IN THE SUPREME COURT OF FLORIDA

STUART LESLIE POMERANZ,

Appellant,

vs. Case No. 82,467

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, STUART LESLIE POMERANZ, was the defendant in the trial court below and will be referred to herein as "Appellant." Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as "the State." Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to the supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Appellee includes the following relevant and pertinent facts which have been omitted from appellant's initial brief: Officer Paul Reader observed money on the floor. A crumpled dollar bill was observed on the floor away from the rest of the money. (R 1245, 1755). The positioning of the shell casings indicate that the killer was standing on the public side of the counter. (R 1263-1265). Mr. Patel, the victim, had powder burns on his shirt. (R 1276). There was no way of knowing how much was taken from the cash register since know one knew how much was in the register when the store opened for business. (R 1332).

Lorenza Pasquale, a neighbor of appellant; Hector Velasquez, Pasquale's husband; and Tony Jackson, appellant's roommate, all testified that appellant conversed with Mrs. Pasquale in Spanish. (R 1401, 1402, 1404, 1412, 1417, 1458).

Dr. Charles Diggs, the medical examiner, testified that Mr. Patel was shot six times. (R 1471). The first wound was in the upper left side of his chest. The second wound was to the right of the midline of the chest. The third wound was on the left side of the midline of the chest. Two other shots were close to each other in the middle of the abdomen. (R 1472-1477). There was also a wound to the back of the left hand. (R 1477, 1498). Mr. Patel was alive when he received all of the shots. The first three shots were consistent with Mr. Patel standing, and the second two shots were consistent with the victim lying on the floor. (R 1491-1493).

George Primm, an emergency medical technician, responded to the scene. He found money on the floor behind the counter. (R 1773). He also observed a crumpled dollar bill outside the counter area. (R 1781-1782).

Katherine Colburn testified that she saw Pomeranz with the murder weapon three days after the murder. (R 1784, 1786). Appellant had shoulder-length hair around the time of the murder. She was present during a discussion between Tony Jackson and Pomeranz wherein they discussed killing someone for $51.00. (R 1788-1789).

Sandra Colburn also testified that Pomeranz had long hair around the time of the murder. (R 1795). She also stated that Pomeranz spoke Spanish. (R 1796, 1800-1801).

Michael Coberly lived near Tony Jackson and Pomeranz. He testified that Pomeranz had shoulder-length hair around the time of the murder. He also testified that he saw Pomeranz with a .32 caliber gun. (R 1820, 1834).

Sean Bouchard testified that around 9:50 p.m. he was filling the beer cooler while Mr. Patel was about to count the money. (R 1865-1866). He heard a bang that sounded like someone was hitting the cash register. (R 1866). He heard someone say, "Does anyone else want to die mother fucker?" Then two more shots were fired. (R 1867). He heard five shots in all. After the first three shots, he could hear Mr. Patel moan. It was shortly thereafter that the last two shots were fired. (R 1869, 1872). The killer

had a Spanish accent. (R 1872). Bouchard only heard the voice of one person. (R 1892).

Bonnie Johnson testified that as she and her family were driving by the store she heard three continuous noises. She then saw a man standing in the doorway with his left hand extended inside the door. (R 1901). She continued to drive by and within seconds she heard two more shots. (R 1902-1903). The man looked at her between the separate volley of shots as she drove by. (R 1904). The man was around 5'8 to 5'10, with dark shoulder-length hair. (R 1904). He was wearing cut-off pants with a white shirt. Underneath the shirt was a black T-shirt. (R 1904-1906). The man had a slim build, very much like appellant. (R 1927). She testified that she thought the man she saw was Pomeranz but she could not swear to it. (R 1927). She was positive that the man was not Kinser. (R 1927).

Ina Thomas, who lives in the neighborhood, testified that she saw Pomeranz in the store between 8:00 and 8:30 p.m. the night of the murder. (R 1953-1956). Pomeranz was wearing shorts. (R 1937).

Deputy James Hannon from the Martin County Sheriff's Office responded to the scene. He saw money on the floor. (R 1985). A crumpled up dollar bill appeared to have been grabbed and dropped on the floor. (R 1985). Hannon also testified that the investigation was fruitless until Kinser came forward. (R 2015, 2019). The police had no idea that Kinser was involved since the description given by Bonnie Johnson did not match that of Kinser.

There was no evidence linking Kinser to the crime until he came forward. (R 2021, 2173).

Erica Hernandez testified that, while she and her mother and bother were in the store that evening, she saw Pomeranz at the phone outside. (R 2452-2454).

Elizabeth Hernandez, Erica's mother, was called as a court witness without objection by appellant. (R 2475). She testified that Kinser came into the store between 9:15 and 9:35 p.m. while she and her family were there. (R 2511-2515).

Tony Jackson, appellant's roommate, testified that Pomeranz left the trailer that evening in dark shorts and shirt. (R 2568). Kinser picked him up after Pomeranz left the trailer to call him. Appellant left the house carrying a gun and a knife. (R 2572). Jackson stated that Pomeranz had disguised his voice with a Spanish accent during the previous Wright robbery. (R 2665-2667).

Ed Barnard testified that Kinser lived with him at the time of the murder. They had known each other for nine years. (R 2672). On the day of the murder, Barnard and Kinser had spent the day together until Pomeranz called around 8:30 p.m. (R 2676-2677).

Kinser testified that he had met Pomeranz in prison back in 1991. (R 2784). Kinser provided transportation for Pomeranz since he did not have a driver's license or a car. (R 2788). Kinser testified that he picked up appellant at Jackson's house at 9:42 p.m. (R 2815). Pomeranz told him that he had scoped out the store for the past two days. (R 2812). While in the car driving to the store, Pomeranz loaded the gun. They drove around the block a few

times. Pomeranz went into the store and bought a lollipop. (R 2815). When Pomeranz went into the store a second time, Kinser drove around the block again. Pomeranz then came out of the store and dove into the window of the car. (R 2829). He told Kinser that he "shot the fucker five times." (R 2830). He then reloaded the gun. Pomeranz had a handful of money and stated that "he can't believe that he killed someone for $51.00." (R 2830). Appellant sat in the passenger seat straightening out the money across his legs. (R 2943). Kinser admitted that he was a principal in the robbery. He pled guilty to first degree murder and received a life sentence without the possibility of parole for at least twenty-five years. He admitted committing countless other robberies, some with Pomeranz, and some without. (R 2852-2854). He stated that he turned himself in because he felt badly about the murder of Mr. Patel. (R 3101). He also stated that his life was out of control due to his drug habit. He was consuming $3,000 worth of cocaine a week. (R 3121).

Darrin Cox testified that he met Pomeranz in jail in July 1992. Pomeranz told him that he killed a guy for $51.00. (R 3162).

The victim's wife, Tara Patel, testified that she saw Pomeranz in the store the night of the murder between 7:00 and 8:00 p.m. (R 3172).

At the penalty phase, Pomeranz called Barry Norman. Her daughter, Kim, dated Pomeranz. (R 4197). She opined that Appellant had a potential for rehabilitation. She does not know anything

about his past criminal record, but her gut feeling was that he made a mistake and could be rehabilitated. (R 4204, 4206).

