, the assignments in this case were for two six-month periods. Judge Wild had not become a *de facto* circuit court judge. Rather, while maintaining county court duties, he was temporarily assigned to circuit court while one judge recuperated from a heart attack and the other judge served compulsory military duty. Under these circumstances, the assignments were proper, and Appellant's motion to transfer was justifiably denied.

Even if the case should have been transferred, however, any error in failing to do so was harmless beyond a reasonable doubt. Based on the quantity and quality of evidence proving Appellant's guilt and that supporting the aggravating circumstances, and the minimal evidence in mitigation, there is no reasonable possibility that the verdict or the sentence would have been different had a circuit court judge been presiding over the case. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

ISSUE VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING THE STATE'S SPECIAL REQUESTED INSTRUCTION DURING THE GUILT PHASE (Restated).

During the trial, the State requested the following special instruction:

> Inconsistent exculpatory statements can be used to affirmatively show consciousness of guilt and unlawful intent.

(R 1802; T 1030). At the charge conference, Appellant raised the following objection to the proposed instruction:

> I object to the giving of that instruction. I would submit that the standard instruction on the how --instructing the jury as to how to weigh the testimony of the witness and the other general instructions are sufficient and it's not -- . . . . I think they certainly argue with it and I would object to that instruction.

(T 1030-31). Based on the case law provided by the State, the trial court granted the State's request and gave the instruction to the jury. (T 1031, 1126).

In this appeal, Appellant claims that the trial court abused its discretion in giving the instruction because it constituted an "impermissible judicial comment[] on the evidence." **Brief of Appellant** at 66. As is evident from the excerpt above, however, Appellant did not raise this argument below as a ground for objection; as a result, he cannot raise it here on appeal. Tillman v. State, 471 So.2d 32, 35 (Fla. 1985) ("In order to preserve for review an issue arising from a trial court's ruling on a question of admissibility of evidence, the specific ground to be relied upon must be raised before the court

of first instance."); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

Regardless, Appellant's argument has no merit. As he concedes, this Court has previously approved the use of this exact jury instruction in Johnson v. State:

> We find that the jury instruction merely made the jury aware of a legally permissible inference from certain evidence, if found, and did not have the effect of creating a mandatory or conclusive presumption. Nor did the instruction constitute a judicial comment mandating or suggesting that the jury find certain facts from the evidence. . . . It was left to the jury to determine whether the statements were inconsistent and exculpatory and even then the instruction plainly allowed the jury to consider whether such facts, if found, had any value in deciding whether there was intent or consciousness of guilt.
>
> The instruction was a correct statement of the legal relevance of inconsistent pretrial statements.

465 So.2d 499, 504 (Fla.) (citing Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983); State v. Frazier, 407 So.2d 1087 (Fla. 3d DCA 1982)), cert. denied, 474 U.S. 865 (1985). This instruction has also been approved, based on Johnson, in Norman v. State, 555 So.2d 1316 (Fla. 5th DCA 1990). Thus, the trial court did not abuse its discretion in giving this instruction to the jury.

Even if it were error, however, it was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Based on the following evidence of Appellant's guilt, there is no reasonable possibility that the verdict would have

been different had the instruction not been given: Appellant left from work between 9:58 a.m. and 10:34 a.m. (T 665-67). The murder occurred between 10:07 a.m. and 10:13 a.m. (T 819). Steven Leudtke saw a black male walking out of the store just before he found the victim shot. He also identified Patty White's car as the car in which the black male left the scene. (T 550, 555-56). Appellant's fingerprints were found on a hamburger wrapper in the store's microwave oven. (T 991-92). The bullets removed from the victim's body were fired from the gun Appellant had been using just prior to the murder. (T 636, 830-31, 859, 900-01, 969-70). Finally, Appellant told Dwayne Blackmon that he "shot the whore three times." (T 933-34). Based on this evidence, Appellant's conviction should be affirmed.

ISSUE IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTIONS FOR MISTRIAL DURING THE STATE'S GUILT-PHASE CLOSING ARGUMENT (Restated).

Initially, Appellant excerpts four statements made by the prosecutor during guilt-phase closing argument and complains that they were improperly disparaging to defense counsel and to his defense. **Brief of Appellant** at 68-70. Not one of these statements, however, was properly objected to. Although Appellant made a motion for mistrial at the end of the State's closing argument regarding the last of the four complained-of statements (T 1103), it was made after a ten to fifteen minute recess and no objection coupled with a request for a curative had preceded it; thus, Appellant failed to preserve this latter comment for review as well. See State v. Cumbie, 380 So.2d 1031 (Fla. 1980) ("When there is an improper comment, the defendant, if he is offended, has the obligation to object and to request a mistrial."); Duest v. State, 462 So.2d 446, 448 (Fla. 1985) ("The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks."); Randolph v. State, 556 So.2d 808, 809 (Fla. 5th DCA 1990) ("[A]t least an objection should be made to the remark at the time it occurs followed by a motion for mistrial no later than the end of the prosecutor's closing statement. Since no objection was made at the time of the offending comment, such silence is considered an implied waiver."). Moreover, "[a] motion for mistrial based on certain grounds cannot operate to preserve for appellate review other

issues not raised by specific objection at trial." Craig v. State, 510 So.2d 857, 864 (Fla. 1987). In other words, the motion for mistrial, which was directed at the last comment by the State, cannot be used to preserve for review all other objectionable remarks, whether objected to or not. Regardless, as noted by the trial court, Appellant's characterization of the State's comment was incorrect: "[F]rom the context of the argument I didn't take -- I don't think anybody would take it to mean what Mr. Long took it to mean. So I'll deny the motion." (T 1104).

