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IN THE SUPREME COURT OF FLORIDA

CASE NO= 78,536

DONALD McCALL,

Petitioner,

vs.

STATE Of FLORIDA,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Donald McCall, the criminal defendant and appellant below in the appended decision under review, McCall v. State, 583 So.2d 411 (Fla. 4th DCA 1991), review granted, Case No. 78,536 (Fla. February 10, 1992), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

The few necessary references to the two-volume record on appeal will be designated "(R:)."

Any emphasis will be supplied by the State unless otherwise specified.

STATEMENT OF THE CASE AND FACTS

The State rejects petitioner's "statement of the case" and "statement of the facts." These statements impermisssibly involve the two of petitioner's three points on direct appeal which the Fourth District rejected sub silentio. See e.g. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) and Reaves v. State, 485 So.2d 829, 830 note 3 (Fla. 1986). The sole question properly before this Court is that explicitly passed upon by the Fourth District in McCall v. State, 583 So.2d 411, 412. See e.g. Berezovsky v. State, 350 So.2d 80, 81 (Fla. 1977), Sobel v. State, 437 So.2d 144 (Fla. 1983), Barket v. State, 356 So.2d 263, 264 (Fla. 1978), cert. denied, 439 U.S. 848 (1978), State v. Heqstrom, 401 So.2d 1343 (Fla. 1981) and Blackshear v. State, 522 So.2d 1083, 1084 (Fla. 1988). This question is simply whether, following petitioner's adjudication for possessing cocaine, his sentencing as an "Habitual Felony Offender" under section 775.084, Fla. Stat. (1989) (R 173-174, 177, 180-185) was constitutionally precluded because section 1 of Chapter 89-280 of the Laws of Florida slightly revised this statute in violation of the "Single Subject Rule" of Article III, section 6 of the Constitution of the State of Florida. Accordingly, the State McCall v. State, 583 So.2d 411, 412, the State adopts McCall v. State as its statement of the case and facts.[1]

---

[1] Should this Court resolve the sole issue before it adversely to petitioner, but nonetheless choose to exercise its seldom-used Fla.R.App.P. 9.040(a) discretion to review his two ancillary claims, the State would rely upon its appended April 26, 1991 "Answer Brief of Appellee" filed with the Fourth District to refute same.

SUMMARY OF ARGUMENT

The trial judge did not fundamentally or reversibly err in declaring petitioner an habitual felony offender. This statute is constitutional in all respects as written, and even if it is not, it was nonetheless properly applied against petitioner.

ISSUE

THE TRIAL JUDGE DID NOT FUNDAMENTALLY OR REVERSIBLY VIOLATE SINGLE SUBJECT PRECEPTS IN DECLARING PETITIONER AN HABITUAL FELONY OFFENDER, AND SENTENCING HIM ACCORDINGLY FOR POSSESSION OF COCAINE

ARGUMENT

Petitioner essentially alleges that the trial judge fundamentally erred by declaring him an habitual felony offender and sentencing him as such upon his adjudication for possession of cocaine (R **173-174,** 177, **180-185).** Petitioner notes that certain portions of section **775.084,** under which he **was** habitualized, **were** revised by section 1 of Chapter **89-280** of the Laws of Florida. He posits that this legislation was enacted in violation of the "single subject rule" found in Article 111, Section 6 of the Constitution of the State of Florida. The State disagrees that petitioner is entitled to any relief on this basis, for three reasons.

Preliminarily, the State submits that petitioner cannot fruitfully litigate this claim here insofar as he did not raise it at the trial; court level. Compare Henderson v. State, **569** So.2d 925 (Fla. 1st **DCA 1990)** and Walker v. State, 565 So.2d **873** (Fla. 4th DCA 1990); see generally Cheng **v.** State, 595 So.2d **1098** (Fla. 4th **DCA** 1992); contrast Trushin **v.** State, **425 So.2d** 1126 (Fla. 1982).

