047 OA.1-4-93

IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS CONLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,278

INITIAL BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This case is before the Court on conflict jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

Mr. Conley, the petitioner, was the defendant in the trial court and the appellant in the district court. Herein, he will be identified as petitioner. Respondent will be identified as the state. The victim will be identified in this brief, as she was in the district court opinion, as M.M. In this brief, references to pleadings, orders, etc., appear as (R[page number]), while citations to trial and hearing transcripts appear as (T[page number]).

STATEMENT OF THE CASE

The state charged petitioner, WILLIAM THOMAS CONLEY, with armed burglary, armed robbery and three counts of armed sexual battery. (R28) Petitioner was served notice of the state's intent to seek sentencing as a habitual offender and habitual violent offender. (R6, 8) Trial commenced before Judge Michael R. Weatherby. (R1)

Defense counsel objected during the testimony of Isaac Brown, a police officer, to the contents of a dispatch which led to his involvement in this case. (T93-94) The objection was overruled. (T94) The defense objected again to testimony by Brown in which he relayed hearsay statements of the alleged victim, M.M., made shortly after the alleged crimes and then later after petitioner's apprehension. (T94) Following a proffer and argument from both sides, the court ruled the statements admissible under a "fresh complaint" hearsay exception and overruled the objection. (T95-107) A motion for mistrial was denied. (T107)

The state proffered testimony by police officer W.R. Baer that petitioner gave a false name during an interrogation after his arrest, then admitted the fabrication and gave his real name. (T160-164) Defense counsel sought to exclude this testimony, asserting it was irrelevant to the charges and unfairly prejudicial. (T165) The court overruled the objection. (T170-172) During the testimony of Dr. Darryl Turner, defense counsel objected to hearsay statements made by the alleged victim to the

physician as part of a rape exam. (T205) The objection was overruled. (T206)

The prosecutor attempted to cross-examine Russell Riggs, a defense witness, about a purported confrontation between Riggs and the alleged victim outside the courtroom, during which (according to the prosecutor) Riggs insulted and threatened M . (T246) A defense objection was overruled, and Riggs denied making a threat. (T246-248) During cross-examination of petitioner, the prosecutor asked whether defense witnesses were presented to show the alleged victim was a "slut." (T269) The court sustained a defense objection to the remark. (T269) During the prosecutor's closing arguments, defense counsel objected to remarks which mischaracterized evidence, attacked defense counsel, and conveyed the prosecutor's personal opinion of petitioner. (T309, 326, 331) The court gave curative instructions in response to several of the objections and overruled another. (T309, 327, 331)

The jury found petitioner guilty of all offenses as charged. (T374, R31-35) Petitioner was adjudicated guilty of the offenses. (T377, R46-47) After a state witness matched petitioner's fingerprints with those on a 1985 judgment for robbery, the trial court found petitioner to be a habitual violent felony offender. (T383-390) The court referred at the hearing to a written sentencing order already prepared. (T390) Petitioner was sentenced to life imprisonment with 15-year mandatory minimum terms on all counts. (T392, R48-53) Counts I

and V were consecutive to Counts II, III and IV, which were concurrent to one another.

On direct appeal, the First District Court of Appeal vacated the sentences on Counts II-IV, pursuant to Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991), approved in part, 594 So.2d 267 (Fla. 1992). The district court rejected the remainder of petitioner's arguments asserting errors in trial and imposition of sentence. Conley v. State, 592 So.2d 723 (Fla. 1st DCA 1992).

STATEMENT OF THE FACTS

M.M. testified that she was introduced to petitioner in July or August of 1989 by a female friend who invited M.M. to accompany her, another man and petitioner on a trip from Jacksonville to Daytona Beach. (T55) M.M. said that during the trip, petitioner kissed her several times but that they went no further sexually. (T55) After a night at a hotel, the group returned to Jacksonville the next day. (T55) M.M. testified that she saw petitioner several times in passing after that, but spent no time with him. (T56)

On November 13, 1989, M.M. was at 8224 Eaton in Jacksonville, taking care of "Grumpy," the elderly mother of a neighbor, Al Douglas. (T53) M.M.'s two-year-old son, Zachery, was with her. (T51) She said that at 2:00 p.m. that day, a man she identified as petitioner knocked the door down and entered the house carrying a rifle. (T56) He pointed the gun at M.M. and asked if anyone else was in the house. (T57) At his direction, M.M. got Grumpy out of bed and put her in a wheelchair in the living room. (T58) He then made M.M. go into the bedroom and take her clothes off. (T58) She testified that he forced her to have anal, vaginal and oral sex with him while he kept the gun nearby. (T59-60) Anal sex lasted for 15 to 20 minutes before the man had M.M. place a lubricant on his penis, then resumed. (T60-61) M.M. stated that after anal and vaginal sex, she noticed blood on the man's penis. (T86) At one point, M.M.'s son cried from the living room, and the man allowed her to give him a bottle. (T63-63) While M.M. got a piece of ice at the man's

direction, he hit Zachery because the child began to cry again. (T63) More sex in the bedroom ensued. (T65-66) The man fired the gun into the ceiling "to show me he meant business," M.M. said. (T64)

Eventually, the man had M.M. put her clothes back on, and took three rings from her fingers and the checkbook from her purse. (T70) He had her accompany him to a nearby trailer, where she was directed to knock on the door and ask for Steve. (T71) M.M. was allowed to bring Zachery with her. (T71) A child answered the door and ran outside. (T72) The man ordered M.M. into the trailer, then started looking through drawers. (T72) He told M.M. to leave, but as she went out the door asked her what she was doing. (T72) She ran down the street, pursued by the man until she turned into a yard with people in it. (T73)

Police arrived in response to a call of an armed man pursuing a woman down the street, and heard M.M.'s version of events. (T73, 108) Officers apprehended petitioner under a bed in a house nearby with a gun at his side. (T111) The owner of the house, where petitioner had been staying, testified that he ran inside just before police arrived and said he was in trouble. (T153) An evidence technician took a checkbook from the bedroom where he was found. (T137) M.M. identified the gun as the one she said petitioner had that day, and the checkbook as hers. (T57, 70) She also identified petitioner, sitting alone in the back of a police car, as her assailant. (T76, 116-117) After his arrest, police found money and three rings in petitioner's possession. (T117) During the trial, M.M. identified the rings

as hers. (T70-71, 117-118) Petitioner gave police a false name, then stated his correct name. (T175-177) He denied committing any of the crimes against M.M., and asserted that he was hunting with a friend until 6:00 p.m. that day. (T178)

A physician examined M.M. within hours of the alleged rape. (T199) He found a bruise on her neck but no evidence of trauma to the rectum or vagina. (T209-211) The exam revealed a small amount of yellowish fluid in the anus, but there was no evidence of sperm in either orifice. (T209) Police failed to find evidence of a bullet having been fired at the ceiling in the room where she said the rapes occurred. (R128)

Several defense witnesses testified that they had seen petitioner and M.M. together as a couple as recently as two weeks before the alleged crimes. (T240-241, 244-245, 250) Manson McClain testified that on November 13, he saw petitioner without a gun around noon. (T250) Petitioner testified at trial that he and M.M. had a relationship which included sexual intercourse, ending in late September. (T256, 266) He stated that on November 13, he returned from hunting with friend Wayne Westberry around 2:00 p.m. (T257) He then went to Al Douglas' house, where he once lived, to visit Al and check on his mother. (T258) M.M. was there. (T259) She invited petitioner in, but became angry when he started kidding her about seeing two black men (the substance of their conversation was held inadmissible and stricken). (T259) M.M. cursed petitioner, who slapped her face and left. (T264-265) He denied raping her. (T265) Petitioner testified that he hid from the police because he was wanted on violation of probation.

(T265) He said the gun was already under the bed when he went to hide there. (T273)

SUMMARY OF THE ARGUMENT

I. The trial court admitted testimony from a police officer in which he said he answered a dispatch about a man with a gun chasing a woman down the street. The ruling was in error. The district court held that the officer's statement was relevant to establish why he went to investigate. In light of more recent case law from this Court and others, the district court's reliance on a 1984 district court decision for this proposition was misplaced. The dispatch contained inessential, prejudicial information which the jury should not have heard.

II. The trial court admitted hearsay statements by the victim to a physician detailing her claim of sexual battery. A defense objection to the testimony was overruled after the state argued it was admissible under section 90.803(4). The ruling was in error, as was its approval by the district court. First, the examination was conducted solely for law enforcement purposes, not for purposes of diagnosis or treatment. Second, as noted in the dissenting opinion by Judge Ervin below, M.M.'s statement to the physician included damaging detail wholly irrelevant to diagnosing or treating her condition.

III. The trial court erred in admitting testimony that petitioner used a false name after his arrest. The false name carried no relevance to the crime charged. Petitioner had already been informed he was identified by sight as the perpetrator, so this was no attempt to avoid arrest or prosecution by asserting a false identity. The potential

prejudice to jury impartiality from irrelevant testimony suggesting only that petitioner was a man with something to conceal was great. Reversible error resulted which deprived petitioner his right to trial by an impartial jury.