Appellant's maternal aunt, Janet Mayerbach, testified that Appellant and his mother began living with his maternal grandmother when he was three and a half years old. (R 4271,4290). His grandmother provided a good, loving home. (R 4292). Ms. Mayerbach had not seen Appellant in the past five years. (R 4280). She does not believe that he committed this crime, since he would not hurt anyone. (R 4296, 4299).

In rebuttal, the state called Dr. Glen Caddy. He opined that appellant takes pride in his criminal behavior. (R 4391). Appellant is a sociopath with an anti-social personality. (R 4403). He has very little chance for rehabilitation. (R 4401, 4403). Pomeranz has an I.Q. of 106, which indicates that <u>if</u> he had brain damage, it certainly is not severe enough to effect his intelligence. (R 4438). Appellant does not suffer from any mental illness and knows the difference between right and wrong. (4439).

SUMMARY OF ARGUMENT

Issue I - The trial court's exclusion of evidence was proper based on appellant's discovery violation. Regardless, appellant suffered no prejudice.

Issue II - The trial court properly restricted the cross-examination of Kinser.

Issue III - Trial court's ruling allowing the state to use the prior deposition of a court witness for impeachment purposes was harmless error.

Issue IV - The trial court properly excluded evidence regarding Kinser's reputation for truthfulness among his family members.

Issue V - The trial court properly restricted the cross-examination of Kinser regarding his prior criminal record.

Issue VI - The trial court properly permitted the state to cross-examine Steven Drake.

Issue VII - The trial court properly refused to allow defense counsel to subpoena the prior medical records of Kinser.

Issue VIII - The trial court properly refused to release or conduct an in camera review of grand jury testimony.

Issue IX - The trial court properly allowed the admission of appellant's prior conviction for armed robbery.

Issues X-XII - The trial court properly allowed the admission of collateral crime evidence.

Issue XIII - The trial court properly denied appellant's request for a jury instruction on circumstantial evidence.

Issue XIV - The trial court's instruction to the jury on principals was at most harmless error.

Issue XV - The trial court properly denied appellant's motion for judgment of acquittal as to the charge of robbery.

Issue XVI - Appellant's absence from two pretrial conferences was not error.

Issue XVII - Appellant was not unrepresented for ten days prior to his arraignment. In any event, he cannot establish any prejudice.

Issue XVIII - The trial court properly adjudicated appellant guilty of both murder and robbery.

Issue XIX - The trial court properly made an independent evaluation of the aggravating and mitigating circumstances in overriding the jury's recommendation.

Issue XX - The trial court's override of the jury's recommendation was proper.

Issue XXI - The trial court employed the correct legal standard in overriding the jury's life recommendation.

Issue XXII - The sentencing order clearly details the court's factual and detailed analysis of all the evidence.

Issue XXIII - The trial court properly allowed the admission of victim impact evidence. In any event, the record is clear that the court did not consider same when making its sentencing recommendation.

Issue XXIV - The "felony murder" aggravating factor in § 921.141(5)(d), Fla. Stat. (1993), is constitutional.

Issue XXV - Death by electrocution is not cruel or unusual punishment.

Issue XXVI - Florida's death penalty statute has repeatedly been upheld as constitutional.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN EXCLUDING EXTRINSIC EVIDENCE RELATING TO A COLLATERAL MATTER BASED ON A PERCEIVED DISCOVERY VIOLATION.

Pomeranz challenges the trial court's ruling which precluded use of extrinsic evidence (a prior inconsistent statement) during cross-examination of the state's key witness, Jay Kinser. The facts adduced at trial are the following: A topic of inquiry during the cross-examination of Jay Kinser involved appellant's prior conviction for an armed robbery that occurred two weeks after the murder of Mr. Patel.[1] During cross-examination, Kinser was asked to confirm that the collateral robbery was planned a week to ten days before its commission. (R 2944-2945). Kinser disagreed and responded that the robbery was planned and carried out on the same day. (R 2945). Defense counsel attempted to clarify Kinser's response, but Kinser again stated that the prior robbery was planned within three hours of its occurrence. (R 2947). Defense counsel then attempted to impeach Kinser with his prior inconsistent testimony from the collateral robbery trial. The state objected, alleging a discovery violation. (R 2947). The prosecution argued that appellant had not given notice that it

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[1] Jay Kinser and Stuart Pomeranz committed an armed robbery on May 1, 1992. Kinser testified against Pomeranz at that trial. Pomeranz was found guilty of armed robbery. That conviction was reversed on appeal. Pomeranz v. State, 634 So. 2d 1145 (Fla. 4th DCA 1994). On remand, Pomeranz pled guilty to grand theft. (SR 931-945).

intended to use the extrinsic evidence at this trial. Appellant countered that notice was not necessary since the same state attorney's office prosecuted both the collateral robbery and the instant murder case. The trial court allowed appellant to make a proffer of the challenged evidence. (R 2949-2956).

In the proffer, Kinser acknowledged his prior inconsistent statement, but maintained that the robbery was planned and committed on the same day. (R 2954). The trial court called a lunch recess and suggested that the state review the prior statement. (R 2957-2958). After reviewing the statement, the state again objected, claiming that there was no notice, and that the failure to notice was both wilful and prejudicial. (R 3098). The trial court found a discovery violation and precluded defense counsel from using Kinser's prior statement as impeachment evidence. The court ruled that appellant was permitted to ask Kinser the question, but he could not challenge Kinser's response. (R 3100).

On appeal, appellant claims that the trial court's Richardson hearing was inadequate, that its finding of a discovery violation was erroneous, and that its exclusion of the evidence was unjustly extreme. Appellant also claims that the State committed a Brady violation by allowing its witness to present perjured testimony. All of appellant's arguments are without merit for the following reasons.

Irrespective of any valid finding that a discovery violation had occurred,[2] the sanction imposed properly prevented appellant from engaging in an improper method of impeachment. It is well-settled that use of extrinsic evidence to impeach a state witness regarding a collateral matter is impermissible. Caruso v. State, 645 So. 2d 389, 394-395 (Fla. 1994); Gonzalez v. State, 538 So. 2d 1343 (Fla. 4th DCA 1989). The test for determining whether a matter is collateral and nonmaterial is "whether the proposed testimony can be admitted into evidence for any purpose independent of the contradictions. Two types of evidence pass this test: (1) facts relevant to a particular issue; and (2) facts which discredit a witness by pointing out the witness' bias, corruption, or lack of competency." Lawson v. State, 651 So. 2d 713, 715 (Fla. 2d DCA 1995).

In the instant case, the testimony was offered solely to impeach Kinser. Whether the collateral robbery was planned well in advance or within hours of its commission was not a material issue in the murder case. Nor did Kinser's inconsistent statement relate to witness bias, corruption, or lack of competency. See Caruso, 645 So. 2d at 394-395 (finding cross-examination of defendant's parents about whether they were afraid of their son collateral to any material issue, and thus state must accept answer given by

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[2] Appellee contends that the trial court properly found that appellant had committed a discovery violation. The record is clear that defense counsel did not put the state on notice that it intended to present Kinser's prior sworn statement for impeachment purposes. However, the state concedes that the alleged prejudice to the state is not apparent from the record.

witness). Thus, even if the Richardson inquiry was insufficient and the remedy for such a discovery violation was too harsh, the trial court's exclusion of the testimony should nevertheless be affirmed. See Caso v. State, 524 So. 2d 422, 424 (Fla. 1988) (stating that rulings premised on erroneous rationales can be affirmed provided valid alternative theory supports ruling). With these principles in mind, this claim should be denied.