Even if Appellant had made contemporaneous objections to these four comments, relief would still not be warranted. When read in toto, the State's closing argument focuses on Appellant's numerous inconsistent statements. This focus, however, was in direct response to Appellant's defense, namely, to create a reasonable doubt that he was the only one involved -- that he was the shooter. It was imperative for the State to convince the jury not to find the existence of reasonable doubt simply because of the inconsistencies among Appellant's various statements. Contrary to Appellant's contention, however, the prosecutor's reference to these statements as "a web of lies" was not meant to be disparaging to defense counsel or to insinuate that defense counsel was purposefully lying to the jury or perpetuating Appellant's lies. Rather, the State's argument was an attempt to show that Appellant told story after story, never telling the same one twice, because he was guilty and could not quite manage to explain how his fingerprints got inside the store and how his gun came to be used to murder Donna Burnell. This was a

permissible line of argument, and thus it did not deprive Appellant of a fair trial. See Craig v. State, 510 So.2d 857 (Fla. 1987) ("repeated references to defendant's testimony as being untruthful and to the defendant himself as a 'liar'" did not exceed the bounds of proper argument in view of the evidence); State v. Lewis, 543 So.2d 760 (Fla. 2d DCA) (prosecutor's comment "we know through other testimony the story is a lie, the one he told yesterday" was proper comment based on evidence presented at trial), rev. denied, 549 So.2d 1014 (Fla. 1989).

Appellant next complains that the State shifted its burden of proof to the defendant when it argued to the jury that it would have to disbelieve all of the state's witnesses in order to find reasonable doubt. **Brief of Appellant** at 70-72. At the time the comment was made, Appellant objected and moved for mistrial. As noted previously, however, "[t]he proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." Duest, 462 So.2d at 448. Here, no request was made. In Rodriguez v. State, 493 So.2d 1067, 1067 (Fla. 3d DCA 1986), rev. denied, 503 So.2d 327 (Fla. 1987), a case relied upon by Appellant, the same argument was made, and the appellate court held that "the harm of the unquestionable erroneous remark was capable of being cured by an instruction to the jury." So too in the present case a curative instruction would have sufficed to cure any error, but Appellant failed to request one. Consequently, he should not now be heard to complain.

Appellant also relies upon Clewis v. State, 605 So.2d 974 (Fla. 3d DCA 1992), to support his claim of reversible error. Clewis, however, is easily distinguishable. It is apparent from the opinion that the evidence against the defendant was weak, as evidenced by one verdict to a lesser charge and a jury question regarding testimony from a state witness as to a crucial fact. Thus, the district court could not say beyond a reasonable doubt that the prosecutor's comment did not affect the verdict. Here, on the other hand, the evidence of guilt was overwhelming, as outlined in several previous issues. Patty White's car was seen at the Nu-Pack just moments before the victim was discovered shot, Appellant was in possession of the murder weapon immediately before and immediately after the murder, Appellant's fingerprints were found inside the store on a still-warm hamburger wrapper, and Appellant confessed to Dwayne Blackmon that he shot Donna Burnell three times. Appellant was convicted as charged, and the jury, which reached a verdict sometime between noon and the end of the day, posed no questions to the court. Thus, in light of the quality and quantity of evidence of guilt, and the fact that the jury was properly instructed as to the burden of proof and the concept of reasonable doubt, there is no reasonable possibility that the State's erroneous comment affected the verdict in this case. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Appellant's third complaint relates to comments regarding the presence of the victim's child in the store when the victim was discovered by Steven Leudtke. **Brief of Appellant** at 72-73. These comments, however, were in direct response to Appellant's

initial closing argument. The focus of Appellant's initial argument was to establish reasonable doubt based on Mr. Leudtke's description of the black male leaving the store just before he found the victim. (T 1051-56). In its response, the State tried to justify the dissimilarities between Mr. Leudtke's description and Appellant's actual appearance by emphasizing the circumstances under which the witness' observations were made. As Mr. Leudtke testified, he had no reason to scrutinize the person leaving the store; at that point, he did not know someone had tried to rob and murder the store's clerk. (T 558). He went in the store to get a newspaper, heard a child crying, but thought nothing of it because the victim had brought her child to the store before, laid the newspaper on the counter to pay for it, and then noticed Donna Burnell lying on the floor. He went behind the counter to check on her and thought she had been stabbed, so he found a phone and called 911. He then picked up the victim's child to comfort him and walked outside to wait for the police. (T 549-54). Appellant made no objection to Mr. Leudtke's testimony regarding the child. As the State recalled his testimony for the jury, to explain Mr. Leudtke's state of mind surrounding his description of the assailant, however, Appellant raised the following objection and motion in front of the jury:

> Your Honor, now I object to the argument concerning the child. It's purely and simply an appeal to the sympathy of the jury. Has nothing to do with the guilt or innocent [sic] or the fact that the woman was killed or anything else. It's strictly an appeal to the sympathy of the jury and I object and I move for a mistrial.