More importantly, petitioner lacks the standing to pursue this claim here. The portions of the statute under which he was habitualized and sentenced, sections 775.084(1)(b)(1-2) and 775.084(4)(b)(2), Fla. Stat. (1989), were not substantively

affected by the portions of the statute which were amended by section 1 of Chapter 89-280. *See* Wright v. State, 579 So.2d 418 (Fla. 4th DCA 1991), citing Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952); compare Johnson v. State, 589 So.2d 1370 (Fla. 1st DCA 1991), review granted, Case Nos. 79,150 & 79,204 (Fla. May 19, 1992) with Tims v. State, 592 So.2d 741, 742 (Fla. 1st DCA 1992); see generally Webster v. North Orange Memorial Hosp. Tax Dist., 187 So.2d 37, 42 (Fla. 1966). Aggravated battery, and not possession of cocaine, was the sole qualifying offense for habitual felony offender treatment engrafted onto section 775.084 in 1989.

Turning alternatively to the unpresented merits, it is abundantly clear that the 12 sections of Chapter 89-280 comprise one "comprehensive law in which all of its parts are directed towards meeting the crisis of increased crime" under Burch v. State, 558 So.2d 1, 3 (Fla. 1990). It is not a law involving "two....separate....subjects....so tenuous[ly]....relat[ed].... that....the single-subject rule of the constitution ha[s] been violated." Id. In Burch, this Court upheld the constitutionality of the 76-section Chapter 87-243, Laws of Florida, despite the fact that this law contained many quasi-civil facets which were designed to meet the crime crisis. Therefore, the mere fact that some sections of Chapter 89-280 deal directly with solving the crime crisis by strengthening criminal sentencing enhancement statutes, while other sections of this chapter deal indirectly therewith by regulating the often problematic and crime-riddled practice of repossessing vehicles,

does not render the entire chapter void under Burch. Petitioner's main case of Bunnell v. State, 453 So.2d 808 (Fla. 1984) is readily distinguishable, since it involved two practically unrelated, uncomprehensive topics. The State notes that the Fourth District has elsewhere indeed already held that the new habitual felony statute was not enacted in violation of the single subject rule. Jamison v. State, 583 So.2d 413 (Fla. 4th DCA 1991).

Assuming arguendo that petitioner's single subject challenge to the constitutionality of the habitual offender statute was both preserved and meritorious, the State would note for the record that any such holding would not constitutionally bar the habitualization of criminal defendants who have committed their predicate offenses on or after May 2, 1991. The passage of Chapter 91-44, Laws of Florida on this date, reenacting all of Chapter 89-280 as codified, prospectively cured any single-subject flaws in its original enactment. See e.g. Laxahatchee River Environmental Control District v. School Board of Palm Beach County, 515 So.2d 217, 218-219 (Fla. 1987); State v. Combs, 388 So.2d 1029, 1030 (Fla. 1980); Santos v. State, 380 So.2d 1284 (Fla. 1980), and Florida Statutes, Vol. I (1989), "Preface," page vi.

In sum, petitioner's sole claim before this Court is woefully uncompelling. This Court should therefore approve the decision of the Fourth District under discretionary review.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must AFFIRM the disposition under discretionary review.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

CASE No. 78,536

DONALD McCALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

****

APPENDIX TO RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PER CUHIAM.

Barbara Watson appeals from an order that denied her motion to set aside a final judgment of dissolution of marriage on the grounds that she did not receive notice of the final hearing. We reverse.

The trial court entered an order, pursuant to Fla.R.Civ.P. 1.440(c), setting the dates and times for a pretrial hearing and a non-jury trial in the parties' dissolution of marriage suit. Appellant, a pro se respondent, claims that she did not receive her copy of the order.' The face of the order shows that the trial court did not mail the notice to appellant's correct address. Appellant did not appear at either the pretrial or final hearing. The trial court mailed **a** copy of the final judgment to appellant's correct address and upon receipt, appellant promptly filed a motion to set aside the judgment on the grounds of **lack** of notice.

[1–3] It is well settled that a judgment entered without notice to a party is void. ***See*** *Shields* **v.** *Flinn,* 528 So.2d 967 (Fla. 3d DCA 1988); *Falkner v. Amerifirst Federal Savings & Loan Ass'n.,* 489 So.2d 758 (Fla. 3d DCA 1986). **As** we stated in *Taylor* **v.** *Bowles,* 570 So.2d 1093, 1094 (Fla. 4th DCA 1990), "[w]hen a party has no notice of a trial date, the trial court abuses its discretion when it proceediwitli a final hearing." ***See*** *also Li* **v.** *Li,* **442** So.2d 327 (Fla. 4th DCA 1983). Accordingly, we reverse the trial court's order denying appellant's motion to set aside the judgment and remand this cause for a new trial.