IV. The prosecutor made several clearly improper remarks in closing argument. The first group of statements conveyed hostility toward petitioner for exercising his right to a trial and extending the victim's ordeal, a swipe at defense counsel or petitioner for impeaching the victim's credibility and a blatant appeal to instincts of sympathy. The court compounded the prejudice in overruling an objection to these comments. The second improper statement conveyed the prosecutor's personal beliefs as well as his distaste for petitioner. Both sets of comments went far astray of fair comment, and together they sabotaged jury impartiality.

V. Cumulative trial errors denied petitioner his constitutional rights to due process of law and trial by an impartial jury.

VI. Petitioner's sentences as a habitual violent offender facially violate constitutional Double Jeopardy clauses. In every case in which it is used, application of section 775.084(1)(b), Florida Statutes, focuses on the nature of a prior felony, to the exclusion of any criteria for the offense leading to its use, so as to constitute a second punishment for the prior felony. Thus, on its face, the provision places offenders twice in jeopardy for the same crime(s), violating the state and federal constitutions. Where, as here, the prior offenses on

which the sentences depend occurred prior to the amendment creating the enhancement, the statute also violates constitutional Ex Post Facto clauses.

VII. The court erred in preparing the order declaring petitioner a habitual violent felony offender in advance of the sentencing hearing. As in the case of guideline departure orders not contemporaneous with imposition of sentence, the nature of the error requires that petitioner be resentenced without resort to the habitual offender statute.

VIII. The trial court erred in imposing consecutive overall and mandatory minimum sentences on petitioner as a habitual offender for crimes committed in a single episode, consecutive to one another. In a recent decision, this Court held that consecutive mandatory minimum terms may not be imposed under section 775.084(4)(b), Florida Statutes, for offenses committed in a single criminal episode. The Court left unanswered the question whether overall habitual violent felony offender sentences may be imposed consecutively. There is no reason to reach a different conclusion as to the overall habitual offender sanction. A mandatory minimum term is no less a sentence than an overall term of years. Either the statute authorizes both consecutive mandatory minimum and overall habitual offender sentences for offenses committed in the same criminal episode, or it authorizes neither.

The district court erred in concluding that because the burglary and robbery were separate acts hours apart, consecutive

sentences were authorized. The crimes clearly were part of the same criminal episode.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING, OVER OBJECTIONS, HEARSAY TESTIMONY OF A POLICE DISPATCH.

Police officer Isaac Brown testified to a dispatch he received before he met the alleged victim, M.M. (T94) Brown said he "received a call in reference to a man chasing a female down the street. The man supposedly had some type of gun or rifle." (T94) The trial court overruled a hearsay objection by defense counsel to the testimony. (T94) The district court of appeal approved the trial judge's ruling. 592 So.2d at 727.

Both the circuit and district courts are in error. First, the dispatch was base hearsay, inadmissible under any recognized exception. Section 90.801(1)(c), Florida Statutes, defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Under section 90.802, hearsay evidence is inadmissible. Here, there was no testimony of the source of the information relayed via the dispatch. Brown's recounting of this dispatch is inadmissible double hearsay. It does not fall under the exception, 90.803(3), for then existing mental, emotional, or physical condition because the statement was not offered to prove the declarant's (caller's) state of mind or "prove or explain acts of subsequent conduct of the declarant." See s.90.803(3)(a)(1),(2), Fla. Stat.

The district court held that the officer's statement was relevant to establish why he went to investigate, citing Johnson v. State, 456 So.2d 529, 530 (Fla. 4th DCA 1984). In recent

years, the Fourth District Court of Appeal has backed away from its holding in Johnson. In Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989), the court reviewed Johnson and another opinion that followed it, and stated:

> [W]e emphasize that it is not a sufficient justification for the introduction of incriminating hearsay that the statement explains or justifies an officer's presence at a particular location or some action taken as a result of the hearsay statement. There is a fine line that must be drawn between a statement merely justifying or explaining such presence or activity and one that includes incriminating (and usually unnecessary) details.

Id. at 324. Accord, Cooper v. State, 573 So.2d 74 (Fla. 4th DCA 1990); Calloway v. State, 588 So.2d 652 (Fla. 4th DCA 1991). In State v. Baird, 572 So.2d 904 (Fla. 1991), this Court expressly agreed with Harris that when the sole purpose for admitting hearsay information received from an informant is to show a logical sequence of events ending in arrest, the need for the evidence is slight and the likelihood of misuse great. Citing Baird, the Third DCA has held that a police officer may testify to what he or she did pursuant to information received from others, but may not relay the hearsay information itself. Mense v. State, 570 So.2d 1390 (Fla. 3d DCA 1990). The same court has held that there is no "BOLO exception" to the hearsay rule. Lane v. State, 430 So.2d 989, 990 n.1. (Fla. 3d DCA 1983). Even the First DCA, its decision in this case notwithstanding, has cited Harris with approval in holding a declarant's out-of-court incriminating statement inessential to establish a logical sequence of events. Asberry v. State, 568 So.2d 86 (Fla. 1st DCA

1990). In light of these holdings, the district court's reliance on Johnson is misplaced.

Here, the hearsay contained in the dispatch, from a source unknown, included the incriminating detail that the man running down the street was carrying a gun. The question whether a gun was used during these offenses was a disputed issue at trial. The dispatch thus included incriminating detail unnecessary to show why the officer went to the area. As noted in Harris and Baird, the better practice is to allow the officer to state that he acted on a tip or information received, without relaying the details of the accusatory information.

Misuse of the information, which the Harris and Baird courts considered likely, actually occurred here. As observed in the district court opinion, the prosecutor referred to the officer's testimony to corroborate M.M.'s testimony in closing argument. (T306) In this context, the court noted, the evidence was inadmissible hearsay. 592 So.2d at 727. This improper use of the testimony magnified the harm in its admission, raising the error to reversible proportions.

II. HEARSAY STATEMENTS BY THE ALLEGED VICTIM TO A DOCTOR WHO EXAMINED HER AS PART OF THE SEXUAL ASSAULT INVESTIGATION WERE INADMISSIBLE.

Section 90.803(4), Florida Statutes (1989), permits:

> Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, ... which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

The trial court admitted hearsay statements by the victim to a physician detailing her claim of sexual battery. (T206) A defense objection was overruled after the state argued the testimony was admissible under section 90.803(4).

For reasons explained below, this ruling was in error, as was its approval by the district court. First, the statements were made during an examination conducted solely for law enforcement purposes, not for purposes of diagnosis or treatment. Second, as noted in the dissenting opinion by Judge Ervin below, M.M.'s statement to the physician included damaging detail wholly irrelevant to diagnosing or treating her condition.

A hearsay statement is admissible under the medical treatment or diagnosis exception only after a showing that (a) it was made for the purpose of diagnosis or treatment; and (b) that the declarant knew the statement was made for this purpose. Begley v. State, 483 So.2d 70 (Fla. 4th DCA 1989). Here, the state made no showing that the doctor's examination was made for the purpose of diagnosis or treatment. The witness testified from a form he had filled out while conducting the exam. He testified that he

routinely uses the form when performing an exam based on an allegation of sexual assault. (T214) The doctor offered neither testimony of a medical diagnosis or treatment, nor findings consistent with either a legal conclusion of sexual battery or a medical conclusion of vaginal or anal trauma. Evidently, he functioned solely as an investigator, much like an evidence technician who gathers information for later use by law enforcement officers and lawyers.

The district court relied on its own precedent holding that what it reasonably pertinent to diagnosis or treatment must be determined from the perspective of the healthcare provider, not that of an appellate court. 592 So.2d at 723, citing to Danzy v. State, 553 So.2d 380 (Fla. 1st DCA 1980). See also, Flanagan v. State, 586 So.2d 1085 (Fla. 1st DCA 1991), rev. pending, No. 78,923. When there is no evidence that an exam is conducted for purposes of diagnosis or treatment, however, the deference given to the physician because of his expertise in medical matters is unwarranted. In Flanagan, the court referred to a number of statutes showing that the legislature intended examinations by Child Protection Team investigators to serve to produce a diagnosis and treatment plan for child sex abuse victims. Here, there is no statutory expression of legislative intent and no evidence that the physician acted as anything but a criminal investigator.

Without a showing that the statements of the victim were made for the purpose of medical treatment or diagnosis, the statements of the alleged victim to the doctor were inadmissible,

as in Lazarowicz v. State, 561 So.2d 392, 393 (Fla. 3d DCA 1990). This error cannot fairly be characterized as harmless. This case pitted the credibility of the alleged victim against that of petitioner on the three counts alleging rape. In these circumstances, the erroneous admission of the statement to the doctor compromised petitioner's right to a fair trial on the sexual battery charges. Cf. Bradley v. State, 546 So.2d 445, 447 (Fla. 1st DCA 1989).

Apart from the threshold consideration whether section 90.803(4) applied to the statements to the physician, one portion of the victim's statements clearly falls outside the scope of admissibility. From Judge Ervin's dissent:

> Dr. Turner testified that M.M. had told him she was raped, and that "[t]his was done, as she said, at gunpoint." I do not consider that this statement falls within the hearsay exception for statements dealing with medical diagnosis or treatment. Sec. 90.802(4), Fla. Stat. (1989). That her assailant, whom she had already testified was appellant, may have held her at gunpoint as he assaulted her, had no relevant value regarding whatever medical treatment she may have required. [citation omitted] The court should therefore have directed the jury to disregard the hearsay statement quoted above. See also Flanagan v. State, 586 So.2d 1085, 1102 (Fla. 1st DCA 1991) (Ervin, J., concurring and dissenting) (statements of fault not related to diagnosis and treatment are inadmissible under section 90.803(4)).