(T 1078). Again, he made no request for a curative instruction. Regardless, the trial court properly overruled the objection and denied the motion. (T 1078). The State was making fair comments on the evidence and drawing reasonable inferences therefrom. Moreover, they were in direct response to Appellant's initial closing argument. Thus, no mistrial was warranted.

Finally, Appellant seeks reversal of his conviction and sentence based upon the prosecutor's demeanor in the courtroom. **Brief of Appellant** at 73. Besides some challenging remarks by a prospective juror who was apparently offended by the prosecutor's "forceful personality," and a comment by the trial court that was probably made in jest, Appellant has failed to show any instance in which the prosecutor exhibited inappropriate courtroom demeanor. Since the beginning of the legal profession, judges have had the authority to establish and control the decorum of persons within their courtroom. When faced with counsel who cannot maintain proper decorum, the trial judge can admonish them, hold them in contempt, and/or file a grievance with the Bar. No such actions were taken in this case; thus, one must assume that no such actions were appropriate. Consequently, Appellant's conviction should be affirmed.

ISSUE X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE STATE'S MOTION IN LIMINE SEEKING TO EXCLUDE AN OUT-OF-COURT STATEMENT FROM AN INCOMPETENT CHILD WITNESS (Restated).

Prior to trial, the State filed a motion in limine, seeking to exclude hearsay statements made by Danny Butts, the victim's three-year-old child, to Debra Brook, a friend of the victim, to the effect that "two peoples" argued with and shot his mother. The State alleged that the child was not a "competent" witness, that his statements were not "reliable," and that the circumstances under which they were made indicated a lack of trustworthiness. (R 1650-51). At the first hearing on the motion, Michelle Burnell, the victim's best friend, testified that she and her husband lived with the victim, her husband, and Danny, whom they were adopting. Danny had a brain disorder, could barely speak, could not count, and was slow to grasp concepts. He also said "peoples" whether he was referring to one person or many people. (ST 207-13). The victim's husband, Richard Burnell, testified that Danny did not know his colors or numbers at all at the time of the murder, and that Danny had a learning disability. (T 218-22). The trial court took the motion under advisement until it could read Debra Brook's deposition and see Danny's videotaped deposition. (ST 223; T 58-63, 222-23). After doing so, the trial court granted the State's motion, "finding the witness incompetent to testify." (R 1792; T 402).

In this appeal, Appellant claims that the trial court abused its discretion in excluding the child's statements to Debra

Brook, because the statements fell within the excited utterance exception to the hearsay rule. Brief of Appellant at 74-78. The State submits initially, however, that Appellant has failed to preserve this issue for review. Several years ago, this Court held that, "when a prior motion in limine has been denied, the failure to object at the time [the evidence] is introduced waives the issue for appellate review." Correll v. State, 523 So.2d 562, 566 (Fla.), cert. denied, 488 U.S. 871 (1988). Although factually the opposite is true in the present case--the motion in limine was granted and the evidence was excluded--the rule remains applicable. In fact, the rationale behind the rule has greater force. Appellant is claiming that the trial court's ruling denied his right to produce favorable evidence in his behalf. Brief of Appellant at 78. Yet, when the State rested its case, Appellant made no attempt to persuade the trial court to reconsider its ruling in light of the evidence presented. If this was such a crucial piece of evidence in his defense, then he should have made some attempt at trial to secure its admission, but he did not.[12] Having failed to provide the trial court with an opportunity to reconsider its ruling during the trial after the State had presented its case, Appellant should not now be

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[12] The State would note that Appellant's first attorney, Cliff Barnes, argued against the State's motion in limine at the hearing in January. (ST 204-06). When the motion was revisited in April, just prior to the trial, Mr. Barnes had been disqualified and Mr. Long had been appointed to represent Appellant. Although offered the opportunity to present additional argument, Mr. Long declined to do so. (T 402). And as noted, Mr. Long made no attempt to offer this evidence during the defense case.

able to claim reversible error. As Judge Farmer so aptly stated in his concurring opinion in Gilliam v. State:

> The contemporaneous objection rule is not a mere mechanical formality which appellate judges may overlook in an effort to do substantial justice. It serves the prophylactic function of requiring a renewal of the objection in order that the trial judge can reconsider the earlier ruling in limine in light of the evidence since adduced and while the witness is present in court to testify as to any factual inquiry made necessary by the circumstances. Hence, it is not a question of the temporal span between the ruling in limine and the actual presentation of the evidence sought to be excluded, so much as it is a recognition of what has transpired between the two events.

602 So.2d 986, 986 (Fla. 4th DCA 1992).

In support of his position that he sufficiently preserved this issue for review, Appellant cites to Bender v. State, 472 So.2d 1370 (Fla. 3d DCA 1985). In Bender, the district court held that a defendant does not have to, and should not try to, "attempt to elicit [excluded testimony] to preserve the error of the trial court's earlier ruling." Id. at 1373. While the State would agree that a party should not defy a court's ruling and attempt to elicit excluded testimony in front of the jury, the State would submit that the party should, at the very least, pose an objection to the exclusion of the testimony at the time that its admission would be appropriate. Here, when the State rested its case, Appellant should have at least revisited the issue with the trial court before resting his own case. Having heard the State's case and Appellant's cross-examination of the State's witnesses, the trial court may very well have reconsidered its ruling and allowed Appellant to call Debra Brook.