REVERSED AND REMANDED.

DELL, GUNTHER and POLEN, JJ., concur.

KEY NUMBER SYSTEM

1. **To** rebut this, **appellee relies** exclusively upon **an affidavit that is** *not* properly before **this** court. See Fla.R.App.P. 9.200(a)(1) and **9.220.**

Willie KEMY, Appellant,

v.

STATE of Florida, Appellee.

No. 90–3481.

District Court of Appeal of Florida, Fourth District.

July 31, 1991.

Appeal from the Circuit Court for Broward County; Richard D. Eadc, Judge.

Richard I,. Jorandhy, Public Defender, and Tanja Ostapoff, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Rutterworth, Atty. Gen., Tallahassee, and Patricia G. Lampert, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Reversed on the authority of *State v. Raland,* 577 So.2d 680 (Fla. 4th DCA 1991).

DOWNEY, GUNTHER and POLEN, JJ., concur.

KEY NUMBER SYSTEM

Donald McCALL, Appellant,

v.

STATE of Florida, Appellee.

No. 91–0134.

District Court of Appeal of Florida, Fourth District.

July 31, 1991.

Appeal from the Circuit Court for Broward County; Stanton S. Kaplan, Judge.

Richard L. Jorandby, Public Defender, and Nancy Perez, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Georgina Jimenez–Orosa, Asst. Atty. Gcn., West Palm Reach, for appellee.

PER CURIAM.

We affirm the appellant's conviction and sentence as a habitual offender. We reject appellant's contention that chapter 89–280, Laws of Florida, amending section 775.084, Florida Statutes, violates the single subject rule of article III, section 6 of the Florida Constitution. *E.g., Burch v. State,* 558 So.2d 1 (Fla.1990).

HERSEY, STONE and GARRETT, JJ., concur.

KEY NUMBER SYSTEM

Frank OLIVERIO, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1119.

District Court of Appeal of Florida, Fourth District.

July 31, 1991.

Defendant was convicted in the Circuit Court, Indian River County, Dwight L. Geiger, J., of burglary. Defendant appealed. The District Court of Appeal held that restitution could not be imposed without determination of statutory factors.

Affirmed in **part,** reversed in part, and remanded.

1. Criminal Law ⇐1038.1(1)

Defendant waived error by failing to object to court's charge. West's F.S.A. RCrP Rule 3.390(d).

2. Criminal Law ⇐1208.4(2)

Restitution could not be imposed without determination of statutory factors, e.g., loss to victim and defendant's present and future financial resources. West's F.S.A. § 775.089(6, 7).

Richard L. Jorandby, Public Defender, and Anthony Calvello, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and John Tiedernann, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

This is a timely appeal from a judgment of conviction and sentence of three and one-half years' imprisonment, pursuant to the sentencing guidelines, for the offense of burglary of a structure.

[1] Appellant poses three points on appeal, only one of which requires reversal. The first point presented relates to the court's failure to instruct the jury on the underlying offense of the burglary. We believe the court's instruction was adequate. But, even if it were not, appellant waived the error by failing to object to the court's charge. Fla.R.Civ.P. 3.390(d); *Castor v. State,* 365 So.2d 701 (Fla.1978).

The second point relied upon by. appellant relates to the trial court's failure to sustain appellant's objection to the state's alleged comment on appellant's silence. We agree with the state that the comment was not improper and with the argument that it was, in any event, invited by appellant's cross-examination of state witnesses.

[2] Finally, the sentence imposed restitution upon appellant without-a determination of the factors set forth in section 775.089(6) and (7), Florida Statutes, *i.e.,* the loss to the victim, the defendant's present and future financial resources, etc. This is required by both statute and case law. *Mounds v. State,* 526 So.2d 1084 (Fla. 4th DCA 1988).