592 So.2d at 733. For the reasons expressed above and in his written opinion in Flanagan, Judge Ervin has the better perspective on the issue. The reference to the gun in M.M.'s statement was particularly harmful, as was the reference to the gun in the dispatch (see Point I, infra), because the evidence at trial was

in conflict over whether M.M.'s assailant had a gun during the offenses. She testified that petitioner fired a gun into the ceiling in the room where the sexual batteries occurred, yet police found neither a bullet nor a bullet hole there. (T64, 128)

For these reasons, admission of M.M.'s statements to the physician constituted harmful, reversible error.

III. THE TRIAL COURT ERRED IN PERMITTING TESTIMONY THAT PETITIONER GAVE A FALSE NAME AFTER HIS ARREST.

After arresting petitioner, police asked him his name. He told them it was Ronald Jones. (T175) The officer determined this was a false name and said so to petitioner, who then gave his correct name. (T177) The defense objected to this testimony, asserting it was irrelevant to the charges and unduly prejudicial. (T165) The objection was overruled. (T172) The district court approved the ruling, citing to Weston v. State, 452 So.2d 95 (Fla. 1st DCA), rev. denied, 456 So.2d 1182 (Fla. 1984).

Both courts erred. Here, as in Redford v. State, 477 So.2d 64 (Fla. 3rd DCA 1985), the use of a false name carried no relevance to the crime charged. Petitioner had already been informed he was identified by sight as the perpetrator, so his action could not be construed as an attempt to avoid arrest or prosecution by asserting a false identity. The potential prejudice to jury impartiality from testimony irrelevant to its fact-finding task, but suggesting appellant was a man with something to conceal, was great. Reversible error resulted which deprived appellant his right to trial by an impartial jury under Article I, Section 16 of the Florida Constitution and the Sixth Amendment to the U.S. Constitution.

The district court mistakenly relied on Weston v. State in approving the trial court's ruling. In Weston, the defendant gave a false name upon being apprehended across the street from the scene of a theft 10 minutes after the crime. The appellate

court ruled the testimony admissible as evidence of consciousness of guilt. 452 So.2d at 95. Petitioner, in contrast, was already under arrest when he gave the false name. Judge Ervin, who found error on this point, noted the distinction in his dissent below. 592 So.2d at 733. Moreover, the facts provided by the court in Weston suggest identity was in issue. Finlay v. State, 424 So.2d 967 (Fla. 3rd DCA 1983), relied upon by the Weston court, holds that statements calculated to avoid prosecution show consciousness of guilt. There was no showing here that appellant's use of a false name was done with an intent to avoid prosecution for the offenses charged in this case. As observed by Judge Ervin, appellant testified that he was wanted at the time of his arrest for violation of probation. 592 So.2d at 733. This supplied his motivation for giving a false name.

IV. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO TRIAL BY AN IMPARTIAL JURY.

In his closing argument, the prosecutor combined an appeal to victim sympathy with an attack on defense counsel:

> You know what you have seen and what you have heard is exactly why they tell us a lot of people don't report rape. You know why? Because they are going to have to tell their entire details of a very disgusting, terrible, degrading, demoralizing event to two, three, five, ten people, tell it to a jury, tell it to police officers, tell it to defense attorneys, and then sit idly by as he parades witness after witness to say what a terrible person she is.

(T326) Among the messages conveyed by this passage are hostility toward petitioner for exercising his right to a trial and extending the victim's ordeal, a swipe at defense counsel or petitioner for impeaching the victim's credibility and a blatant appeal to instincts of sympathy. See Garron v. State, 528 So.2d 353, 358 (Fla. 1988) (improper to ask jury to imagine the victim's pain). See Jenkins v. State, 563 So.2d 791 (Fla. 1st DCA 1990) (prosecutor's repeated accusations that defense counsel further victimized victim and sought acquittal at all costs rather than searching for truth were clearly improper). Although the prosecutor claimed in response to a defense objection that the remarks were directed at petitioner and not defense counsel, this distinction, even if true, would not sanitize the remarks. The prejudice is the same. Moreover, the tone of the remarks created a strong likelihood that they would be perceived as directed at defense counsel. The trial court magnified the damage of these remarks in overruling the defense objection. (T327) Contrary to the

court's assessment, evidence impeaching the victim's credibility did not open the door to the prosecutor's remarks impugning the defense for accusing the victim of being "a terrible person."

Finally, the prosecutor injected his own feelings directly into the proceedings in responding to defense counsel's argument that the jury need not like petitioner to acquit him:

> Don't like my client. I don't like him either. I don't like people who rape, rob, burglarize.

A defense objection drew an instruction from the judge to "limit it to the facts." (T331) This remark went beyond the oft-condemned statement of belief in the defendant's guilt and into personal feelings about the defendant. See Walker v. State, 473 So.2d 694 (Fla. 1st DCA 1985); Blackburn v. State, 447 So.2d 424 (Fla. 5th DCA 1984). As noted in Singletary v. State, 483 So.2d 8, 10 (Fla. 2nd DCA 1985), the prosecutor's role has the potential for particular significance being attached by the jury to expressions of personal belief. When a prosecutor tells a jury he dislikes a defendant, he demonstrates deplorable ignorance of his role in the criminal justice system. Here, the prosecutor abandoned his duty to be "fair, honorable and just" in his zeal to get a conviction through any means available. See Boatwright v. State, 452 So.2d 666, 667 (Fla. 4th DCA 1984).

The remarks explored above were sufficient alone to sabotage jury impartiality, a protection guaranteed to a criminal defendant under the state and federal constitutions. For that reason the remarks constituted reversible error. Though it found error in both remarks, the majority concluded both errors were

harmless. 592 So.2d at 723. In dissent, Judge Ervin found these errors, in combination with two others raised anew herein, to be harmful and hence reversible. 592 So.2d at 733. Either alone or cumulatively, the prosecutorial misconduct compels a new trial.

V. CUMULATIVE TRIAL ERRORS RESULTED IN THE DENIAL OF DUE PROCESS OF LAW.

In his dissent below, Judge Ervin found cumulative, reversible error on the issues raised anew herein in Points II-IV. Petitioner maintains that the trial court also erred in admitting the contents of the police dispatch, as argued in Point I. Together, these errors combined to deprive petitioner of his right to due process of law and trial by an impartial jury, guaranteed in Article I, Sections 9 and 16 of the Florida Constitution and the Sixth and Fourteenth Amendments to the U.S. Constitution. See Douglas v. State, 135 Fla. 199, 184 So. 756 (1938); Carter v. State, 332 So.2d 120 (Fla. 2d DCA 1976); Collins v. State, 423 So.2d 516 (Fla. 5th DCA 1982); Gamble v. State, 492 So.2d 1132, 1134 (Fla. 5th DCA 1986). Consequently, a new trial is required.

VI. THE HABITUAL VIOLENT FELON PROVISIONS OF SECTION 775.084, FLORIDA STATUTES (1989), VIOLATE THE DOUBLE JEOPARDY AND EX POST FACTO PROVISIONS OF ARTICLE I, SECTION 10 AND THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 10 OF THE FLORIDA CONSTITUTION.

In the district court, petitioner argued that application of the habitual offender statute, resulting in a life sentence as a habitual violent felony offender, violated state and federal Double Jeopardy and Ex Post Facto clauses. The court rejected both arguments. 592 So.2d at 723. Petitioner renews these arguments before this Court. These issues are already before the Court in Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), rev. pending, No. 78,613; Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), rev. pending, No. 78,715; and Raulerson v. State, 589 So.2d 369 (Fla. 1st DCA 1991); rev. pending, No. 79,051. Petitioner's instant offenses are violent. Therefore, the arguments peculiar to Raulerson, that the habitual violent felony offender provisions facially violate the constitutional Double Jeopardy clauses and violate the constitutional Ex Post Facto clauses as applied, cover this case as well. Petitioner adopts the Raulerson argument, which is set out in abbreviated form below.

A statute is void on its face if it cannot be applied constitutionally in any conceivable situation. City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984); Voce v. State, 457 So.2d 541 (Fla. 4th DCA 1984), rev. denied, 464 So.2d 556 (Fla. 1985). In every case in which it is used, application of section 775.084(1)(b), Florida Statutes (1989), focuses on the

nature of a prior felony to the exclusion of any criteria for the offense leading to its use so as to constitute a second punishment for the prior felony. Thus, on its face, the provision violates the Double Jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

To punish a defendant as a habitual violent felony offender under section 775.084(1)(b) and (4)(b), the state need only show that he or she has one prior offense within the past five years for a violent felony enumerated within the statute. The current offense need meet no criteria, other than that it is a felony committed within five years of commission, conviction or conclusion of punishment for the prior "violent" offense. Analysis of the construction of this statute and its potential uses leads to an ineluctable conclusion: that the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony. The almost exclusive focus on this prior offense renders use of the statute a second punishment for that offense, violating state and federal double jeopardy prohibitions. When that prior offense also occurred before enactment of the amended habitual offender statute -- as is the case here -- the statute's use also violates prohibitions against ex post facto laws.