Nevertheless, any error in its exclusion of her testimony was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Had her testimony been admitted, the jury would have heard that the victim's three-year-old child said, "two peoples came in; argued with Mommy and bang, bang, bang." (SR 8-9). Even coupled with Appellant's statements to Patty White and the police that he drove the car while Dwayne Blackmon served as lookout and Lorenzo Sailor went inside the store, there is no reasonable possibility that the verdict would have been different in light of the overwhelming evidence which rebutted Appellant's hypothesis that Dwayne and Lorenzo committed the murder.

First, Appellant was gone from work for 36 minutes. Sergeant Green established that it was not physically possible for Appellant to drive from work to pick up Dwayne and Lorenzo at Dwayne's house in Wabasso, drive to the Nu-Pack in Sebastian, drive back to Dwayne's house, drive to his own house, then drive back to work in 36 minutes. (T 833, 841-45). He could, however, have driven from work to the Nu-Pack, then to his own house, then back to work with 14 minutes to spare. (T 828, 836-39).

Second, Steven Leudtke testified that he saw one black male leave the Nu-Pack and walk towards a car identical to one owned by Patty White, who was letting Appellant drive her car that day. No one else was in the car, and no one else was in the store when he went in, except the victim and her child. (T 553, 556-58).

Fourth, Appellant's fingerprints were found on a hamburger wrapper inside the microwave oven. The hamburger was still warm when the police arrived. A 7-Up can with condensation on the

outside was on top of the counter near the microwave. (T 464-66, 991-92). Thus, contrary to his assertion that he was the driver of the getaway car only, the fingerprints place him in the store.

Fifth, Patty White testified that after she dropped Appellant off at work, she went to pick up Vickie Blackmon to go shopping. When she went inside, she saw Dwayne "in the bedroom in bed. . . . He looked like he had just gotten up." Vickie told her that Lorenzo was also there asleep. (T 857). Vickie Blackmon also testified that Patty came over that morning while she and Dwayne were asleep. She almost did not go with Patty because Dwayne had been "up all night before. He had tonsillitis." Although she did not know for sure whether Lorenzo was there or not, he lived there with them and his bedroom door was closed when she left with Patty. (T 895-96, 910). Thus, Dwayne and Lorenzo could not have been with Appellant robbing the Nu-Pack and shooting Donna Burnell just minutes before.

Finally, Dwayne Blackmon testified that Appellant came to his house after Appellant got off of work on the evening of the murder. Appellant was upset. He said he went to rob the Nu-Pack. Dwayne asked him if he got anything, and Appellant replied, "No, I shot the whore three times." (T 934). Appellant said he shot her twice in the head and once in the chest. (T 933-34). A few days later, Vickie brought the gun used to kill the victim back to their house after visiting Patty and Appellant. She told Dwayne that Appellant gave it to her for Dwayne to keep for him. (T 938).

Based on all of this evidence, there is no reasonable possibility that the verdict would have been different even if

the trial court had allowed Debra Brook to testify to the statements made by the victim's three-year-old child. His theory of defense that Lorenzo shot the clerk while Dwayne stood as lookout and he sat in the getaway car was overwhelmingly rebutted by the physical and circumstantial evidence of Appellant's single perpetration of the attempted robbery and murder. Moreover, the child's statements would have been eviscerated by the testimony of the child's father and Michelle Burnell that he could neither count, nor identify colors, that he had a brain disorder and a learning disability, and that he used the term "peoples" to refer to any number of persons. Thus, even if error, the trial court's exclusion of this testimony was harmless at worst. Consequently, this Court should affirm Appellant's conviction and sentence.

ISSUE XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S SPECIAL REQUESTED INSTRUCTION DURING THE PENALTY PHASE THAT THE PRESENCE OF THE VICTIM'S CHILD AT THE SCENE OF THE MURDER COULD NOT BE CONSIDERED IN THE PENALTY DELIBERATIONS (Restated).

During the penalty phase of the trial, Appellant requested the following special instruction:

> Although the evidence you have heard at this trial included testimony that a child was present at the scene of the crime, I instruct you that the presence of a child at the scene of the crime, even if the inference can be made that the child witnessed the crime itself, is not a legal aggravating circumstance. You are prohibited from giving this matter any weight towards a decision to recommend a death sentence.

(R 1824). At the charge conference, the trial court denied the request. (T 1239, 1249). Appellant now challenges the trial court's ruling, claiming that the substance of the instruction was not covered by any of the standard instructions and was thus required to be given. **Brief of Appellant** at 79-80. Contrary to Appellant's assertion, the substance of this instruction clearly fell within the following admonitions:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> [Court instructs on "prior violent felony," "felony murder," HAC, and CCP.]
>
> The aggravating circumstances which I have just listed are the only aggravating circumstances that you may consider.

(T 1304-05). None of the aggravating factors instructed upon could reasonably include the presence of the victim's child at the murder. Thus, the instruction was not warranted.