Accordingly, the judgment of conviction arid sentence are affirmed except for that aspect of the sentence relating to restitu-

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 91-0134

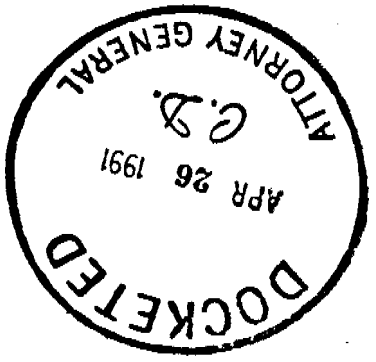
DONALD McCALL,

Appellant,

vs.

STATE OF FLORIDA

Appellee.



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AN APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA CRIMINAL DIVISION

****

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PRELIMINARY STATEMENT

Appellee, the State of Florida, was the prosecution and Appellant, Donald McCall, was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In this brief, the parties will be referred to as they appear before this Court of Appeal, except that Appellee may also be referred to as "the State."

References to the record on appeal will be made by the following symbols:

"R" = Record on Appeal

"AB" = Appellant's Initial Brief

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE

The State of Florida accepts Appellant's statement of the case as it appears at page two of the initial brief to the extent that it represents an accurate, non-argumentative recitation of the proceedings below,

STATEMENT OF THE FACTS

The State of Florida accepts Appellant's statement of the facts as it appears at pages three and four of the initial brief to the extent that it represents an accurate, non-argumentative recitation of the proceedings below, and only to the extent the facts are necessary to resolve the three issues raised by Appellant. However in compliance with Fla. R. App. P. 9.210(c), and for a complete and fair recitation of the procedural history and facts of this case, the state hereby submits the following additions, clarifications and modifications to point out areas of disagreements between Appellant and Appellee as to what actually occurred below.

1. Contrary to Appellant's assertion in the first paragraph on page 3, Officer Penny ~~did not~~ testified that, "He (Penny) was suspicious because he (Appellant) was alone standing on the corner (R. 16, 36, 39)." (AB 3) The record is clear that Officer Penny, in fact, testified that Appellant "looked suspicious because he was looking around as if looking for the police or looking for potential ... buyers ..." (R. 16).

2. Officer Penny's testimony was that he saw Appellant flagging cars down, if one stopped, Appellant would run over to the passenger side of the car and engage the driver in a real

short quick conversation (R. 21). Appellant would then reach into his pocket and take out what appeared to be a piece of paper, and show the object in his hand to the person in the car. The driver would either drive away, or exchange money, pick something out of Appellant's hand, and drive away real quickly (R. 21-22).

3. After observing Appellant do this for a while, Officer Penny and his partner, Officer Bollinger, decided to make contact with Appellant, and drove up to Appellant in their marked police vehicle (R. 22). Then the officers walked up to Appellant, and because when he encounters people with their hands in their pockets, the officer is afraid of concealed weapons, he asked Appellant, "Please take your hands out of your pocket." (R. 22).

4. When Appellant complied with the Offices's request, Appellant took out a $20 bill in his left hand, and four pebble-like substances fell to the ground (R. 23). At that point, Offices Penny saw Appellant *started* to reach'around to his back with his sight hand, so Officer Penny told Appellant, "don't move, I'm going to pat you down and see if you have any weapons on you." Officer Penny felt a hard metal-like object in Appellant's rear waistband. And when the officer lifted Appellant's shirt, he saw a buck knife (R. 23), with the blade open (R. 68), down into Appellant's pants (R. 23, 27).

5. Appellant was arrested for the concealed weapon (R. 27). The Officer then picked up the pebbles that had fallen down, and conducted a Valtox Test on them. The test was *positive* for cocaine (R. 28-29).

SUMMARY OF THE ARGUMENT

Point I - Appellant has failed to show the trial court abused its discretion in sustaining Appellant's objection, striking the comments, admonishing the jury to disregard that answer, but denying the motion for mistrial since once the comments were stricken, the comments did not affect the substantial rights of Appellant.

Point II - Appellant's allegations that the trial court failed to make the statutorily required findings prior to sentencing Appellant as an habitual felony offender are totally refuted by the record. It is well settled that after the trial court orally makes specific findings of fact and conclusions of law that Appellant qualifies to be sentenced as an habitual felony offender, the court is not required to enter a separate written order setting forth these findings and conclusions prior to habitualizing defendant's sentence. Therefore, Appellant's sentence as an habitual felony offender must be affirmed.