In all its potential applications, section 775.084(1)(b) violates constitutional Double Jeopardy clauses. An offender with a qualifying prior enumerated felony comes within its purview regardless of whether he is being sentenced for a felony

bad-check offense or an armed robbery. The statute dictates ignorance of the type of crime it purports to punish in the initial determination whether an offender qualifies for enhancement as a habitual violent felon. Therefore, regardless of the character of the prior offense, application of the provisions amounts to a second punishment for the prior qualifying offense in every case. For these reasons, on its face, section 775.084(1)(b) violates the Double Jeopardy clauses of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution. Conley must be resentenced without resort to this unconstitutional provision.

VII. THE TRIAL COURT ERRED IN PREPARING AN ORDER IMPOSING HABITUAL OFFENDER SENTENCES PRIOR TO THE SENTENCING HEARING.

At sentencing, the trial judge announced that he had already prepared a sentencing order. (T390). The order, which includes extensive findings on petitioner's qualifications as a habitual offender and habitual violent offender, was obviously completed before the sentencing hearing began, and before the court heard any argument. (R54-59)

The court erred in preparing the habitual offender order before the sentencing hearing. As in the case of guideline departure orders which are not contemporaneous with imposition of sentence, the nature of the error requires that petitioner be resentenced without resort to the habitual offender statute.

Florida Rule of Criminal Procedure 3.720 mandates that at the sentencing hearing, the trial judge shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence; . . . ." A trial judge who enters the sentencing hearing with a prepared order declaring the defendant a habitual offender has already made a decision which the parties may not be able to overcome. Such a judge cannot fulfill his or her role as an objective, open-minded magistrate during the hearing.

This situation has a parallel in guideline departure orders which are not prepared contemporaneously with imposition of sentence. Florida Rule of Criminal Procedure 3.701(d)(11) requires that sentences outside the permitted guideline range be accompanied by a written statement explaining the reasons for departure. In Ree v. State, 565 So.2d 1329 (Fla. 1990), this

Court held that written reasons must be issued at the time of sentencing. Addressing the concern of a district court judge that this would force trial judges to prepare departure orders before sentencing and thereby subject the order to an attack that it violated due process, the Court said:

> We agree with Judge Sharp that the sentencing guidelines and accompanying rules do not permit a trial court to decide a sentence before giving counsel an opportunity to make argument. Fundamental principles of justice require that decisions restricting a person's liberty be made only after a neutral magistrate gives due consideration to any argument and evidence that are proper. However, we are equally persuaded that the statute and rules that create the sentencing guidelines require written reasons for departure that are "contemporaneous." To be contemporaneous, reasons must be issued at the time of sentencing.
>
> We do not believe the requirements of the guidelines and the concerns raised by Judge Sharp are irreconcilable. When the state has urged a departure sentence, the trial court has three options. First, if the trial judge finds that departure is not warranted, he or she then may immediately impose sentence within the guidelines' recommendation, or may delay sentencing if necessary. Second, after hearing argument and receiving any proper evidence or statements, the trial court can impose a departure sentence by writing out its findings at the time sentence is imposed, while still on the bench. Third, if further reflection is required to determine the propriety or extent of departure, the trial court may separate the sentencing hearing from the actual imposition of sentence. In this event, actual sentencing need not occur until a date after the sentencing hearing.
>
> We realize this procedure will involve some inconvenience for judges. However, a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

Id. at 1332. Ree expressly warns against preparation of a departure order before the sentencing hearing, as occurred here. In this case, the district court rejected petitioner's reliance on Ree, not because Ree does not apply to habitual offender sentences, but because this Court had stated in Ree that its decision was to be applied only prospectively. 592 So.2d at 732. This Court recently receded from that part of Ree in Smith v. State, 17 FLW S213 (Fla. April 2, 1992). There the Court held that, like departures with no written reasons whatsoever, departures without contemporaneous written reasons must be vacated and the case remanded for resentencing within the guidelines. 17 FLW at S214.

Whether the sentence is a guideline departure or a habitual offender enhancement, Rule 3.720 and the state and federal Due Process clauses prohibit a trial judge from entering a sentencing hearing having already decided on the type or length of sentence to impose. Therefore, in accord with Ree and Smith, petitioner's sentences as a habitual violent felony offender must be vacated, and the case remanded for resentencing without resort to section 775.084, Florida Statutes (1989).

VIII. THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES UPON APPELLANT AS A HABITUAL VIOLENT FELON FOR OFFENSES OCCURRING DURING A SINGLE EPISODE AND PROSECUTED IN A SINGLE CASE.

The trial court sentenced petitioner as a habitual violent felony offender to three consecutive life sentences, including three consecutive 15-year mandatory minimum terms. (T392-393) The district court vacated the concurrent life sentences on the sexual batteries, leaving petitioner with two consecutive life sentences including two consecutive mandatory minimum terms. 592 So.2d at 732. The trial court erred in making both the overall sanctions and the mandatory minimum terms consecutive to one another. Moreover, the district court erred in concluding that because the burglary and robbery were separate acts hours apart, consecutive sentences were authorized.

In Daniels v. State, 595 So.2d 952 (Fla. 1992), this Court held that consecutive mandatory minimum terms may not be imposed under section 775.084(4)(b), Florida Statutes, for offenses committed in a single criminal episode. The Court reworded the certified question posed by the district court to eliminate reference to the overall sanction, "[i]n an effort to highlight the disputed issue". 595 So.2d at 953. Thus, the Court left unanswered the question whether overall habitual violent felony offender sentences may be imposed consecutively under the same circumstances. Finding in Daniels an implicit rejection of the claim that consecutive overall sentences are not authorized, the First District Court of Appeal answered this question in the negative in Brooks v. State, 17 FLW D1019

(Fla. 1st DCA April 15, 1992).[1] For reasons explored below, only concurrent sentences are authorized.

Daniels rests on this Court's conclusion that the mandatory minimum portion of the habitual offender statute operates in the same manner as the mandatory penalty for use of a firearm in the commission of a felony. Id. at 954. There is no reason to reach a contrary conclusion as to the overall habitual offender sanction. A mandatory minimum term is no less a sentence than an overall term of years. Either the statute authorizes both consecutive mandatory minimum and overall habitual offender sentences for offenses committed in the same criminal episode, or it authorizes neither.

When a habitual offender commits several crimes in an episode which are then prosecuted in a single case, the prior record subjects the perpetrator to habitual offender enhancement as to each offense. This enhancing factor is closely analogous to possession of a firearm, which as an element common to each crime in a single episode, subjects an offender to a single mandatory minimum penalty under section 775.087(2). For purposes of this analysis, the focus is not whether a mandatory minimum penalty is involved, but whether the same enhancement factor attaches to each offense. For habitual offenders, the enhancement factor attaches to the overall penalty imposed, and for habitual violent offenders, to

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[1]This was a decision on rehearing. A second motion for rehearing was still pending when this brief was filed.

a mandatory minimum term as well. For crimes committed with a firearm, it attaches only the mandatory minimum penalty. The prohibition of consecutive firearm mandatory minimum penalties in Palmer v. State, 438 So.2d 1 (Fla. 1983), depended not on the nature of the penalty, i.e., that it is a mandatory minimum and not an overall sanction, but on the absence of express legislative authority for denial of parole for longer than three calendar years. Thus, the distinction between overall sentences and mandatory minimum penalties, drawn in Daniels and followed in the decision on rehearing here, is artificial and should be reconsidered. In determining whether a consecutive penalty is authorized by the existence of an enhancement factor, the nature of the penalty is irrelevant. Whether mandatory or permissible, whether gain time attaches or not, a sentence is a sentence.

Add to these considerations the fact that sections 775.084(4)(a) and (4)(b) are worded to authorize the prescribed penalties "[i]n the case of a felony of the" first, second or third degree. The use of the word case, not offense or crime, is significant. This suggests the Legislature intended that the enhanced penalty ceilings in the habitual offender statute apply to the overall case, not each crime within a case. In Brooks, the district court rejected this argument. The court did not, however, note the effect of section 775.021(1), Florida Statutes, the rule of lenity, on this statutory language. The confluence of these two statutes operates to require a construction which, consistent with

Daniels and Palmer, bars consecutive habitual offender sentences for offenses committed in the same criminal episode and prosecuted in the same case. Application of the rule of lenity is not barred by section 775.021(4)(b), for that provision does not come into play in construing the habitual offender statute. Moreover, to the extent that section 775.021(4)(a) states a legislative preference for separate sentences, it expresses no preference for consecutive sentences.

For these reasons, consecutive overall and mandatory minimum sentences may not be imposed under the habitual offender statute for crimes committed in a single episode and prosecuted in the same case. The district court was wrong in concluding that the "same episode" test did not apply to the burglary and robbery in this case. The criminal episode began with the burglary and continued with sexual batteries in the burglarized house.[2] The robbery was committed immediately after the sexual batteries. (T64-65) Certainly, it was within the same episode. The case on which the district court relied, Murray v. State, 491 So.2d 1120 (Fla. 1986), is distinguishable. There, the assailants took the car in Pompano

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[2]The fact that these sexual battery sentences were vacated and remanded for non-habitual offender sentencing does not sever the burglary before the sexual batteries from the robbery which occurred after them. As a peripheral observation, petitioner's sentences on the sexual batteries should not be consecutive to these sentences, either. Otherwise, he will have been punished more severely for committing crimes not subject to habitual offender enhancement, an absurdity which should not be permitted.