To support his position to the contrary, Appellant focuses on the State's reference to the child during its opening and closing arguments during the guilt phase. What attorneys say in their arguments, however, is not evidence, and the jury was specifically instructed that its advisory sentence "should be based upon the evidence" presented during the guilt and penalty phases. (T 1304). Although Appellant also relies upon the fact that evidence of the child's presence was admitted at trial, he neglects to mention that he posed no objection to it. Regardless, the evidence was admissible, but was neither elicited to, nor argued to, constitute a nonstatutory aggravating factor. Thus, since the instructions as read adequately channeled the jury's discretion in finding and weighing applicable aggravating factors, the trial court did not abuse its discretion in denying Appellant's requested instruction. See Parker v. State, 456 So.2d 436, 444 (Fla. 1984) (finding the requested instructions encompassed within the standard instructions and thus properly rejected).

ISSUE XII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN INSTRUCTING THE JURY ON THE HAC AND CCP AGGRAVATING FACTORS (Restated).

In this case, the jury was instructed on four aggravating factors--"prior violent felony," "felony murder," HAC, CCP--and two mitigating factors--age and the "catchall." (T 1304-05). The jury returned a recommendation of death by a vote of 9 to 3. (T 1309). After its own independent analysis of the evidence, the trial court found the existence of two aggravating factors--"prior violent felony" and "felony murder"--but rejected the statutory mitigating factor of age. As for nonstatutory mitigation, the trial court found that Appellant functioned well in a strict environment, was a responsible employee after release from prison, had a strict home environment as a child, and participated in Bible studies after release from prison. The court was not reasonably convinced that anyone other than Appellant was involved in the perpetration of this murder; thus, the trial court rejected any claim that Appellant received a disproportionate sentence and was merely an accomplice with minor participation. (R 1852-55).

In this appeal, Appellant claims that the trial court erred in instructing the jury on the HAC and CCP aggravating factors where there was no evidence to support them. **Brief of Appellant** at 80-82. The evidence established, however, that Appellant and Dwayne Blackmon and Lorenzo Sailor had been planning for days to rob the Nu-Pack. According to Dwayne, the three of them went to rob the store the previous week. Appellant went inside, came

back out and got a gun, then went back inside. He came back out again, saying someone was in the cooler, so they left. They tried again the next day, but a car pulled up as Appellant and Lorenzo were about to go inside, so they left. (T 923-29). Dwayne also testified that Appellant came to his house the evening of the murder and told him that he went to rob the store that day. When Dwayne asked if he got anything, Appellant replied, "No, I shot the whore three times," twice in the head and once in the heart. (T 933-34). When the prosecutor asked Dwayne what he did when Appellant told him this, Dwayne responded, "I was like shocked and then I, you know, it -- I was confused. You know what I mean? I -- he said he had talked about he would shoot somebody but I didn't think he was gonna do it, you know." (T 935) (emphasis added). Appellant told the police that he knew Donna Burnell from when she was the clerk at another nearby convenience store. (SR 1788-90). Moreover, Donna Burnell was shot twice in the head and once in the heart from extremely close range in an execution-style manner. (T 617-21). Based on this evidence, which shows the heightened premeditation required for this aggravating factor, the trial court did not abuse its discretion in giving the CCP instruction. See Stewart v. State, 558 So.2d 416, 420 (Fla. 1990) (finding no error in instructing jury on CCP even though trial court did not find it where evidence relating to aggravating factor was presented to jury).

Similarly, the evidence showed that Steven Leudtke found the victim and called 911 at 10:13 a.m. (T 552, 819). The victim was conscious when Sergeant Ewert arrived on the scene shortly after 10:20 a.m. "She was having a hard time breathing and what

[he] thought was a sucking chest wound." When he asked her questions, she responded very shallowly "no, no, no, which was approximately three times." She was gagging on what he presumed to be blood. (T 540-42). She was still alive when the paramedics arrived at 10:24 a.m., but immediately went into cardiac arrest and died on the way to the hospital. (T 585-87). The medical examiner testified that the victim was shot once just above the left eye from "inches away," once to the top of the head, and once to the chest, penetrating the heart, also from "a few inches" away. These injuries would have been extremely painful. (T 616-21, 633). Given the fact that the victim literally stared down the barrel of Appellant's gun while he shot her just above the eye and lay there for several minutes trying to suck air into her lungs through the hole in her chest, the trial court did not abuse its discretion in giving the HAC instruction. See Haliburton v. State, 561 So.2d 248, 252 (Fla. 1990) (finding evidence sufficient for instruction on HAC although trial court did not find existence of aggravating factor).

Even if the trial court should not have instructed the jury on these two aggravating factors, any error in doing so was harmless beyond a reasonable doubt, since "courts are required to presume that unsupported factors did not weigh with the jury." Johnson v. Singletary, 612 So.2d 575, 576 (Fla. 1993). See also Sochor v. Florida, ___ U.S. ___, ___, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326, 340 (1992). Here, defense counsel argued during closing argument that Appellant's actions did not support either of these aggravating factors. (T 1291-95). Moreover, the trial

court instructed the jury that its recommendation "must be based upon the facts as you find them from the evidence and the law." (T 1306). Thus, if the evidence did not support the aggravating factors, as the judge found, then it must be presumed that the jury did not use them in determining their recommendation. See Occhicone v. State, 18 Fla. L. Weekly S235 (Fla. April 8, 1993). Consequently, this Court should affirm Appellant's sentence.