Point 111 - The fact that some sections of Chapter 89-280 deal directly with solving the crime crisis by strengthening criminal sentencing enhancement statutes, while other sections of this chapter deal indirectly with solving the crime crisis by regulating the often problematic and crime-related practice of repossessing vehicles, does not render the entire chapter void. Thus, Appellant's allegations that Chapter 89-280 enacting 5775.084 Fla. Stats. (1989) violates the "single subject rule" are without merit.

ARGUMENT

POINT I

APPELLANT FAILED TO SHOW ABUSE OF DISCRETION IN THE TRIAL COURT DENYING APPELLANT'S MOTION FOR MISTRIAL.

Appellant argues the trial court erred in denying his motion for mistrial when Offices Penny was allowed to testify that Appellant was attempting to flag car down "to see if they were interested in what he has to sell." (AB 6). Appellant's arguments are without merit.

The relevant portion of the record is as follows:

> Q. [By the prosecutor]: ... Specifically, what did you see when you began observing Donald McCall? What did you see him doing?
>
> A. [By Officer Penny]: He was looking around. As a vehicle would come down, he would attempt to flag them down, as we would call it, to *see* if they're interested in what he has to sell.
>
> MR. DIAZ [defense counsel]: Judge, I object. Ask that we go side bar.
>
> THE COURT: Okay.
>
> * * *
>
> MR. DIAZ: Your Honor, object to that last question. Judge, my client is not charged with delivery of cocaine, he's indicating him as a drug dealer and there won't be any evidence as to that at this time.
>
> THE COURT: I strike the answer. You can ask him what did he see. He can't tell us what's in the Defendant's mind. He can ask what's in his mind.

MR. DIAZ: At this time, I move for a mistrial based on the inference that's already been put in the jury's mind. He's not charged with that crime.

THE COURT: He can testify as to that, fine.

MR. DIAZ: I don't think he's charged with that crime.

THE COURT: Overruled.

(Thereupon, the following proceedings were resumed within the hearing of the jury:)

THE COURT: I am striking the answer of the witness and ask it again and rephrase it.

BY MS. HERMAN [the prosecutor]:

Q. Okay. Officer, what did you specifically see Donald McCall do?

A. Okay. He was attempting to flag down vehicles. He was waving at the drivers as they'd go by.

Q. And how is it that you could see what he was doing at night a block-and-a-half, two blocks away?

A. I was using a pair of binoculars that I bought for myself for this point.

THE COURT: At this point, I want to admonish the jury to disregard the prior answer that was stricken. Go ahead.

(Whereupon, direct examination of Officer Penny continued by the prosecutor.)

(R. 19-21), Appellant did not request a more extensive curative instruction to the jury and no further objections were heard from Appellant on the matter.

Florida case law clearly states that a motion for mistrial is addressed to the sound discretion of the trial judge. Salvatore v. State, 355 So.2d 745 (Fla. 1979); Barsden v. State, 203 So.2d 194 (Fla. 4th DCA 1967). The power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done in cases of absolute necessity. Salvatore. The standard of prejudice which must be met by the defendant in order to obtain a new trial varies adversely with the degree to which the conduct of the trial has violated fundamental notions of fairness. Id. It should not be presumed that if the error did occur it injuriously affected the substantial rights of the defendant. Id.

Under identical circumstance the court in Johnson v. State, 248 So.2d 208 (Fla. 3d DCA 1971) held:

> A witness for the State made an improper response to a question which, upon appropriate motion by defense counsel was stricken and the jury admonished to disregard it, which is in accordance with the applicable decisions as to trial conduct. [Citations omitted.] Examining the evidence in its totality does not indicate that the response was of sufficient prejudicial nature to vitiate the entire trial.

The State submits that the testimony of Officer Penny that Appellant appeared to be looking for people to sell the crack to did not injuriously affected the substantial rights of Appellant. The remark was unrequested opinion testimony of the officer, When Appellant objected, the court struck that part of the answer, and admonished the officer to limit his answer to what he saw - which is precisely what the prosecutor had asked.