Were this Court to find, however, that the exclusion of the impeachment evidence was erroneous, any error must be considered harmless. The jury heard extensive testimony regarding Kinser's credibility. Kinser was an accomplice/principal in the robbery and murder of Mr. Patel. (R 2781-2782, 2792). Kinser's extensive criminal record, twenty to twenty-five prior felony convictions, committed both with and without appellant, was discussed at length with the jury. (R 2792-93). Kinser purchased the murder weapon that was ultimately used to commit this murder, knowing that it was a crime for him to do so. (R 2793, 2796, 2800). Kinser was involved in planning the robbery of Mr. Patel. (R 2813). Kinser committed numerous robberies to support his $3,000 a week cocaine habit. (R 3102, 3121). Between the time Mr. Patel was murdered and the time Kinser confessed to his participation in the crime, he had stolen $25,000 dollars worth of property and had written $3,000 dollars worth of bad checks. (R 3144). Kinser detailed his prior criminal history including the maximum penalties he could have received for his various crimes. (R 3136-3143). Thus, given the extensive impeachment evidence already before the jury, there is no

reasonable possibility that the outcome of the proceedings would have been different had appellant been able to further impeach Kinser with his prior inconsistent statement. Cf. Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (rejecting Brady claim where excluded evidence of hostility between possible suspect and victims was not material since jury heard substantial testimony regarding animosity between victims and potential perpetrator); Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987) (rejecting Brady claim where evidence of deal between state and key witness regarding favorable treatment in exchange for testimony was cumulative to evidence presented).[3]

Equally without merit is appellant's allegation that the state committed a Brady violation by withholding impeachment evidence and knowingly allowing a witness to commit perjury. Appellant's argument is misplaced since it is obvious that he was in possession of the prior inconsistent statement well before trial. Consequently, appellant cannot demonstrate that the state withheld evidence that he could not have been discovered with the exercise of due diligence. See Kelley v. State, 569 So 2d. 754 (Fla. 1990)

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[3] In asserting harmful error, appellant principally relies on cases where the trial court excluded the entire testimony of the only witness who would have corroborated the theory of defense. Baker v. State, 522 So. 2d 491 (Fla. 1st DCA 1988) (reversing trial court's exclusion of only witness who could establish self-defense theory based on victim's aggressive actions prior to crime); Donaldson v. State, 656 So. 2d 580 (Fla. 1st DCA 1995) (reversing trial court's exclusion of sole witness who heard confidential informant state that defendant was innocent). As detailed above, the facts of this case are clearly distinguishable from the cases relied upon by appellant.

(finding no Brady violation where tests results were known to defense and utilized at trial). Furthermore, appellant cannot demonstrate the requisite materiality required to demonstrate that a Brady violation occurred. In the context of the entire record, Kinser's inconsistent statement relating to the amount of time used to plan a collateral robbery does not raise a reasonable probability that the result of the proceedings would have been different. After all, the jury was already aware of Kinser's extensive prior criminal record, extensive drug use, participation in the crime, as well as a detailed discussion comparing the sentence he received and the one that could have been imposed. See Thompson v. State, 553 So. 2d 153, 155 (Fla. 1989) (finding main witness' apparent contradiction regarding the amount of money stolen by the victim a clear example of statement that is immaterial); Duest v. State, 555 So. 2d 849 (Fla. 1990) (finding bus ticket which placed defendant out of town after the murder immaterial to whether he was in town at time of murder, thereby doing little to bolster credibility of defendant's witness); Morgan v. State, 415 So. 2d 6, 10-11 (Fla. 1982) (finding erroneous limitation of cross-examination harmless error where same matters were brought out through other evidence); Gibson v. State, 640 So. 2d 288, 291 (Fla 1995)(same).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN RESTRICTING THE CROSS-EXAMINATION OF A STATE WITNESS REGARDING ALLEGED BENEFITS RECEIVED FOR PRIOR WORK AS A CONFIDENTIAL INFORMANT.

Appellant alleges that the trial court erred in restricting the cross-examination of Officer Cucchiara regarding his prior dealings/relationship with Jay Kinser. Appellant claims that on direct examination Cucchiara vouched for the credibility of Kinser and created a false impression that Kinser worked as a confidential informant for the Martin County Sheriffs' Office without receiving any benefit from the state for his efforts. When appellant attempted to impeach Cucchiara during cross-examination, the court sustained an objection by the state. According to appellant, the trial court's ruling erroneously precluded him from demonstrating that Kinser had actually received benefits stemming from his work as a confidential informant.

A review of the record, however, establishes that this issue was not preserved for appeal and is wholly without merit. The alleged error arose during the following exchange: The state called Officer Cucchiara to explain how the police became in contact with Jay Kinser. Officer Cucchiara testified that he was contacted by Kinser on May 22, 1992. Kinser had previously worked with Cucchiara as a confidential informant in the narcotics division. The two had not spoken in almost five years. (R 2700-2701). Kinser sought to reestablish that relationship because his girlfriend was having difficulties with probation. (R 2699-2700).

Specifically, Kinser asked if he could work for Cucchiara by providing him with information in exchange for lenient treatment for his girlfriend's violation of probation charges. (R 2700). Kinser told the officer that he had information regarding the killing of Mr. Patel. In order to prove to Cucchiara that he knew something, Kinser told Cucchiara that the murder weapon was a .32 caliber revolver. (R 2702). At that point, Cucchiara put Kinser in touch with the lead detective in the murder investigation. That was the extent of Cucchiara's involvement. (R 2702-2704).

On cross-examination, defense counsel asked if Cucchiara had helped Kinser get off crack cocaine and help get him into a rehabilitation program. (R 2714). The state objected based on the trial court's prior order regarding Kinser's drug use.[4] (R 2714-2715). Defense counsel challenged the truthfulness of the prosecutor's objection, but he never attempted to explain to the judge the basis for the question. (R 2715). The trial court sustained the objection based on the prior ruling:

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[4] The state filed a motion in limine, seeking to preclude the defense from inquiring into drug use of state witnesses. (SR 467). Relying on Edwards v. State, 548 So. 2d 656 (Fla. 1989), the state argued that, absent any evidence that Kinser was taking drugs at the time of the crime, his drug addiction was inadmissible. (SR 467). Defense counsel argued that the defense would be that the murderer was Kinser, an out-of-control drug addict who robbed and killed the victim in order to get money for his next fix. According to counsel, since Kinser had admitted to extensive drug use, the defense should be permitted to delve into that line of questioning. (SR 468-469). Based on the premise that no evidence had been presented that Kinser was under the influence of drugs at the time of the murder, the trial court granted the state's motion. However, the court was mindful of the defense and made it clear that the issue could be revisited once Kinser was ready to take the stand. (SR 477-481).