ISSUE XIII

WHETHER THE STATE'S PENALTY-PHASE CLOSING ARGUMENT CONSTITUTED FUNDAMENTAL ERROR (Restated).

In this appeal, Appellant claims that the State "dwelt on improper sentencing considerations" during its penalty-phase closing argument, thereby depriving him of a fair sentencing proceeding. **Brief of Appellant** at 82-86. Although Appellant concedes that none of these allegedly prejudicial remarks were objected to below, he asserts that, because his objections to the State's argument during the guilt phase were summarily overruled, "further objection would have been futile," and thus unnecessary. In the alternative, Appellant claims that the contemporaneous rule should not be strictly applied in capital cases. **Brief of Appellant** at 86. This Court has previously rejected these claims. Sochor v. State, 580 So.2d 595, 601 (Fla. 1991), vacated on other grounds, 119 L.Ed.2d 326 (1991); Rose v. State, 461 So.2d 84, 86 (Fla. 1984). Thus, Appellant must rely on the fundamental error doctrine.

The State submits, however, that its comments were not improper, much less fundamentally unfair. The State's focus in closing argument was on Appellant's escalating pattern of violence. Appellant had robbed a man at knifepoint of his wallet and van at the age of seventeen, was caught and sent to prison, and now had killed Mrs. Burnell at the age of twenty in order to rob the store. Based on the facts of the case, e.g., the fact that he shot the victim before getting her to open the cash register, and shot her point blank in the head and heart, it was

a fair inference to argue that Appellant must have decided after his previous robbery not to leave any witnesses. These arguments related directly to the "prior violent felony" and "cold, calculated, and premeditated" aggravating factors. See Muehleman v. State, 503 So.2d 310, 316-17 (Fla. 1987) (finding prosecutors comments highly relevant in establishing aggravating factors). Similarly, the State's argument that Appellant's age was not a mitigating factor was proper. See Valle v. State, 581 So.2d 40, 47 (Fla. 1991) ("The state may properly argue that the defense has failed to establish a mitigating factor.").

To the extent, however, that any of the State's comments were inappropriate, none were so egregious as to constitute fundamental error. See State v. Murray, 443 So.2d 955, 956 (Fla. 1984); Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In light of the strong evidence in aggravation and the scant evidence in mitigation, there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different absent the State's remarks. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992). Consequently, Appellant's sentence of death should be affirmed.

ISSUE XIV

WHETHER THE TRIAL COURT GAVE EXCESSIVE WEIGHT TO THE "PRIOR VIOLENT FELONY" AGGRAVATING FACTOR (Restated).

In this appeal, Appellant complains that the trial court erroneously weighed his prior violent felony conviction as an armed robbery although he had only pled to unarmed robbery. **Brief of Appellant** at 88. As this Court held in Johnson v. State, 465 So.2d 499, 506 (Fla. 1985), however, "[r]obbery is *per se* a crime of violence for purposes of the statutory aggravating circumstance of previous conviction of a crime involving the use or threat or [sic] violence." Moreover, "evidence of the circumstances of the previous offense may be considered." Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985) (finding attempted arson conviction to have been based on a violent incident), cert. denied, 474 U.S. 1078 (1986). Thus, it was appropriate for the trial court to consider Thomas Crosby's testimony that Appellant grabbed him from behind and held what he thought was a knife to his throat, even though Appellant pled guilty to the lesser offense of unarmed robbery because the weapon recovered was inadvertently lost by the police before trial.

> This is so because . . . the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.

Stewart v. State, 558 So.2d 416, 419 (Fla. 1990) (quoting Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977)).

As for the trial court's consideration of the sentence imposed for that conviction, this was just a fact attendant to the conviction. There is no evidence that the length of the sentence carried any weight in the trial court's determination of sentence. See Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991) ("Gunsby had previously been convicted of aggravated assault and sentenced to three and one-half years in the state prison in 1967. He also had been convicted of armed robbery and sentenced to ten years in the state prison in 1971. There is no question that the second aggravating circumstance, that he had been previously convicted of crimes of violence, was properly applied in this case."). Consequently, this Court should affirm Appellant's sentence of death.

ISSUE XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE RELATING TO APPELLANT'S PRIOR VIOLENT FELONY (Restated).

In establishing the existence of the prior violent felony aggravating factor, the State introduced the testimony of the officer who apprehended Appellant after Appellant stole Mr. Crosby's van. Deputy Scully testified that he responded to the robbery call and spotted the victim's van at a traffic light. He followed the van until another unit arrived. (T 1161-63). Over Appellant's objection, Deputy Scully further testified that, before he and the other unit engaged their lights and sirens, Appellant fled in the van, driving through a golf course fairway and a chain link fence before crashing into a tree. Appellant was arrested at gun point. (T 1163-65).

Appellant claims here, as he did below, that this testimony prejudiced his rights to a fair sentencing proceeding because it evidenced crimes for which Appellant was not convicted. **Brief of Appellant** at 89. As Appellant concedes, however, "[d]etails of the prior felony conviction for violence are admissible in the penalty phase." Id. As noted previously in Issue XIV, "[t]estimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Rhodes v. State, 547 So.2d 1201, 1204 (Fla. 1989).

The details of Appellant's flight from the officers and his subsequent arrest immediately following his armed robbery of Mr.