The court then admonished the jury to disregard the answer, which is in accordance with the applicable decisions as to trial conduct, Id. Appellant did not ask for any further curative instructions. Thus the comment must be considered innocuous. Here as in Johnson, examining the evidence in its totality does not indicate that the response was of sufficient prejudicial nature to vitiate the entire trial.

The Officer's comment, therefore, did not constitute error, but in any event, certainly not reversible error. See, Evans v. State, 422 So.2d 60 (Fla. 3d DCA 1980) (reference to a mug shot in police files does not necessarily convey to the jury that the defendant has committed prior crimes or has previously been in trouble with the police); Darden v. State, 329 So.2d 287 (Fla. 1976); Thomas v. State, 326 So.2d 413 (Fla. 1973); Smith v. State, 365 So.2d 405 (Fla. 3d DCA 1978).

In Kothman v. State, 442 So.2d 357 (Fla. 1st DCA 1983), the court held that a reference to an outstanding warrant when the state was permitted to adduce a statement from an evidence technician that the defendant's fingerprint card had been sent to another state was error but not so harmful in terms of inferring criminal propensity as to be reversible in nature.

In the case at bar, Appellant was not charged with selling cocaine, However, the question asked of Officer Penny was simply what he had observed Appellant do that caused him to approach Appellant to have a conversation. Thus, the testimony was admissible and relevant to show the sequence of events. "[R]elevant evidence will not be excluded merely because it

points to commission of a separate crime, unless its sole relevance is to point up bad character or the criminal propensity of an accused." McCrae v. State, 395 So.2d 1545, 1152 (Fla. 1980), cert. denied, 454 U.S. 1041 (1981). Thus, although the response went beyond the question asked, same was stricken by the judge upon Appellant's objection, and the jury was admonished to ignore that response.

In addition, the State points out that in response to a similar question posed by the prosecutor, Officer Penny had already stated, without objection from Appellant, that Appellant was looking around as if "looking for potential ... buyer ... ." (R. 16). The State submits that the testimony of the officer in the instant case was not prejudicial where it was merely cumulative to other similar testimony that was not objected to as that referred to above at R. 16. Also during cross-examination the following occurred:

> Q [by defense counsel]: ... Is this primarily a black area of town?
>
> A [by Officer Penny]: Correct.
>
> **Q. And *you*** said he was suspicious in nature because he was standing on a corner not talking to anyone?
>
> A. And looking around to see, for what I believed to be, two reasons; looking to see if he could ***see*** the police, or also looking, as I said, flagging down vehicles.
>
> Q. But with those binoculars you can't read into peoples mind, can you?
>
> A. No, I can't.
>
> **Q. So you're speculating again** as to what he was doing there?

A. I'm saying what I believed he was doing.

Q. I think you described to Ms. Herman as looking for police or looking for a potential victim, is that what you said?

A. I did say that a person looking around like that could be looking for a potential victim.

Q. Go ahead, I'm sorry.

A, Or like I went on to say, I don't know exactly what I said, but a victim of a buyer or anything to that effect.

Q. Okay. Now, that's from your police training you think like that, is that right?

A, Correct.

Q. And your experience?

A. Correct.

(R. 39-40), Thus, not only had Officer Penny previously said substantially the same thing at R. 16, without objection from Appellant, defense counsel elicited the comment one more time during cross-examination of Officer Penny (R. 40). Thus, the error, if any, in putting the idea in the jury's mind was either waived, or invited by Appellant in his emphasizing the comment to the jury on cross-examination.

The State submits, therefore, that the error, if any, was rendered harmless beyond a reasonable doubt where the offending remark was merely cumulative to other evidence allowed to be heard by the jury. In Meade v. State, 96 So.2d 776 (Fla. 1957), cert. denied, 355 U.S. 920 (1958), the Supreme Court held that refusal to declare a mistrial in prosecutian for murder because

of reference in testimony of police officer to fact that defendant had previously been in trouble was not reversible error, where the objection to such testimony was sustained and the record contained several other similar references, admitted without objection, including the defendant's statement to the police. Similarly, in Cooper v. State, 261 So.2d 859 (Fla. 3d DCA 1972), the court held that the possible error committed by a private security officer in his testimony that upon arresting defendant and warning him not to say anything, the defendant responded that he already knew what to do from prior experience, was subsequently cured where the defendant admitted, while testifying on his own behalf, the prior facts on which the officer's comment was based.