> THE COURT: This is- I've ruled that Kinser testifies-- I recall we were going to go over that in great detail before he does we're not going to get in to some of these areas unless it's contemporaneous.
>
> DEFENSE ATTORNEY: So I can't ask this witness?
>
> THE COURT: I'll sustain the objection and let's go on.

(R 2715). At no time did defense counsel raise any objection based on an alleged incorrect assertion that Kinser did not receive any favorable treatment in exchange for his work as a confidential informant. (R 2715). At no time did defense counsel argue that such inquiry should be permitted because the witness improperly vouched for Kinser's credibility on direct. (R 2715). Given the fact that appellant attempts to raise a different argument on appeal then that which was raised at trial, review is precluded. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Furthermore, after the court sustained the objection, defense counsel never attempted to explain the necessity for this line of questioning. Rather than explain to the court that the inquiry into Kinser's prior drug use became necessary due to the alleged false statements presented on direct, defense counsel did nothing. He acquiesced to the trial court's ruling which was based on the state's motion in limine. Given appellant's total failure to present the issue before the trial court, review must be precluded. Cf. Gibson v. State, 661 So. 2d 288, 290 (Fla. 1995) (finding that counsel's failure to object to trial court's procedure regarding

defense counsel's ability to meet with defendant bars complaining about the sufficiency of that meeting on appeal).

Irrespective of the procedural default attached to this claim, appellant cannot establish that he is entitled to relief on the merits. In order to prevail on this claim, appellant must demonstrate that the trial court abused its discretion. See Maggard v. State, 399 So. 2d 973, 975 (Fla. 1981) (holding that evidentiary rulings will not be overturned absent an abuse of discretion). Contrary to appellant's assertion, the jury was never given the impression that Kinser acted as a confidential informant without the benefit of some type of assistance. Appellant takes Cucchiara's direct testimony out of context. Without objection, Cucchiara characterized his relationship with Kinser as follows:

> He had gotten to be kind of a trust between us as far as that I would tell him the truth exactly the way things would be and he trusted me in that sense of the word. He knew if I told him something he could depend on it and I wouldn't help him, I wouldn't lie to him and I wouldn't do anything to break the law or help him break the law. So we had kind of a rapport developed between us back in '87, '88 when I was working undercover narcotics.

(2701). Cucchiara did not say that Kinser provided information without anything in return. He was only describing the rapport built up between the two through their work together. If Cucchiara could not offer Kinser help in exchange for information he would be honest with him and tell him so. Appellant's characterization/ interpretation of the statement as false testimony regarding a lack of any prior deals between the two men is simply not accurate.

Moreover, the jury was aware that Kinser's most recent contact with Cucchiara involved a potential deal. Cucchiara testified that Kinser, in fact, called the officer to work out an arrangement where he would provide information in exchange for some assistance:

> CUCCHIARA: Basically I got home from work approximately sometime in the area of 4:30 to 5:00 o'clock. I received a telephone call from a Mr. Jay Kinser at my residence. Mr. Kinser was upset. He contacted me due to the fact that he was having problems with his girlfriend and his girlfriend had missed a meeting with her probation officer, and Mr. Kinser wanted to know if there was anything I could do to help him. If he could give me some information or do some work for me, that I could help his girlfriend get off the probation charges if she was going to be in trouble.

(R 2699-2700). The jury was never under the impression that Kinser gave information to the police without receiving anything in return.

A review of the record illustrates that appellant was not interested in correcting an alleged false statement regarding Kinser's prior arrangement with the Martin County Sheriff's Office. He was simply trying to circumvent the trial court's pre-trial ruling regarding Kinser's drug use. At no time did defense counsel ever ask Cucchiara about any actual deal or arrangement he had with Kinser regarding any specific case. Nor did appellant urge the trial court to allow him to question Cucchiara regarding anything specific along that line of questioning. Given defense counsel's clear lack of interest in pursuing any inquiry regarding any deals between Cuchhiara and Kinser in the past, the trial court properly

limited the cross-examination. See Torres-Arboledo v. State, 524 So. 2d 403, 408 (Fla. 1988), cert. denied, 488 U.S. 901 (1989) (finding no error in precluding questioning regarding arrest of witness where proponent made no showing that actual charges were pending).

To the extent this Court finds that it was error to prohibit cross-examination on the issue, any error must be considered harmless. Any working relationship between Cucchiara and Kinser terminated almost five years prior to the murder of Mr. Patel. (R 2700-2701). Furthermore, Kinser's work as a confidential informant was not related to this murder, nor was Officer Cucchiara connected to this murder investigation in any way. (R 2704). Appellant simply cannot establish that any critical information was kept from the jury. Thus, there is no reasonable possibility that, had the jury heard that Cucchiara may have helped Kinser receive drug rehabilitation in exchange for information, the result of the proceedings would have been different. Breedlove v. State, 580 So. 2d 605, 608-609 (Fla. 1991) (finding that a criminal investigation relating to a witness must not be too remote and must be relevant to the instant case to be admissible), rev'd on other grounds, 595 So. 2d 8 (Fla. 1994); Gibson, 661 So. 2d at 290 (finding improper limitation of cross-examination harmless given fact that defense was able to expose bias through another line of questioning). Therefore, this claim is without merit and should be denied.

ISSUE III

WHETHER THE TRIAL COURT WAS REQUIRED TO CONDUCT A RICHARDSON INQUIRY AND, IF SO, WHETHER ITS INQUIRY WAS SUFFICIENT AND, IF NOT, WHETHER SUCH ERROR WAS HARMLESS.

Appellant contends that the trial court failed to conduct an adequate Richardson[5] hearing once defense counsel alleged that he had never seen a deposition used by the state to impeach a court witness. During the state's case, Elizabeth Hernandez was called as a court witness, without objection from defense counsel, because she had given numerous inconsistent statements. During direct examination, Hernandez stated that she had been in Mr. Patel's store the night of the murder on one occasion. The prosecutor, without objection, impeached Hernandez with her deposition in this case, wherein she stated that she had been in the store twice that evening. (R 2494). The prosecutor then asked Hernandez if she had seen Pomeranz in the store that evening. She stated that she had seen him at the phone outside the store, but not in the store. (R 2496). Again, the prosecutor impeached her with deposition testimony that she had seen Pomeranz in the store. (R 2496-2497).

At that point, the defense asked to see what prior statement the prosecution was using, and the state indicated it was Hernandez' deposition from Kinser's case. (R 2497). Defense counsel objected, claiming that he was never furnished with this statement. He had mistakenly thought that the deposition being used to impeach Hernandez was the one taken in this case. (R

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[5] Richardson v. State, 246 So. 2d 771 (Fla. 1971)

2499). The state countered that defense counsel was well aware of the deposition taken in Kinser's case and well aware of inconsistent statements given by Hernandez. (R 2499-2500). Defense counsel never disputed the state's argument, nor did defense counsel at any time claim that he was surprised by the prior inconsistent statement, or that he was in any way prejudiced by the state's utilization of same. (R 2500). At that point, the trial court stated, "Let's go on." (R 2500). The direct examination continued without any further use of the deposition. (R 2500-2505).