Crosby was relevant in establishing the weight to be accorded this aggravating factor. Thus, the trial court did not abuse its discretion in admitting Deputy Scully's testimony. Even if it were error, however, it was harmless beyond a reasonable doubt. It did nothing to ameliorate the existence of this aggravating factor, which, when coupled with the felony murder aggravating factor, more than outweighed the scant evidence in mitigation. Thus, since there is no reasonable possibility that the jury's recommendation or the trial court's sentence would have been different absent this evidence, Appellant's sentence should be affirmed. See Rogers v. State, 511 So.2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991), cert. denied, 112 S.Ct. 955 (1992).

ISSUE XVI

WHETHER THE TRIAL COURT IMPROPERLY FAILED TO INQUIRE INTO THE LACK OF TESTIMONY FROM A MENTAL HEALTH EXPERT AND OTHER WITNESSES DURING THE PENALTY PHASE (Restated).

At the close of the State's case during the penalty phase proceeding, defense counsel named several witnesses that he "may be calling." Included in this list were seven people whom Appellant ultimately did not call to testify on his behalf: Dr. Rifkin, who was appointed pre-trial as a confidential expert (R 1396-99);[13] Carl Dordelman, who was Appellant's roommate at the time of the murder; Cindy Schrader; Sean Green; Steve White; and Appellant's mother and father. (T 1168). Citing to Koon v. State, 18 Fla. L. Weekly S201 (Fla. March 25, 1993), Appellant claims that the trial court should have "inquir[ed] into the matter and determin[ed] whether the defendant personally waived presentation of the mitigating evidence when they did not appear to testify and that the waiver was informed and voluntary." The trial court's failure to do so "resulted in loss of valuable mitigating evidence." **Brief of Appellant** at 90.

First, Koon does not apply to this situation. In Koon, this Court stated that it was "concerned with the problems inherent in a trial record that does not adequately reflect a defendant's

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[13] After Appellant's eighth witness testified, defense counsel indicated that he had two more witnesses from Gator Lumber who were not there yet to testify. The State objected to these two witnesses as duplicative. When the court asked defense counsel what other witnesses he had, defense counsel responded that Dr. Rifkin was not there yet and that he was "kind of rebelling as to -- about coming." The trial court offered to send a bailiff to pick him up, but defense counsel responded, "No, no, no, no, I, no, no, it's not that kind of problem." (T 1228-29).

waiver of his right to present any mitigating evidence." Id. at 202 (emphasis added). Thus, this Court established a prospective rule to be applied "in such a situation." Id. Not only should Koon not be applied retroactively to this case,[14] but it should not be stretched to its extreme to require a personal waiver from the defendant of every witness that could possibly be called, but who is, for obvious strategic reasons, not called.

Second, in any given case, there are any number of potential witnesses that may be called on a defendant's behalf. Strategically, however, it may not be advantageous to call any or all of these witnesses, especially if they are hostile or their testimony is not helpful. The decision must be one between the defendant and the attorney. The trial court should not be required to interrogate the defendant about witnesses not called to testify.

Finally, Appellant's assertion that the trial court's failure to inquire and obtain a waiver resulted in the "loss of valuable mitigating evidence" simply does not logically follow. Obtaining a waiver from the defendant would not result in the gain of "valuable mitigating evidence;" thus, not obtaining a waiver would not result in the loss of "valuable mitigating evidence." The rationale behind Koon simply does not apply under the facts of this case. Thus, Appellant's conviction should be affirmed.

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[14] Appellant was sentenced on May 1, 1991. (R 1851-56). Koon became final on March 21, 1993. Thus, the new rule of trial procedure established in Koon should not be applied to a case already tried.

ISSUE XVII

WHETHER THE TRIAL COURT FAILED TO CONSIDER OR WEIGH MITIGATING EVIDENCE (Restated).

Appellant claims that "the trial court failed to give any mitigating weight to any of the mitigation that Mr. Lowe presented at the penalty phase." **Brief of Appellant** at 92. Specifically, Appellant complains that the trial court refused to give any weight to the fact that (1) "Mr. Lowe's work habits were wonderful and that he was a wonderful employee at Gator Lumber," and that (2) "Mr. Lowe adapted well to the structured environment in prison, was a good inmate at the jail pending trial, acquired his G.E.D. in prison, worked as a teacher's aide there, . . . and that he functioned well in the less structured environment of a half-way house (where he lived voluntarily), submitted to authority of the house, and was engaged in serious Bible study there." Id. at 92-93. He also complains that the trial court "misconstrued the mitigation concerning Lowe's home life that was presented" and "failed to consider mitigating evidence regarding Charlie Lowe's conversion to the Jehovah Witness faith when his son Rodney was an adolescence [sic] or teenager." Id. at 93-94.