In the instant case, therefore, the objection was waived when Appellant allowed the same statement to be heard by the jury without objectfon at R. 16; and then the defense elicited the same statement from Officer Penny on cross-examination (R. 39-40).

Furthermore, as pointed out by Appellant, he was not charged with sale of cocaine. The charges were "possession" of cocaine, and carrying a concealed weapon. The record shows that, without the comment that Appellant was "looking for buyers," the officer's testimony was that they approached Appellant because he looked suspicious by his acts of standing in the corner, flagging down cars, approaching the driver of the car, having a short conversation with them, exchanging something from his pocket for money, and then that car driving away, and

Appellant proceeding *to* do the same thing with another car. Therefore, without the specific comment, the jury would have made the same conclusions that Appellant was in possession of cocaine when the officers observed him doing the "suspicious" acts. Therefore, it can be said that, beyond a reasonable doubt, the objected to comment did not contribute to the verdict. Thus, the error, if any, was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), see also, Johnson, supra (in view of the evidnece in its totality, the response was not of sufficiently prejudicial nature to vitiate the entire trial, thus the denial of the motion for mistrial. was not ground for reversal of conviction.)

Thus, Appellant ha5 failed to show the trial court abused its discretion in sustaining Appellant's objection, striking the comments, admonishing the jury to disregard that answer, but denying the motion for mistrial since once the comments were stricken, the comments did not affect the substantial rights of Appellant.

POINT II

APPELLANT HAS FAILED TO SHOW ANY REVERSIBLE ERROR IN THE TRIAL COURT DECLARING APPELLANT TO BE AN HABITUAL FELONY OFFENDER.

Appellant argues the trial court erred in declaring Appellant to be an habitual felony offender "without following the statutory procedure and making the requisite findings." Appellant alleges the court failed to make findings of fact to justify an enhanced sentence under 775.084; or to state that the felony for which Appellant was being sentenced was committed within five years of the date of the previous felony conviction. Appellant's argument is totally refuted by the record on appeal.

At the sentencing hearing, the court inquired as to any legal cause why sentence should not be pronounced, and the defense responded by stating that they had received the PSI report prior to the date of the hearing (R. 168), and that they were not disputing his prior record, which was supported by certified copies of the convictions, including one under an alias used by Appellant (R. 167-168). Defense counsel specifically agreed with the court that Appellant "qualifies as a habitual offender" (R. 168). Thereafter, the court's ruling is as follows:

> THE COURT: Okay. I have a certified copy of conviction, judgment, Case 89-1014058 CF 10, Judge Grossman, 28 July, 1989, delivery of cocaine; certified copy, Case 88-81112, Judge Seay, September 23rd, 1988. I have a judgment in Case No. 84-7005, Judge Kaplan, October 8, 1984, grand theft.

> **Court finds that he has been previously convicted of two or more felonies, which are qualified offenses for the invocation *of* the habitual offender statute 775084** (sic).
>
> Fron my information, there are no pardons, no post-conviction relief on the judgments. He has received notice to **be** declared a habitual offender, so has his counsel. He has been appointed counsel at this hearing and at this time, I'm ready to sentence him.
>
> I agree, he doesn't have anything violent, but he's **like a** thorn **in the side of society. He never stops going on for years and years and years, and I don't see any hope that it'll ever stop. He's the** type **of guy that brings the system *to*** its **knees.**

(R. **169-170).**

> **THE COURT: ... .**
>
> At this point, **I would find that he qualifies under 775084 (sic), Subsection 4A and** sentence him **on** the possession of cocaine to **eight** years **as** a habitual **offender,** which is **a felony offense, and** found not guilty of count II.

(R. 171).

First, it is settled that when the State produces **certified** judgments of convictions to satisfy **the** requirements **of** the habitual offender statute, and the **defendant** does not challenge the prior record as **submitted by the** State, **the** trial court does not err in declaring Appellant to be an habitual felony offender relying solely on **the** certified convictions **to** satisfy the statutory requirements. See, Eutsey v. State, 383 So.2d 219 (Fla. 1980); Lewis v. State, 514 So.2d 389 **(Fla.** 4th **BCA** 1987); Wright v. State, 476 So.2d 325, 327 (Fla. 2d DCA 1985); Grimmett v. State, **357** So.2d 461 **(Fla.** 2d **DCA** 1978).