Beach and the necklace miles away in Deerfield Beach. Here, the burglary and robbery occurred in the same house, and by any view of the evidence were part of the same episode in which the assailant maintained control over the victim. Consequently, the consecutive overall and mandatory minimum terms imposed on appellant in Counts I and V must be vacated, and the case remanded for concurrent sentences on these counts.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court and remand with appropriate directions.

Respectfully submitted,

NANCY A. DANIELS
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Edward C. Hill, Jr., Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 5th day of August, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS CONLEY,	:	
Petitioner,	:	
v.	:	CASE NO. 79,278
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

APPENDIX TO INITIAL BRIEF OF PETITIONER ON THE MERITS

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insurance company are over and above and do not duplicate the benefits received from the crimes compensation fund. Since there was no duplication of benefits, Mr. Livingston did not receive "payment of the same expenses for which [he received] compensation from the Bureau," as described in his agreement with the Bureau. Mr. Livingston had no right of action against Aetna to recover for losses with respect to which the Bureau had paid benefits. Thus, the Bureau had neither a statutory nor a contractual subrogation right against the uninsured motorists benefits.

[4, 5] We note that this interpretation is consistent with the treatment of workers' compensation liens under the uninsured motorists statute. Such liens do not establish any claim against uninsured motorists benefits. *Volk v. Gallopo*, 585 So.2d 1163 (Fla. 4th DCA 1991). We also conclude that the statement within the crimes compensation act that crimes compensation benefits are "subsequent" to insurance benefits does not override the language of the uninsured motorists statute or create a subrogation right not contemplated by the uninsured motorists statute.

In this case, it is entirely possible that the Bureau would have paid $10,000 to Mr. Livingston even if he had already received this insurance settlement. His damages and his actual needs far exceed both payments. In other cases, however, such an insurance dispute and delayed payment of uninsured motorists benefits could result in a payment of scarce crimes compensation benefits that might be better paid to another victim of crime. We express no opinion as to whether this concern could be cured by a change in the Bureau's contract or whether it requires legislative review, but it is a matter that warrants some additional attention.

Finally, the parties present extensive arguments concerning the nature and extent of the Bureau's subrogation right when a victim receives only a partial payment of damages from another source. In light of our holding, we decline to review that issue at this time.

Affirmed.

SCHEB, A.C.J., and CAMPBELL, J., concur.

William Thomas CONLEY, Appellant,

v.

STATE of Florida, Appellee.

No. 90–1745.

District Court of Appeal of Florida, First District.

Jan. 2, 1992.

Defendant was convicted in the Circuit Court, Duval County, Michael Weatherby, J., of armed burglary, armed robbery, and armed sexual battery and was sentenced as habitual felony offender. Defendant appealed. The District Court of Appeal held that: (1) police officer's testimony that he received report that someone was being chased down the street by a person with a gun so that he went to investigate was not inadmissible hearsay; (2) testimony of emergency room physician as to description of rape given to him by victim was admissible; (3) habitual offender statute is constitutional; and (4) habitual offender statute prohibited sentencing for life felony but did not prohibit sentencing for first-degree felonies punishable by life.

Affirmed in part and reversed and remanded in part.

Ervin, J., filed a dissenting opinion.

1. Criminal Law ⇐419(3)

Police officer's testimony that he received report that someone was being chased down street by person with a gun, and so he went to investigate, was not

inadmissible hearsay in prosecution for armed burglary, armed robbery, and armed sexual battery; statement was not offered to prove truth of matter asserted but to establish why officer went to scene to investigate.

2. Criminal Law ⇐720(2), 1037.1(2)

Prosecutor's reference in closing argument to police officer's testimony that he received report that someone was being chased down street by person with gun was inadmissible hearsay as it was used to corroborate victim's version of events; however, because defense counsel failed to object, error was not preserved for appeal.

3. Rape ⇐48(1)

Police officer's testimony regarding what rape victim told him when he arrived at scene was not admissible under fresh complaint exception to hearsay rule which is recognized in rape cases to rebut inference of consent which may be drawn from victim's previous silence about sexual assault where statements did not follow period of silence which could have raised inference of consent.

4. Criminal Law ⇐366(3)

Police officer's testimony regarding what rape victim told him when he arrived at scene was admissible as excitable utterance; officer stated that victim was hysterical and crying at time she gave her statement. West's F.S.A. § 90.803(2).

5. Criminal Law ⇐367

Testimony of emergency room physician as to description of rape given to him by victim was admissible under hearsay exception for statements made for purposes of medical diagnosis or treatment; physician testified that it was necessary whenever he examined sexual assault victim to obtain history or description of event so that he could concentrate his efforts in terms of any examination. West's F.S.A. § 90.803(4).

6. Criminal Law ⇐367

Statements to physician that describe cause of injury are admissible under exception to hearsay rule for statements made for purposes of medical diagnosis or treatment if they are reasonably pertinent to diagnosis or treatment of injury. West's F.S.A. § 90.803(4).

7. Criminal Law ⇐1169.2(6)

Even if it was error to admit testimony of emergency room physician as to description of rape given to him by victim, error was harmless; testimony was cumulative to statements of police officer recounting victim's account of what transpired and did not appear to have added any additional insight into victim's testimony.

8. Criminal Law ⇐351(5)

When defendant used alias to avoid his arrest or prosecution, testimony regarding alias was admissible in prosecution for armed burglary, armed robbery, and armed sexual battery as evidence of consciousness of guilt.

9. Witnesses ⇐372(2)

Trial court properly permitted prosecutor to ask defense witness about confrontation outside courtroom between him and rape victim where witness' alleged remarks to victim were not introduced for purpose of showing that witness tried to prevent her from testifying but to show witness' bias.

10. Witnesses ⇐277(3)

Prosecutor's cross-examination of defendant as to whether defendant was trying to prove through his witnesses that he and victim were in a relationship was proper to set foundation for asking defendant why, if he and victim were on friendly basis and had ongoing sexual relationship, defendant would have needed to kick in door on date of alleged rape.

11. Criminal Law ⇐730(1)

Prosecutor's reference in closing argument to hostile remarks defense witness allegedly made to rape victim outside courtroom and alleged mischaracterization of evidence by asserting that witness had testified that he intentionally spoke loudly to his friend so that victim could hear him when, in fact, victim had testified he had not made disparaging remarks loudly was essentially insignificant and was not reversible error particularly where defendant

objected and court instructed jury that what lawyer said was not evidence.

12. Criminal Law ⇐1171.1(3)

Prosecutor's remark in closing argument commenting on defendant's alleged improper character assassination of rape victim through defense witnesses was improper but was harmless error; prosecutor contended he had right to comment on defendant's conduct because defendant had implied in opening statement that he would rely on defense of consent but when defendant took stand, he testified he did not have sex with victim on that day.

13. Criminal Law ⇐720½, 1171.1(3)

Prosecutor's remarks in closing argument that defense counsel had stated he did not like his client and that prosecutor did not either and that he did not like people who raped, robbed, or burglarized were improper remarks about guilt, innocence, or credibility of defendant; however, error was harmless.

14. Criminal Law ⇐1201.5

Habitual offender statute is not unconstitutional although it was contended it arbitrarily left up to prosecutor or judge to decide whether defendant would be sentenced under statute when another defendant charged with identical offenses might not be. West's F.S.A. § 775.084.

15. Constitutional Law ⇐203
Criminal Law ⇐1201.5

Habitual offender statute was not rendered ex post facto by providing enhanced punishment for subsequent offense because of defendant's prior violent offense which occurred prior to passage of statute. West's F.S.A. § 775.084.

16. Double Jeopardy ⇐30

Consideration of prior offense in determining whether defendant was habitual offender did not constitute second punishment for former offense and did not violate double jeopardy. U.S.C.A. Const.Amend. 5; West's F.S.A. § 775.084.

17. Criminal Law ⇐1202.2

Sentences for first-degree felonies punishable by life could be enhanced under habitual offender statute. West's F.S.A. § 775.084.

18. Criminal Law ⇐1202.2

Life felony imposed for armed sexual battery could not be enhanced under habitual offender statute. West's F.S.A. § 775.084.

19. Criminal Law ⇐1177

Trial court did not commit reversible error by preparing written sentencing order prior to sentencing hearing; Supreme Court decision in *Ree v. State* that trial court must prepare written order containing reasons for departure from Sentencing Guidelines at time of sentencing applied only to sentences imposed after *Ree* was decided and defendant was sentenced before *Ree* was decided.

20. Criminal Law ⇐1210(4)

Burglary and robbery constituted two separate acts warranting consecutive minimum-mandatory sentences; defendant committed armed burglary when he broke into home where victim was working and committed armed robbery several hours later after he perpetrated sexual batteries.

21. Criminal Law ⇐1244

Guidelines scoresheet reflecting 120 points for victim injury which trial court presumably derived by assessing 40 points for penetration or slight injury for each of three counts of sexual battery was erroneous; rather, victim injury had to be scored according to number of victims in criminal episode rather than number of counts. West's F.S.A. § 775.087(2); West's F.S.A. RCrP Rule 3.701, subd. d, par. 7.