In its sentencing order, the trial court made detailed factual findings regarding Appellant's nonstatutory mitigating evidence. (R 1853-54). Ultimately, however, the trial court found, based on its review of the evidence presented, that

> the circumstances presented by the Defendant do not reasonably convince me that they are mitigating circumstances. The evidence established that that [sic] the Defendant received a normal upbringing, free from abuse or deprivation. The Defendant was exposed to moral training both before and after his

> previous prison sentence. The Defendant was provided housing upon release from prison and given a steady job. I find that the Defendant, based on his life experiences, was able to make free and voluntary decisions with full knowledge of the consequences of his decisions. I do not believe that the fact that the Defendant lived a normal life during the periods of time when he was not committing a crime is any mitigation of a sentence of death for the crime committed in this case.
>
> In addition, I find that even if living a normal, responsible life and being a model prisoner were mitigating circumstances, this would not outweigh the aggravating circumstances of committing a prior robbery and committing a murder during the commission of another attempted robbery.
>
> Therefore, after weighing both of the proven aggravating circumstances against the evidence and circumstances presented by the Defendant, I find there are sufficient aggravating circumstances to justify the sentence of death on Count I of the Indictment.

(R 1855-56) (emphasis in original).

As this Court stated in Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) (emphasis added), "[w]hen addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." Moreover, "[t]he decision as to whether a particular mitigating circumstance is established lies with the judge. Reversal is not warranted simply because an appellant draws a different conclusion." Sireci v. State, 587 So.2d 450, 453 (Fla. 1991). Further, "[t]he resolution of factual conflicts is solely the responsibility and duty of the trial judge, and, as

the appellate court, [this Court has] no authority to reweigh that evidence." Gunsby v. State, 574 So.2d 1085, 1090 (Fla. 1991). See also Jones v. State, 580 So.2d 143, 146 (Fla. 1991). As is obvious from the trial court's order, the trial court considered all of Appellant's nonstatutory mitigating evidence, but concluded, based on the evidence presented, that Appellant's evidence was not of a truly mitigating nature, or that, if it were, it would not outweigh the aggravating circumstances.

Regarding Appellant's home environment, the trial court found the testimony by Appellant's aunt, who only visited Appellant's home once or twice a year, contradicted by the testimony of Appellant's father. Charlie Lowe testified that he thought he showed his children love, but he would discipline them when necessary. He believed that as long as Appellant lived under his roof, Appellant would abide by his rules. He raised Appellant "the best [he] knew how." (T 1265-66, 1272). As a Jehovah's Witness, he would often take his family with him to pass out literature, unless they were sick or had other obligations. (T 1269). Appellant's aunt even admitted that Appellant was "a normal little boy." (T 1213). He was disciplined, however, because he rebelled against his parents' and their religious faith and got into "a lot of trouble." (T 1215, 1218-19).

"Although cultural deprivation and a poor home environment may be mitigating factors in some cases, sentencing is an individualized process." Jones, 580 So.2d at 146 (affirming the trial court's rejection of nonstatutory mitigating factor). "Evidence is mitigating if, in fairness or in the totality of the

defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime committed." Wickham v. State, 593 So.2d 191, 194 (Fla. 1991). Here, the trial court found the father's testimony more persuasive than the aunt's and determined that Appellant "received a normal upbringing, free from abuse or deprivation." (R 1855). It did not believe, however, that this was of a truly mitigating nature, i.e., it reduced the degree of moral culpability for the murder of Donna Burnell.

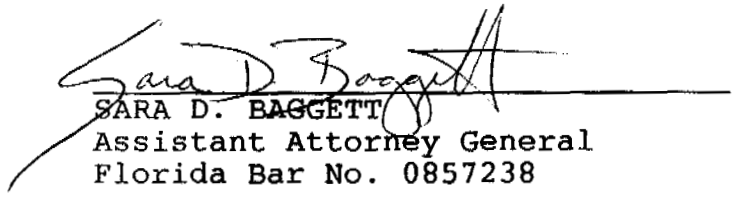
Similarly, the trial court did not believe that Appellant's good work habits, his religious teachings, and his ability to function well in a controlled environment, if mitigating in nature, were sufficient to outweigh the two aggravating circumstances proven by the State: "I find that even if living a normal, responsible life and being a model prisoner were mitigating circumstances, this would not outweigh the aggravating circumstances of committing a prior robbery and committing a murder during the commission of another attempted robbery." (R 1855-56). As noted previously, the weight to be accorded aggravating and mitigating circumstances is within the trial court's discretion, Campbell, 571 So.2d at 420, and there is competent, substantial evidence in this record to support the trial court's findings. In light of the strong aggravation in this case, however, any error in the trial court's weighing of the aggravating and mitigating factors was harmless beyond a reasonable doubt since it could not reasonably have resulted in a lesser sentence. See Wickham, 593 So.2d at 194. Consequently, this Court should affirm Appellant's sentence.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests that this Honorable Court affirm Appellant's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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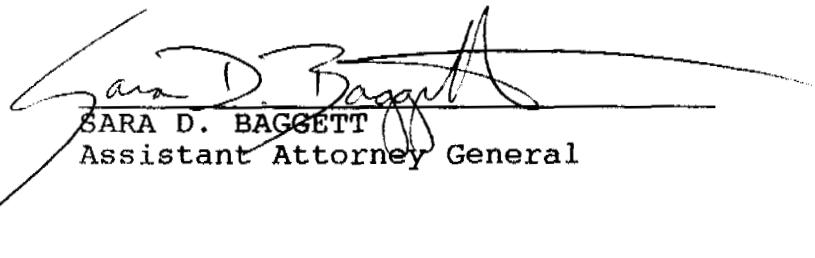
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Margaret Good, Assistant Public Defender, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401, this 17th day of August, 1993.



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