Second, the record is abundantly clear that the trial court placed on the record the fact that the last prior conviction was rendered by Judge Grossman July 28, 1989 (R. 169). The offense for which Appellant was been sentenced herein was committed MAY 27, 1990 (R. 173), less than one year after the July 28, 1989, prior conviction, and clearly within the five years statutory requirement.

Third, although the court did make findings that an enhanced sentence was necessary for the protection of the public (R. 170), these findings were not necessary in this particular case. Appellant committed the offense on May 27, 1990; thus, the 1989 version of 6775.084 was applicable to Appellant's sentencing. In amending Section 775.084(3), Fla. Stat. (1989) the legislature eliminated the sentence, "the court shall determine if it is necessary for the protection of the public to sentence the defendant, to an extended term" if the defendant is found to be a habitual offender, which appeared in §775.084(3), Fla. Stats. (1987). Therefore, the findings were not necessary to have been made by the trial court, *See*, Arnold v. State, 566 So.2d 37 (Fla. 2d DCA 1990).

Lastly, it is well settled that after the trial court orally makes specific findings of fact and conclusions of law that Appellant qualifies to be sentenced as an habitual felony offender, the court is not required to enter a separate written order setting forth these findings and conclusions prior to habitualizing defendant's sentence. *See*, Eutsey; Pabon v. State, 554 So.2d 663 (Fla. 4th DCA 1990).

Appellant's sentence as an habitual felony offender must be affirmed.

POINT III

THE TRIAL COURT DID NOT FUNDAMENTALLY VIOLATE SINGLE SUBJECT PRECEPTS BY DECLARING APPELLANT AN HABITUAL OFFENDER AND SENTENCING HIM ACCORDINGLY.

Appellant essentially alleges that the trial court fundamentally erred by declaring him an habitual offender and sentencing him under 5775.084, Fla. Stats. (1989), because the statute is unconstitutional. Appellant argues that Chapter 89-280 of Florida Laws, which enacted the amended statute violates the "single subject rule" found in Article III, Section 6 of the Florida Constitution. The State once more disagrees.

Preliminarily, the State submits that Appellant lacks the standing to pursue this claim since he did not raise the issue below. Moreover, the portions of the statute under which he was habitualized and sentenced, §§775.084(a)(a)(1-2), (4)(a)(2), were not affected by the portions of the statute which were amended by section 1 of Chapter 89-280. Cf., Webster v. North Orange Memorial Hosp. Tax Dist., 187 So.2d 37, 42 (Fla. 1966).

Turning alternatively to the unpreserved merits, it is clear that the 12 sections of Chapter 89-280 comprise one "comprehensive law in which all of its parts are directed towards meeting the crisis of increased crime," rather than a law involving "two separate ... subjects ... so tenuous[ly] ... relat[ed] ... that ... the single-subject rule of the constitution ha[s] been violated." See, Burch v. State, 558 So.2d 1, 3 (Fla. 1990). In Burch, the Supreme Court upheld the constitutionality of the 76-section Chapter 87-243, Laws of

Florida, despite the fact that this la contained many quasi-civil facets which were designed to meet the crime crisis. Therefore, the fact that some sections of Chapter 89-280 deal directly with solving the crime crisis by strengthening criminal sentencing enhancement statutes, while other sections of this chapter deal indirectly with solving the crime crisis by regulating the often problematic and crime-related practice of repossessing vehicles, does not render the entire chapter void. See, Burch.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florid respectfully submits that the judgment and sentence imposed below should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by Courier to: NANCY PEREZ, Assistant Public Defender, Counsel for Appellant, at The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 26th day of April, 1991.

Of Counsel

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been forwarded by courier to: Ms. Debra Moses Stephens, Assistant Public Defender, 421 3rd Street, West Palm Beach, FL 33401, this 28th day of September, 1992.

John Fountain
Of Counsel

JF/mlt