Barbara M. Linthicum, Public Defender, and Glen P. Gifford, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Edward C. Hill, Jr., Asst. Atty. Gen., for appellee.

PER CURIAM.

Appellant, William Thomas Conley, appeals his conviction for armed burglary, armed robbery, and three counts of armed

sexual battery, and his sentence as a habitual felony offender. He contends the trial court erred (1) in admitting hearsay testimony of a police dispatch and of the alleged victim's statements to a police officer, (2) in admitting hearsay statements made by the alleged victim to a physician who examined her, (3) in permitting an officer to testify that appellant had given police a false name after his arrest, (4) in permitting cross-examination of a defense witness about a threat he purportedly made to the victim, and (5) in permitting prosecutorial misconduct during cross-examination of the defendant and during closing argument. Conley also claims the trial court committed sentencing errors because (1) section 775.084, Florida Statutes (1989), the habitual-felony offender statute, is unconstitutional, (2) section 775.084(4) prohibits habitual-offender sentencing for both his life felonies and his first-degree felonies punishable by life, (3) the trial judge prepared an order imposing sentence prior to the sentencing hearing, (4) the court imposed three consecutive minimum-mandatory sentences upon appellant as a habitual violent felon for offenses that occurred during a single episode, and (5) the trial court included on the guidelines scoresheet a triple assessment of victim injury points for injury to a single victim during a single criminal episode. We affirm all of Conley's convictions, affirm some sentences and reverse others, for the reasons stated below.

M.M. testified that she was introduced to appellant in July or August 1989 by a friend who invited M.M. to accompany her, Conley, and another man on a trip between Jacksonville and Daytona Beach. M.M. testified that during the trip, Conley kissed her several times but that they went no further sexually. After a night at a hotel, the group returned to Jacksonville. M.M. testified that she saw Conley several times in passing after that, but spent no time with him.

M.M. testified that on November 13, 1989, she was at 8224 Eaton Avenue in Jacksonville, working as a nurse's assistant taking care of "Grumpy," the elderly mother of a neighbor, Al Douglas. Her two-year-old son, Zachary, was with her. She said that at 2 p.m. that day, Conley knocked the door down and entered the house carrying a rifle. While pointing the gun at M.M., Conley directed her to get Grumpy out of bed and put her in a wheelchair in the living room. He then forced M.M. to go into the bedroom and have repeated anal, vaginal, and oral sex with him while he kept the gun nearby. When Zachary cried from the living room, Conley permitted her to give him a bottle, but when the child started to cry again, Conley hit him. Conley then forced M.M. to continue having sex. She said that Conley fired his gun into the ceiling "to show me he meant business."

Eventually, Conley had M.M. put her clothes back on, and he took three rings from her fingers and the checkbook from her purse. He had her accompany him to a nearby trailer, where he directed her to knock on the door and ask for Steve. A child answered the door and ran outside. Conley ordered M.M. into the trailer where he looked through several drawers. He then told her to leave, but as she went out the door, he asked her what she was doing. She said she ran down the street with Conley in pursuit until she turned into a yard with people in it.

Police arrived in response to a call at about 5:15 p.m. on November 13, 1989, reporting an armed man pursuing a woman down the street. M.M. told officer Isaac Brown her version of events. Officers apprehended Conley under a bed in a house nearby with a gun at his side. The owner of the house where Conley had been staying, testified that Conley ran inside just before police arrived and said he was in trouble. An evidence technician took a checkbook from the bedroom where Conley was found. M.M. identified the checkbook as hers and the gun as the one Conley had that day. She also identified Conley, who was sitting alone in the back of a police car, as her assailant.

After arresting Conley, police found money and three rings in his possession. M.M. identified the rings as hers at trial. A photograph depicting a damaged front door to the Douglas home was admitted in

evidence, without objection. Police did not find evidence that a bullet had been fired at the ceiling in the bedroom where M.M. said the rape occurred. Officer W.R. Baer testified that Conley gave a false name during an interrogation after arrest, then gave his real name. Baer also said that Conley denied committing any of the crimes against M.M., and stated that he was hunting with his friend Wayne Westberry until 6 p.m. that day.

Dr. Darryl Turner examined M.M. within hours of the alleged rape. He found a bruise on her neck but no evidence of trauma to the rectum or vagina, but testified that this was not unusual depending on the preexisting state of the patient's vaginal and anal areas. The exam revealed a small amount of yellowish fluid in her anus, but no evidence of sperm in either orifice.

Several defense witnesses testified that they had seen Conley and M.M. together as a couple as recently as two weeks before the alleged crimes. Conley testified that the two of them had had a sexual relationship until late September. He testified that on November 13, he returned from hunting at around 2 p.m., then went to Al Douglas' house, where he had once lived, to visit Al and check on Grumpy. He said M.M. invited him in, but got angry when he started kidding her about seeing two other men. Conley said that she cursed him, so he slapped her face and left. He denied raping her or having sex with her that day. Conley testified that he hid from the police because he was wanted for violation of probation, and he said the gun was already under the bed where he hid.

The jury found Conley guilty of armed burglary (Count I), three counts of armed sexual battery (Counts II, III, and IV), and armed robbery (Count V). The trial court found Conley to be a habitual violent felony offender and sentenced him to life imprisonment with a fifteen-year mandatory-minimum term on each count. The sentences for Counts I and V are consecutive to those for Counts II, III, and IV, which are concurrent with one another.

TRIAL ISSUE 1

[1] The first witness the state called was M.M., who testified that Conley had sexually assaulted her, robbed her, and confined her against her will. She testified that when she was finally able to break away and run, Conley chased her down the street with his rifle as she shouted, "Call the police." The state's second witness, Officer Isaac Brown, testified that he received a report that someone was being chased down a street by a person with a gun, so he went to investigate. The trial court properly overruled Conley's hearsay objection. The officer's statement was not offered to prove the truth of the matter asserted, but to establish why the officer went to the scene to investigate. *Johnson v. State*, 456 So.2d 529, 530 (Fla. 4th DCA 1984) (content of dispatch to which investigating officer responded is not hearsay, but is instead a common-sense way to explain why officers went to the scene), *review denied*, 464 So.2d 555 (Fla.1985).

[2] We note that the prosecutor did refer to this same testimony during closing argument to corroborate M.M.'s version of events, and in this context the evidence was inadmissible hearsay. Because defendant's counsel failed to object, however, this error was not preserved for appeal. *Jones v. State*, 577 So.2d 606, 608 (Fla. 4th DCA 1991) (contents of BOLO was inadmissible hearsay because it was improperly used by prosecutor to establish truth of the matter asserted).

[3, 4] The trial court also properly overruled Conley's hearsay objection to Officer Brown's testimony regarding what M.M. told him when he arrived at the scene. Brown stated that M.M. was hysterical and crying, and said that she had just been raped by a man called "Mad Dog," gave Brown a description and told him where the man had run, and recounted details of the rape. After the police canvassed the area thirty-five minutes to an hour after he had first questioned her, Officer Brown again questioned M.M. Although she was still "screaming and crying," she was able to recount the incident in detail to Officer

Brown. The defense objected to this entire testimony as hearsay.

The court admitted the testimony under the "fresh complaint" exception to the hearsay rule, which has been recognized in rape cases to rebut an inference of consent which may be drawn from a victim's previous silence about a sexual assault. *Custer v. State*, 159 Fla. 574, 34 So.2d 100, 106 (1947); *McDonald v. State*, 578 So.2d 371, 373–74 (Fla. 1st DCA 1991); *Monarca v. State*, 412 So.2d 443, 445 (Fla. 5th DCA 1982); *Lyles v. State*, 412 So.2d 458, 459 (Fla.2d DCA 1982). While we acknowledge the applicability of this common-law doctrine, see *McDonald*, we note that M.M.'s statements did not follow a period of silence which could have raised an inference of consent.

Therefore, we hold that M.M.'s responses to the officer's questions were admissible as excited utterances under Section 90.803(2), Florida Statutes (1989). *Garcia v. State*, 492 So.2d 360, 365 (Fla.) (officer who responded to crime was properly permitted to testify regarding what victim told him when he asked what happened, as a contemporaneous utterance admissible under the res gestae rule), *cert. denied*, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986). During the state's proffer, the court asked Officer Brown whether he could make a distinction between what M.M. told him at the two separate contacts, and the witness replied that she gave him nearly all the information in the first contact. It was within the trial court's discretion to assess the officer's credibility, and we see no error on this point.

TRIAL ISSUE 2

[5] Dr. Darryl Turner, a resident at the University Hospital emergency room, testified that he examined M.M. on November 13. He testified that it is necessary when he examines a sexual-assault victim to obtain a history, or a description of the events. He testified that M.M. told him,

> That approximately 2:00 in the morning [sic] in the home of a patient of hers, she was allegedly raped, assaulted, which included penile, oral, penile/vaginal, and penile/anal intercourse. This was done, as she stated, at gunpoint. There was also some question of violence that had occurred at that time in terms of her being struck by her assailant.

She did not know whether her assailant had ejaculated. Turner testified that from this information, he knew he needed to conduct vaginal, anal, and oral examinations, and prepare microscopic slides to look for sperm.