On appeal, appellant complains that the trial court failed to conduct an adequate Richardson hearing and failed to make factual findings regarding any prejudice that may have been caused by the alleged violation. The state submits, however, that the discussion that ensued between the court and the parties was adequate to establish that no prejudice had occurred. The trial court provided both sides an opportunity to discuss the alleged violation. (R 2498-2500). From that exchange, it was obvious that defense counsel was well aware of the fact that Ms. Hernandez had given several prior inconsistent statements. The statements appear in police reports as well as in her deposition in this case. (R 2472-2473). As noted above, defense counsel never stated that he was unaware of the inconsistent statements and, in fact, the record clearly demonstrates that counsel was aware of the inconsistent statements. (R 2472-2474, 2499-2500). Thus, from this discussion,

the trial court could have determined that no prejudice had occurred, and no sanction was warranted.

To the extent the trial court failed to make specific findings, such error was harmless beyond a reasonable doubt. See State v. Schopp, 653 So. 1016 (Fla. 1995) (reviewing court may determine whether or not procedural prejudice exists absent adequate hearing below). Procedural prejudice occurs when "there is a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." Id. at 1020. Pomeranz claims that, had he known about this particular prior inconsistent statement of Hernandez, he might have objected to her status as a court witness, or he might have redeposed her. Neither assertion, however, even if true, would establish procedural prejudice. First, Appellant cannot establish that the success of the state's motion depended on his approval. To the contrary, all that is required is a showing that a witness will testify contrary to a prior statement. See Brumbley v. State, 453 So. 2d 381, 384 (Fla. 1984) (finding trial court well within its discretion to grant state's motion to call witness as court witness once it was known witness would contradict prior statement). Second, the fact that appellant may have conducted a further deposition of the witness had he known about the additional inconsistent statement does not establish a "different defense or strategy" for purposes of establishing procedural prejudice. Redeposing Hernandez would not have made her other prior statements any less inconsistent. Nor would redeposing the witness make her

any more prepared for her trial testimony. She insisted that she saw Pomeranz at the phone outside the store, and Kinser in the store. (R 2496, 2511-2516). Finally, defense counsel was not precluded from having Hernandez explain her prior inconsistent statements if he chose to do so. Thus, given the lack of procedural prejudice, this claim must be denied.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF KINSER'S SISTER REGARDING KINSER'S REPUTATION WITHIN HIS FAMILY.

Appellant attempted to introduce evidence regarding Kinser's dishonest reputation among his family members. Kinser's sister, Mitizi Caldwell, was asked if Kinser had a bad reputation in the family for being untruthful. (R 3389). She responded that her brother was sometimes untruthful. (R 3389). The state objected based on the leading nature of the questions, as well as the fact that her personal opinion is inadmissible. (R 3389-3393). Defense counsel argued that the testimony should be admitted under section 90.803(21), Florida Statutes, under the "Reputation as to Character" exception to the hearsay rule. (R 3394-3395). Defense counsel further argued that Kinser's family was large enough to constitute a "community" within the hearsay exception. (R 3394-3396). The court ruled that Caldwell's testimony was based on personal knowledge and contact with Kinser, and was therefore improper. (R 3398). The Court permitted appellant to ask the witness if she knew what Kinser's reputation was among the neighborhood, but Caldwell responded that she did not know. (R 3398-99).

The trial court's ruling was correct. See Larzelere v. State, 21 Fla. L. Weekly S147, 148 (Fla. March 28, 1996) (stating that testimony concerning someone's reputation for truthfulness within community cannot be based on personal opinion and that opinion must be drawn from broad group of people). To the extent there was

error, it must be considered harmless, given the extensive impeachment evidence against Kinser as outlined in Issue I, supra. See State v. DiGuilio, 491 So. 2d 1182 (Fla. 1989); cf. Gibson v. State, 661 So. 2d 288, 291 (Fla. 1995) (finding any error in limiting cross-examination harmless given fact that impeachment evidence was elicited through other means).

ISSUE V

WHETHER THE TRIAL COURT PROPERLY PRECLUDED APPELLANT FROM IMPEACHING KINSER WITH SPECIFIC DETAILS OF HIS PRIOR CONVICTIONS.

Appellant complains that he was impermissibly precluded from cross-examining Kinser regarding the details of his prior convictions. Appellant argues that the state opened the door to the inquiry during the following exchange:

> PROSECUTOR: Would Ed be upset with you if you started carrying guns and had that in front of him?
>
> KINSER: He would have been real upset, yes.

(R 2843-2844). Appellant objected and asked that the this line of questioning be stricken. Appellant claimed that the jury was left with the false impression that it was out of character for Kinser to carry guns. The court told the prosecutor to move on, but refused to strike the testimony and refused to allow defense counsel the opportunity to delve into the details of Kinser's prior record. (R 2846-2847).

Relying on Lusk v. State, 531 So. 2d 1377 (Fla. 2d DCA 1988), appellant claims that the trial court committed reversible error. However, a trial court enjoys a broad range of discretion in ruling on evidentiary matters. See Maggard v. State, 399 So. 2d 973, 975 (Fla. 1983). In the instant case, the trial court properly determined that the state had not opened the door to any inquiry concerning the details of Kinser's prior convictions. Whether Kinser's friend, Ed Barnes, would have been upset at the sight of

Kinser carrying guns could not have been construed to mean that it was out of character for Kinser to carry guns. Unlike the victim's testimony in Lusk where he stated that he was a nonviolent person, no similar logical inference could have been drawn from Kinser's testimony. Appellant has not demonstrated that the trial court's ruling was an abuse of discretion or that the jury was left with any false impression regarding Kinser's use of guns. See Gibson v. State, 661 So. 2d 288, 291 (Fla. 1995).

Even if the court's ruling was erroneous, appellant's conviction should nevertheless be affirmed. The jury was well aware that Kinser used guns frequently. The jury knew that Kinser supplied appellant with the murder weapon and a twelve-gauge shotgun. (R 2725, 2793, 2726). Besides hearing that Kinser had committed numerous other robberies, the jury also heard that Kinser used a .357 Magnum in one of those other robberies. (R 2752, 2792, 2864, 3103, 3121). Kinser also stated that the fact that he was a convicted felon did not stop him from obtaining or possessing guns even though he knew it was wrong. (R 2796). Finally, in response to questioning by defense counsel, Kinser admitted that he kept guns at Barnes' house even though he knew Barnes would be upset. (R 2893). Thus, there is no reasonable possibility that, had the jury heard the nature of Kinser's prior convictions, the result of the proceedings would have been different. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY ALLOWED THE STATE TO CROSS-EXAMINE A DEFENSE WITNESS CONCERNING THE WITNESS' CREDIBILITY.

Appellant claims that the state was improperly allowed to use recross-examination of defense witness, Steven Drake, to bolster the credibility of Jay Kinser. His objection at trial, however, was that the state's recross was irrelevant and beyond the scope of appellant's redirect examination:

> PROSECUTOR: Mr. Drake, since we've gone into a little bit of your background history, the word snitch has been used here in trial with people.
>
> DEFENSE COUNSEL: Objection, Your Honor, may we approach?
>
> DEFENSE COUNSEL: This is completely absurd and I object to it, Judge, no relevancy. What he's doing--what he's supposed to be asking is Recross-Examination based on what questions were elicited on Redirect Examination.
>
> PROSECUTOR: Judge, he opened the door when he talked about background and jail and everything else.