[6] Section 90.803(4), Florida Statutes (1989) permits,

> Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment ... which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

Statements that describe the cause of an injury are admissible if they are reasonably pertinent to diagnosis or treatment of the injury. *Torres–Arboledo v. State*, 524 So.2d 403, 407 (Fla.), *cert. denied*, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988). Appellant contends that the statement in question was not reasonably pertinent to the doctor's medical diagnosis and/or treatment of the condition presented by the victim so as to be admissible under section 90.803(4). We are not so persuaded.

The uncontradicted testimony of the doctor below was that in examining an alleged victim of sexual assault he found it "necessary" to question the patient regarding the occurrence "so I can know exactly where to concentrate efforts in terms of any additional examination ..." He testified further, again without objection or contradiction, that, in addition to examining M.M.'s internal and external genitalia, he performed an overall examination which goes "to the overall condition of the patient." He described M.M. as "upset" and "emotionally labile" at the time of her visit and expressed an opinion that her emotional state at the time precluded in-depth questioning concerning the incident.

With regard to statements offered under the medical diagnosis/treatment exception to Florida's hearsay rule, we have held that what is reasonably pertinent to medical diagnosis or treatment is to be determined from the perspective of the healthcare provider to whom the statement is made rather than the vantage point of an appellate court. *Danzy v. State*, 553 So.2d 380 (Fla. 1st DCA 1989). The *Danzy* court addressed the issue of admissibility of evidence offered to describe cause or inception of injury in terms of its reasonable pertinence to diagnosis or treatment of the declarant's "general condition." As in *Danzy*, it is clear that the doctor in the instant case was concerned about the general condition of his patient. Likewise, as in *Danzy*, the appellant at bar invites us to decide what the doctor needed to know or whether he needed to know information he testified was *necessary* in dealing with the general condition presented by his patient. We declined the invitation in *Danzy* and do so here.

Lastly, in *Flanagan v. State*, 586 So.2d 1085 (Fla. 1st DCA 1991), we recently noted that the standard of appellate review of a trial court's admission of such evidence is whether the trial court abused its discretion in admitting the evidence. Below, the trial court evaluated the statement offered and found it to be reasonably pertinent to diagnosis and treatment. Appellant does not argue here that the trial court abused its discretion in finding that the evidence in question was reasonably pertinent to diagnosis and treatment. Rather, he only argues in general and conclusory fashion that such evidence was erroneously admitted. Our review of the record fails to disclose any abuse of discretion in admitting M.M.'s statement to her examining doctor.

[7] Even if error had been shown in this regard, on this record we would hold such error to be harmless. The testimony in question was cumulative to statements of Officer Brown recounting M.M.'s account of what transpired and does not appear to have added any additional insight into M.M.'s testimony. *See also Flanagan v. State.*

TRIAL ISSUE 3

[8] Officer Baer testified that after the police arrested Conley, he told them his name was Ronald Jones. The officers determined it was a false name and told that to Conley, who then gave his correct name. The defense objected to this testimony, asserting that it was irrelevant to the charges and unduly prejudicial, but was correctly overruled. When the defendant uses an alias to avoid arrest or prosecution, testimony regarding the alias is admissible as evidence of a consciousness of guilt of the instant offense. *Weston v. State*, 452 So.2d 95, 95 (Fla. 1st DCA), *review denied*, 456 So.2d 1182 (Fla.1984).

TRIAL ISSUE 4

[9] During the defendant's case, the prosecutor queried defense witness Russell Riggs about a confrontation outside the courtroom between Riggs and M.M. After the court overruled Conley's objection, the prosecutor asked Riggs whether he had said, "There's the bitch," "You ain't worth fucking," and "You are going to pay, bitch." Conley claims the court should not have permitted such questioning. He relies on cases in which courts have held that evidence of threats made against a witness to induce that witness not to testify are inadmissible to prove a defendant's guilt unless it is shown that the defendant authorized the threat. *Duke v. State*, 106 Fla. 205, 142 So. 886 (1932); *Jones v. State*, 385 So.2d 1042 (Fla. 1st DCA 1980); *Reeves v. State*, 423 So.2d 1017 (Fla. 4th DCA 1982).

However, Riggs' alleged remarks to M.M. were not introduced for the purpose of showing that Riggs tried to prevent her from testifying, but to show Riggs' bias, and in this context they were admissible. *Koon v. State*, 513 So.2d 1253, 1256 (Fla. 1987) (trial court properly permitted the state to question a defense witness about "an unflattering name" he had allegedly called a federal prosecutor), *cert. denied*, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988); *Chandler v. State*, 366 So.2d 64, 71 (Fla. 3d DCA 1978) (defendants were prop-

erly permitted to develop theory that witness for the state was prejudiced against co-defendants because the latter had once made a complaint about the witness to their common employer), *cert. denied*, 376 So.2d 1157 (Fla.1979), *aff'd*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981).

TRIAL ISSUE 5

[10] Conley contends that the prosecutor made four statements that were improper and together constitute reversible error. First, during Conley's cross-examination, Conley confirmed that he denied having sex with M.M. on November 13. The prosecutor then asked whether the reason, then, that the defense presented other witnesses who testified that Conley and M.M. were in a romantic relationship was an attempt to "show her as a slut." The court sustained an objection to this question. The prosecutor continued by asking whether Conley was trying to prove through these witnesses that he and M.M. were in a relationship, and that he was therefore able to have sex with her whenever he wanted. Conley claims that this constituted an improper and prejudicial comment on his attorney's presentation of Conley's defense, relying on *Eberhardt v. State*, 550 So.2d 102 (Fla. 1st DCA 1989), *review denied*, 560 So.2d 234 (Fla.1990), and *Rosso v. State*, 505 So.2d 611 (Fla. 3d DCA 1987). However, in each of those cases, the prosecutor's comment on the defendant's defense was found to be improper because it amounted to a comment on the defendant's failure to take the stand.

Even if it is error to comment disparagingly on a person's defense, it appears from reading further in the record that the prosecutor was not doing this. The evidence established that when Conley went to Al Douglas' house on November 13, he kicked the door in. By questioning Conley as described above, the prosecutor was setting a foundation to ask Conley why, if he and M.M. were on a friendly basis and had an ongoing sexual relationship, Conley would have needed to kick in the door. This was entirely proper.

[11] Second, the prosecutor referred in closing argument to the hostile remarks Riggs allegedly made to M.M. outside the courtroom. Conley claims the prosecutor mischaracterized such evidence by asserting that Riggs had testified that he intentionally spoke loudly to his friends so that M.M. could hear him, when in fact, Riggs had testified that he had not made the disparaging remarks loudly. After the defense objected, the court instructed the jury that "what the lawyers say is not evidence." The prosecutor's mischaracterization of Riggs' testimony was essentially insignificant and certainly did not amount to reversible error. Conley also claims that the prosecutor insinuated that he personally witnessed the hallway encounter, but there is no such insinuation in the record.

[12] Third, in closing argument the prosecutor said,

> You know what you have seen and what you have heard is exactly why they tell us a lot of people don't report rape. You know why? Because they are going to have to tell their entire details of a very disgusting, terrible, degrading demoralizing event to two, three, five, ten people, tell it to a jury, tell it to the police officers, tell it to defense attorneys, and then sit idly by as he parades witness after witness to say what a terrible person she is.

Conley claims that this inflammatory statement improperly accused the defendant and/or defense counsel of further victimizing M.M. by exercising his right to a trial. *Jenkins v. State*, 563 So.2d 791 (Fla. 1st DCA 1990). The state contends that the prosecutor had a right to comment on Conley's "improper character assassination" of M.M. through several defense witnesses,[1]

1. The state is referring to the testimony of Wayne Westberry, Russell Riggs, and Manson McClain, each of whom testified that he was a close friend of Conley's, and that he had been with Conley and M.M. together and observed they were in some kind of romantic relationship. Westberry also testified that he walked in on the two of them naked in the bedroom; and Riggs testified that M.M. took her shirt off in Riggs' car while Conley was there. The state did not object to either remark. However, just prior to the defense's case, the state asked for a

because Conley's counsel implied in opening statement that he would rely on the defense of consent, but when Conley took the stand, he testified that he had not had sex with M.M. that day. However, the defense was entitled to present evidence of a prior sexual relationship between M.M. and Conley as a means of attacking M.M.'s credibility, because she had asserted that she had only met Conley once. We conclude that the prosecutor's remark was improper but in the context of this case was harmless error.

[13] Finally, later in closing argument, the prosecutor stated, "[Defense counsel said 'I d]on't like my client.['] I don't like him either. I don't like people who rape, rob, burglarize." (These were precisely the charges against Conley.) Such remarks regarding a prosecutor's personal beliefs about the guilt or innocence, or the credibility of an accused are clearly improper. *Reed v. State*, 333 So.2d 524 (Fla. 1st DCA 1976); *Singletary v. State*, 483 So.2d 8 (Fla. 2d DCA 1985); *Blackburn v. State*, 447 So.2d 424 (Fla. 5th DCA 1984). However, again under the circumstances of this case was harmless error.