(R 3529-3530) (emphasis added). After the trial court overruled the objection, the prosecutor continued:

> PROSECUTOR: You know what a snitch is?
>
> WITNESS: Yes.
>
> PROSECUTOR: You've heard that term?
>
> WITNESS: Yes.
>
> PROSECUTOR: Now, do you see a snitch as a person that always gives -- a person that gives information but gives it falsely?

DEFENSE ATTORNEY: Objection, Your Honor, is this witness an expert of some sort this--

(R 3531). The court overruled the objection, and the testimony continued. Since appellant did not make the same argument below that he makes on appeal, this issue was not preserved for review. See Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Even had it been preserved, appellant cannot establish that the trial court abused its discretion in allowing this evidence. Maggard v. State, 399 So. 2d 973(Fla. 1981). The state's key witness, Jay Kinser, testified that on the night of the murder he picked up Pomeranz at 9:42 p.m. (R 2815-2816). He knew what time it was because he looked at the clock in his car. (R 2815). In an effort to rebut that fact, the defense called Steven Drake. Mr. Drake had purchased the car formerly owned by Kinser and used in the robbery/ murder of Mr. Patel. (R 3481). Drake testified that the car had the original radio in it and that it was not equipped with a clock. (R 3484, 3490). During cross-examination, Drake was shown a copy of a receipt indicating that Kinser had bought a car stereo with a clock. The receipt also indicated that Kinser had paid to have the stereo installed in the car. Appellant objected to the use of the receipt since it had not yet been placed into evidence, and the prosecutor explained that he was attempting to attack the credibility of Drake. (R 3502, 3509-3510). Further impeachment of Drake included the prosecutor's inquiry into Drake's relationship with the defense attorney. (R 3513-3514).

On redirect, defense counsel attempted to bolster Drake's credibility by inquiring into Drake's background. Drake was asked if had a criminal record, if he had ever stolen anything, or molested any anyone. (R 3522-3523). The court sustained the prosecutor's objection to the improper bolstering. (R 3523). However, on recross-examination, the prosecutor asked Drake if he knew what a snitch was. (R 3530). After the court overruled the defense's objection (R 3530), Drake stated that he had given information to the Sheriff's Office in the past few months and that he had never given false information. (R 3531). Given the fact that defense counsel opened the door to further impeachment of Drake's credibility, on redirect, the state's questioning was proper. See Farina v. State, 569 So. 2d 425, 429 (Fla. 1990) (state permitted to impeach defendant on recross-examination once defense opened door to such inquiry on redirect); Gibson v. State, 661 So. 2d 288, 291 (Fla. 1995) (evidence code liberally permits introduction of evidence to show bias of a witness).

In summation, appellant has not preserved this issue for review. Regardless, he has failed to establish that any error occurred. At no time was Kinser's credibility connected to the inquiry. Rather, Drake's responses were related solely to his own credibility. Appellant's characterization of the inquiry as improper bolstering of Jay Kinser is not supported by the record. To the extent that this Court finds error, it must be considered harmless. The overall content of Drake's testimony regarding snitches is that he did not provide any false information. It

defies logic to suggest that such information is harmful to appellant. State v. DiGuilio, 429 So. 2d 1129 (Fla. 1986). Therefore, appellant is not entitled to relief.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO ISSUE A SUBPOENA DUCES TECUM FOR THE JAIL RECORDS OF JAY KINSER.

Several months before trial, defense counsel filed an unsworn motion requesting a psychological examination of Jay Kinser. (R 419-420). In that motion, defense counsel alleged that Kinser suffered from emotional problems, stress, and anguish. The only bases for such a claim derived from appellant and Kinser's criminal history. (R 421-42). At the hearing on the motion, defense counsel conceded that he did not have sufficient grounds to support his motion, and the trial court denied it based on the lack of evidence to support the allegations. (R 418, 429-30). Alternatively, defense counsel requested the issuance of a subpoena duces tecum for Kinser's prison records, specifically his mental health records for the three years preceding the murder. He argued that since the state had obtained prison records on Pomeranz, and since Kinser was the state's main witness, it was only fair that he have access to Kinser's prison records. (R 418-20, 431-39). The trial court denied the request. (R 440).

Appellant claims that the trial court improperly refused to issue a subpoena duces tecum for the jail records of Jay Kinser, and further claims that the trial court should have, at the very least, reviewed the records *in camera* before ruling. The state submits that the trial court's ruling was proper because appellant failed to make even a prima facie showing of relevance. As conceded by defense counsel, Kinser testified during his deposition

that he had not had any psychological evaluations in prison other than those performed yearly on every inmate. Based on information from appellant and "other sources," which was not disclosed, defense counsel believed otherwise and wanted to check Kinser's prison records for proof. He made no assertion, however, as to the relevance of such information, other than as impeachment material. He did not assert that Kinser had a mental disease or defect, nor did he establish a nexus between the records sought and the crimes charged. Rather, he sought to "fish" for potential impeachment material on a collateral matter. Under these circumstances, the trial court properly denied the request. Cf. Edwards v. State, 548 So. 2d 656, 658 (Fla. 1989) (upholding trial court's ruling which precluded defense from bringing forth evidence of drug use for impeachment purposes since there was no evidence that drug use occurred at time of crime or at time of testimony); Tullis v. State, 556 So. 2d 1165, 1166 (Fla. 3d DCA 1990) (upholding trial court's refusal of defense request to impeach witness, former cellmate of defendant, about certain delusions witness may have had, given that such experiences did not occur at time of offense or at time of trial).

Even if defense counsel made factually sufficient allegations, he failed to follow the proper procedures for requesting a subpoena duces tecum. Appellant sought to subpoena confidential mental health records from a state agency relating to a state witness. See § 945.10(1)(a), Fla. Stat. (1993) (providing that mental health, medical, or substance abuse records of an inmate generated

by the Florida Department of Corrections are confidential and exempt from Florida's Public Records Act and Article I, section 24(a), of the Florida Constitution). Under section 455.241, Florida Statute (1993), however, such records can be obtained by court order if proper notice is given to the subject of the records by the party seeking the records. Defense counsel made no written motion for the issuance of a subpoena duces tecum relating to Kinser's confidential mental health records, and gave no notice to Kinser, or Kinser's attorney, of his oral request. Thus, by statute, the trial court was not authorized to issue the subpoena. Cf. Hunter v. State, 639 So. 2d 72 (Fla. 5th DCA 1994) (requiring state to give notice to subject of records sought by investigative subpoena and proof of relevance of records if objection made); Ussery v. State, 654 So. 2d 561 (Fla. 4th DCA 1995) (same).

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S INSUFFICIENT REQUEST FOR A TRANSCRIPT OF THE GRAND JURY TESTIMONY OF ALL THE STATE AND DEFENSE WITNESSES.