SENTENCING ISSUE 1

[14, 15] Conley claims the habitual offender statute, Section 775.084, Florida Statutes (1989), is unconstitutional because it is arbitrarily left up to a prosecutor or a judge to decide whether a defendant will be sentenced under the statute, when another defendant charged with identical offenses may not be. This argument was rejected in *Barber v. State*, 564 So.2d 1169 (Fla. 1st DCA), *review denied*, 576 So.2d 284 (Fla. 1990), regarding the 1987 statute. He also claims the statute violates the prohibition against ex post facto laws because a defendant can be sentenced as a violent felony offender when the instant offense is nonviolent but a prior offense was violent; therefore, the focus of the statute is on the prior violent felony. In the case at bar, Conley's sole prior violent felony was a 1985 robbery conviction, which occurred before the amended habitual offender statute was enacted. He claims that this constitutes an impermissible ex post facto application of section 775.084.

We disagree. The supreme court rejected this kind of ex-post-facto argument in *Cross v. State*, 96 Fla. 768, 119 So. 380 (Fla.1928). "The statute is not rendered ex post facto by providing enhanced punishments for a subsequent offense because of convictions occurring prior to the passage of the statute." *Id.* 119 So. at 385.

[16] Conley also claims that the focus on the prior violent offense renders the enhancement for the instant offense a second punishment, which violates the prohibition against double jeopardy. The court also rejected this argument in *Cross*, when it concluded that the consideration of prior offenses in determining whether a defendant is a habitual offender does not constitute a second punishment for the former offenses, but is instead a "more severe punishment for the last offense." *Id. Accord Washington v. Mayo*, 91 So.2d 621, 623 (Fla.1956).

SENTENCING ISSUE 2

[17, 18] Conley was convicted of armed burglary of a dwelling (Count I) and armed robbery (Count V), both first-degree felonies punishable by life, and armed sexual battery (Counts II, III, and IV), a life felony. Citing *Barber v. State*, he claims the penalties for life felonies and first-degree felonies punishable by life may not be enhanced under the habitual-offender statute.

proffer of Westberry's testimony, and defense counsel represented that Westberry saw Conley and M.M. naked in bed together, and the court stated that such testimony was proper and relevant "based upon what your opening argument was." In opening argument, defense counsel had stated that the evidence was going to establish that M.M. had a sexual relationship with Conley, and that several of the witnesses would testify that they had repeatedly seen the couple kissing and holding hands, or naked together in bed, and that M.M. had removed her shirt in front of Conley and another man, to which counsel commented, "so I think you will get a flavor of the type of relationship that is going on." It appears from the record that both the court and the prosecutor believed from this argument that Conley was going to put on a defense of consent.

This court recently held in *Johnson v. State*, 568 So.2d 519 (Fla. 1st DCA 1990), and *Gholston v. State*, 589 So.2d 307 (Fla. 1st DCA 1990), that the habitual-offender statute cannot be applied to defendant's convictions classified as life felonies. However, we held in *Burdick v. State*, 584 So.2d 1035 (Fla. 1st DCA 1991), *petition for review filed*, No. 78,466 (Fla. Aug. 20, 1991) (oral announcement held Dec. 6, 1991), that sentences for first-degree felonies punishable by life may be enhanced under section 775.084. Therefore, we affirm the life sentences for Counts I and V, reverse the life sentences for the life felonies in Counts II, III, and IV, and remand for resentencing.

SENTENCING ISSUE 3

[19] Conley claims the trial judge committed reversible error by preparing a written sentencing order prior to the sentencing hearing, relying on *Ree v. State*, 565 So.2d 1329 (Fla.1990), in which the supreme court held that a trial court must prepare a written order containing reasons for departure from the sentencing guidelines at the time of sentencing. However, because *Ree* applies only to sentences imposed after *Ree* was decided on July 19, 1990, *State v. Lyles*, 576 So.2d 706 (Fla.1991), and Conley was sentenced on May 23, 1990, *Ree* does not pertain to the case at bar.

SENTENCING ISSUE 4

[20] Conley was sentenced as a habitual violent felony offender to three consecutive life sentences, including three consecutive fifteen-year minimum mandatory terms. The sentences for armed sexual battery are to run concurrently with each other and consecutively to the sentence imposed for armed robbery and armed burglary, which also run consecutive to each other. Conley claims that the court erred in making the overall sentences and the minimum mandatories consecutive when the crimes occurred "during a single episode." *State v. Boatwright*, 559 So.2d 210 (Fla.1990); *Palmer v. State*, 438 So.2d 1 (Fla.1983). Because we reverse Conley's life sentences under the habitual-offender statute for the three counts of sexual battery, and because we conclude that the armed burglary and armed robbery did not constitute a single criminal episode, we affirm the consecutive sentences.

This case is comparable to *Murray v. State*, 491 So.2d 1120 (Fla.1986). In *Murray*, the victim was abducted by two men, who forced the victim to drive away with them in her car. The defendants stole money from the victim's purse while driving, parked the car and sexually assaulted her, took her necklace, then left the victim and took her car. The court held that the robbery of the money and the car took place at different locations from the sexual batteries, justifying imposition of separate minimum-mandatory sentences under section 775.087(2). In the case at bar, Conley committed the armed burglary when he broke into the Douglas home where M.M. was working on November 13, and he committed the armed robbery several hours later after he perpetrated the sexual batteries. We consider the burglary and robbery to constitute two separate acts warranting consecutive minimum-mandatory sentences.

SENTENCING ISSUE 5

[21] A guidelines scoresheet was prepared for Conley which reflects 120 points for victim injury.[2] The trial court presumably derived this amount by assessing 40 points for "penetration or slight injury" for each of the three counts of sexual battery. Pursuant to Florida Rule of Criminal Procedure 3.701(d)(7), however, victim injury should be scored according to the number of victims in a criminal episode rather than the number of counts. *Williams v. State*, 565 So.2d 838 (Fla. 1st DCA 1990), *review denied*, 576 So.2d 295 (Fla.1991). Therefore, the triple assessment against Conley was erroneous.

CONCLUSION

In summary, appellant's convictions for armed burglary, armed robbery, and three counts of armed sexual battery are all af-

2. Because we reverse Conley's sentences under the habitual-offender statute for his life felonies of Counts II, III, and IV, this scoresheet will be applicable to Conley on remand.

firmed; the life sentences for Counts I and V are affirmed; however, the life sentences for the life felonies in Counts II, III and IV are reversed and the case is remanded for resentencing as to Counts II, III and IV.

JOANOS, C.J., and MINER, J., concur.

ERVIN, J., dissents with written opinion.

ERVIN, Judge, dissenting.

In my judgment there were three errors committed during trial that warrant granting appellant a new trial: admission of certain portions of the physician's testimony regarding statements M.M. made to him; admission of Officer Baer's testimony that Conley provided an alias when first arrested; and failure to instruct the jury to disregard certain of the prosecutor's inflammatory remarks. Although I do not believe that any of the above errors standing alone would necessarily be reversible, I consider that in combination they had the effect of denying Conley a fair trial.

Dr. Turner testified that M.M. had told him that she was raped, and that "[t]his was done, as she said, at gunpoint." I do not consider that this statement falls within the hearsay exception for statements dealing with medical diagnosis or treatment. § 90.803(4), Fla.Stat. (1989). That her assailant, whom she had already testified was appellant, may have held her at gunpoint as he assaulted her, had no relevant value regarding whatever medical treatment she may have required. *Torres-Arboledo v. State*, 524 So.2d 403 (Fla.), *cert. denied*, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988) (victim's statement to physician that black men had tried to steal his medallion was not reasonably pertinent to medical treatment, thus was inadmissible hearsay). The court should therefore have directed the jury to disregard the hearsay statement quoted above. *See also Flanagan v. State*, 586 So.2d 1085, 1102 (Fla. 1st DCA 1991) (Ervin, J., concurring and dissenting) (statements of fault not related to diagnosis and treatment are inadmissible under section 90.803(4)).

Next, I agree with appellant that Officer Baer's testimony that Conley gave a false name to the arresting officers was both irrelevant and unduly prejudicial. I do not dispute that when a defendant uses an alias to avoid arrest or prosecution, testimony regarding the alias is admissible as evidence of a consciousness of guilt of the offense. *Weston v. State*, 452 So.2d 95, 95 (Fla. 1st DCA), *review denied*, 456 So.2d 1182 (Fla.1984); *Finlay v. State*, 424 So.2d 967, 969 (Fla. 3d DCA 1983). This was not the situation at bar, however. Because Conley was already under arrest when he gave the false name, it is apparent that he was not using the alias to avoid arrest or prosecution for the instant offenses, but may have been using the alias to avoid prosecution for a prior, unrelated offense. Conley testified that he was wanted at the time of his arrest for violation of probation, which would constitute motivation for giving a false name. In such situation, the testimony is inadmissible. *Redford v. State*, 477 So.2d 64, 65 (Fla. 3d DCA 1985); *Finlay*, 424 So.2d at 969.

Finally, I agree with the majority that the third and fourth instances of alleged prosecutorial misconduct were clearly improper, but when considered in combination with the errors discussed above, I do not find these to have been harmless. *State v. DeGuilio*, 491 So.2d 1129 (Fla.1986).

I otherwise concur with the majority on the remaining points raised regarding errors during the trial. Because I would reverse and remand for new trial based upon the cumulative effect of the errors discussed above, I would not reach the sentencing errors appellant raised.

Jason A. THAMES, Appellant,

v.

STATE of Florida, Appellee.

No. 90-2608.

District Court of Appeal of Florida, First District.

Jan. 2, 1992.

Defendant was convicted in the Circuit Court, Wakulla County, Charles McClure,