Appellant claims that the trial court erred in denying his request for the grand jury testimony of all the state and defense witnesses. He further complains that the court should have at least ordered the release of the statements of Jay Kinser and Darrin Cox based on their importance in the state's case as well as the fact that they both have prior criminal records. Finally, appellant claims that should have conducted an *in camera* review of the information. This issue is not preserved for review, however, as appellant is raising a different argument on appeal than what was raised before the trial court. See Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990) (holding that failure to raise specific argument at trial precludes review on appeal).

Prior to trial appellant requested the release of grand jury testimony of all the witnesses. Pomeranz argued that he was entitled to same since the state had access to the grand jury testimony of defense witnesses. The prosecutor would be at an advantage since he would be able to impeach a defense witness with the grand jury testimony should the need arise. Such impeachment would compromise the credibility of appellant and defense counsel. Consequently, appellant should have access to all the witnesses' testimony. (R 554-555). Alternatively, appellant argued that the state should be precluded from using any grand jury testimony as

impeachment material if he is denied access to it. (R 556). The trial court denied the motion. (R 559).

At no time did counsel argue that he was entitled to the testimony of any individual state witness, including Cox or Kinser, based on the belief that he or she gave an inconsistent statement. To the contrary, appellant's concern below was targeted more towards the testimony of defense witnesses. Moreover, at no time did he request that the court conduct an *in camera* review of the testimony before denying the request. Consequently, review is precluded. Occhicone.

In any event, appellant has not established that he is entitled to relief. Pursuant to section 905.27, Florida Statutes (1993), courts have required defendants seeking to obtain grand jury testimony to show a particularized need, sufficient to justify the revelation of generally secret grand jury proceedings. See, e.g., United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983); Jent v. State, 408 So. 2d 1024 (Fla. 1981); Brookings v. State, 495 So. 2d 135 (Fla. 1986). "Mere surmise or speculation regarding possible inconsistencies in testimony is not a proper predicate. Jent, 408 So. 2d at 1027.

Appellant's reliance on Butterworth v. Smith, 494 U.S. 624 (1990), is of no moment. In Butterworth, the United States Supreme Court held that Florida could not prohibit a witness appearing before a grand jury from disclosing the content of his testimony once the grand jury had been discharged. However, "any witness is free *not* to divulge his own testimony, and that part of the Florida

statute which prohibits the witness from disclosing the testimony of *another* witness remains enforceable." Id. at 633. More compelling is that, the part of the statute at issue here, i.e., the prohibition against *carte blanche* disclosure of witnesses' testimony absent a particularized need, remains enforceable. See State v. Meeks, 610 So. 2d 647 (Fla. 3d DCA 1992) (reversing order of disclosure where defendant's motion did not contain any facts which supported his allegations that the state withheld critical facts from the grand jury).

Appellant's reliance on Pennsylvania v. Ritchie, 480 U.S. 39 is equally unavailing. According to Ritchie, the defendant must still establish a predicate that the testimony contains material evidence. Moreover, there must be some specificity to the request. United States v. Bagley, 105 S. Ct. 3375 (1985). Lastly, appellants' compromise request that an in camera inspection should have been conducted does not transform his demand into any legal entitlement. State v. Gillespie, 227 So. 2d 550 (Fla. 2d DCA 1969); Minton v. State, 113 So. 2d 361 (Fla. 1959).

Finally, appellant's reliance on Keen v. State, 639 So. 2d 597, 600 (Fla. 1994), is of no moment since the cases are factually dissimilar. In Keen, this Court found that the defendant made a particularized showing that justified release of grand jury testimony:

> Some of those circumstances apply here to show a particularized need for the grand jury testimony: Shapiro was the key witness against Keen; Shapiro was the only eye witness to Anita's death, yet he gave conflicting

> statements to police about her death; and a number of years passed between Shapiro's original account and his testimony on retrial.

Id. at 600. The only factor present in the instant case that is similar to Keen is the fact that Kinser is the state's main witness. That factor alone does cannot warrant relief. See Jent and Brookings. The trial court's ruling was proper.

ISSUE IX

WHETHER THE ADMISSION OF A PRIOR VIOLENT FELONY WHICH SUBSEQUENTLY WAS REVERSED TAINTED APPELLANT'S CONVICTION.

Appellant claims that the admission of collateral crime evidence at the guilt phase of his trial violated due process because he was subsequently "acquitted" of the collateral crime. A review of proceedings below, including disposition of the collateral crime, demonstrates that Pomeranz was never acquitted of the armed robbery conviction. Hence, this claim is without merit.

During the guilt phase, the state introduced testimony regarding appellant's prior conviction for armed robbery. (R 2304-2308). Subsequent to his conviction and sentence of death, the armed robbery conviction was reversed on procedural grounds, and his case was remanded for retrial. Pomeranz v. State, 634 So. 2d 1145 (Fla. 4th DCA 1994). Ultimately, Pomeranz pled guilty to grand theft. (R SR 967-968). Relying on Bradley v. State, 378 So. 2d 870 (Fla. 2d DCA 1979), and its progeny, Pomeranz argues that his conviction for grand theft somehow amounts to an acquittal of armed robbery. However, fatal to appellant's claim is the fact that the conviction for armed robbery was not reversed based on insufficiency of evidence. The district court reversed the conviction based on the trial court's erroneous restriction of cross-examination. Pomeranz, 634 So. 2d at 1146.

Moreover, when pleading guilty to grand theft, Pomeranz admitted that he had, in fact, robbed Mark Meacham at gunpoint.

(SR 967-968).[6] Given the fact that Pomeranz has never been acquitted of the collateral crime, the admission of the facts regarding the prior bad acts was not erroneous. Cf. Holland v. State, 466 So. 2d 207 (Fla. 1985) (upholding admission of similar fact evidence despite fact that charges were nolle prossed). This claim must be denied.

[6] Pomeranz admitted to the facts as outlined in the police reports for that case.

ISSUES X, XI AND XII[7]

WHETHER THE TRIAL COURT ERRED IN ADMITTING COLLATERAL CRIME EVIDENCE.

Appellant argues under three separate claims that the trial court erred in allowing the state to present collateral crime evidence during the guilt phase. Prior to trial, Pomeranz filed a motion in limine contesting only the admissibility of appellant's participation in the robbery of a restaurant in Alabama one month after this murder, during which he used the same gun that he used in the instant murder. (R 246-48). The state sought to introduce the evidence not as Williams Rule evidence, but as relevant, inextricably intertwined evidence. After an extensive hearing on the subject, Judge Shack denied the motion in limine, finding the evidence relevant to establish appellant's identity as the killer, and to rebut appellant's contention that Kinser was the killer. The trial court found that it corroborated details of Kinser's testimony, as well as demonstrated that appellant knew how to use a gun. (R 276-278, SR 741-922). Judge Shack ruled, however, that the state could not make the Alabama robbery a feature of the trial, refer to the collateral crime as a "robbery," or create sympathy for the victim in that case. (R 278).

During voir dire, defense counsel repeatedly told the venire that his client had committed dozens of other robberies and burglaries. (R 559, 560, 570, 584, 586, 605, 608, 610, 636, 671,

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[7] For the sake of brevity and clarity, these three issues have been combined.

685, 700, 759, 779, 763, 820, 865-866, 878, 886, 951, 960, 974). His strategy was to show that the collateral crimes committed by Pomeranz were different from this murder, i.e., that Pomeranz was a robber not a murderer. (R 560, 586, 587, 611-612, 637, 671, 672, 740, 780, 802, 862, 906, 952, 975, 977). During his opening statement, defense counsel again told the jury that Pomeranz was involved in other robberies and discussed the dissimilarities between the murder of Mr. Patel and appellant's other crimes. (R 1185-1188).

When the state sought to introduce the testimony of the victim in the Alabama case, defense counsel referred Judge Cianca to Judge Shack's previous order, but did not renew his objection to this testimony. Aware of the limitations placed on the state by Judge Shack, Judge Cianca ruled that it would give the jury a cautionary instruction, but would not otherwise limit the state, given defense counsel's comments during voir dire and opening statement. (R 1537-42). Later, during the state's closing argument, when it referred to the Alabama robbery, defense counsel did not object to any of the state's comments.

Nor did defense counsel object when the state introduced testimony relating to three other robberies. Roy and Violet Wright testified that three masked men, none of whom they could identify, burglarized their home on April 27, 1992. (R 2277-2286, 2289-2302). Anthony Jackson testified that he and Pomeranz committed the Wright burglary. (R 2556-57). He also testified that he and Pomeranz burglarized the Nicoles' home on April 20, 1992. Jay

Kinser testified that Pomeranz robbed a Twistee Treat on April 28, 1992. (R 2840). Finally, Officer Hannon testified on redirect that appellant committed three collateral burglaries/robberies on April 20, 1992; April 27, 1992; and April 28, 1992. (R 2203-2204).

On appeal, appellant claims that the trial court erred in admitting evidence and argument relating to the Alabama robbery, especially in light of appellant's offer to stipulate that he was in possession of the murder weapon on the day of the Alabama robbery; that the trial court erred in refusing to enforce Judge Shack's prior limitations; and that the admission of the Wright, Nicoles, and Twistee Treat burglaries/robberies constituted fundamental error.

Initially, the state submits that appellant's challenge to the admission of the Alabama robbery was not preserved for review since he failed to object to its admission, or the state's argument, during the trial. Failure to object to the introduction of collateral crime evidence at the time it is introduced waives the issue for appellate review even though a prior motion in limine has been denied. Correll v. State, 523 So. 2d 562, 566 (Fla. 1988). See also Lawrence v. State, 614 So. 2d 1092 (Fla. 1993); Lindsey v. State, 6036 So. 2d 1327, 1328 (Fla. 1994).

More importantly, the state submits that Pomeranz abandoned the issue when he affirmatively decided to use the evidence as part of his defense, repeatedly telling the jury that his client had committed dozens of other robberies and burglaries. Simply because his strategy was unsuccessful does not entitle Pomeranz to

challenge, on appeal, the admissibility of the same evidence he relied upon at trial. See Allen v. State, 662 So. 2d 323, 328 (Fla. 1995) (precluding appellate review of prosecutor's comments where defense counsel emphasized same information to jury as part of defense strategy).

Regardless, evidence of the Alabama robbery was properly admitted by the trial court. The relevance of the Alabama robbery centered around the fact that the same gun was used in both crimes. Consequently, the state sought its admission not as Williams rule evidence, but because it was inextricably linked to this case. Cf. Bryan v. State, 533 So. 2d 744, 747 (Fla. 1988). Evidence of crimes which are inseparable from the crime charged or which are inextricably intertwined with the crime charged is not Williams rule evidence. Bryan, 533 So. 2d at 747. Rather, such evidence is admissible because "it is a relevant and inseparable part of the act which is in issue. . . . [I]t is necessary to admit the evidence to adequately describe the deed." Charles W. Ehrhardt, Florida Evidence § 404.17 (1993 ed.).

In Remeta v. State, 522 So. 2d 825, 827 (Fla. 1988), this Court upheld the admission of a collateral murder because the same gun was used in both crimes:

> The testimony was relevant to help establish appellant's identity and the extent of his participation in the Ocala murder in view of his asserted defense that his accomplice was the primary perpetrator and triggerman in the killing. . . . [W]e find it was clearly proper to establish Remeta's possession of the murder weapon and counteract Remeta's

> statements blaming the crimes on his companion.

Id. at 827-828. As in Remeta, evidence relating to the Alabama robbery was relevant to establish Pomeranz' identity as the triggerman, and to rebut his asserted defense that Kinser was the perpetrator. See also State v. Escobar, 570 So. 2d 1343, 1345 (Fla. 3d DCA 1990); Smith v. State, 641 So. 2d 1319, 1322 (Fla. 1994).

In an effort to thwart the state's use of the evidence, appellant offered to stipulate to the fact that he was in possession of the murder weapon on May 21, 1992, in Alabama. He claimed that the state should have been required to accept his offer of stipulation because the stipulation negated the need to present any evidence regarding the robbery. In declining the stipulation, the state responded that merely stipulating that Pomeranz was in possession of the gun on a particular day was not probative of anything and could be easily explained away. The trial court agreed that appellant's stipulation left open the door for appellant to diffuse the importance of his possession. (R 277).

The trial court properly refused to force the state to accept the limited stipulation. In Amoros v. State, 531 So. 2d 1256, 1259 (Fla. 1988), this Court upheld a similar ruling. The state was allowed to present evidence regarding the defendant's acquittal for a collateral murder. The same gun used in the collateral murder was also used in the murder for which the defendant was being

prosecuted. Defense counsel offered to stipulate that Amoros was seen in possession of the same gun on the day of the collateral murder. The state rejected the stipulation, and the trial court allowed the admission of the collateral murder. This Court upheld that ruling:

> It was essential for the state to demonstrate Amoros' possession of the gun on a prior occasion, but as important was the necessity of showing this gun fired the bullet that killed Walter Coney. Without showing where the bullet in Coney came from, there is no basis to link the gun to the shooting of Rivero. The testing concerning the comparison of the bullets was meaningless without an explanation of where the Coney bullet originated. We reject the assertion that Perkins controls or that Jackson limits its admission of the evidence in this instance. Instead, we find that evidence of the possession of the gun and its firing on a prior occasion was clearly admissible to link Amoros to the murder weapon.

Id. (emphasis added).

Aside from the fact that the evidence proved that appellant owned and used the gun, it was also relevant information regarding the credibility of Kinser:

> PROSECUTOR: Well, you heard the testimony from Detective Hannon in this case, that we know that Mr. Kinser came to the Sheriff's Office, he voluntarily called up out of the blue. They had no leads. They had no idea who had committed the robbery and Kinser reports to the Sheriff's Department, based upon the testimony that you heard in this case, what will be heard in this case, is that Kinser says, "I've been talking to the Defendant up there. He tells me he robbed the Steak House, the Sizzler Steak House, in Hunstville, Alabama.

> Hannon gets on the phone. Calls Hunstville, and the Huntsville Alabama Police Department says yeah, a Sizzler Steak House was in fact robbed in this particular case. So, actually, it goes to the importance -- the candor and credibility of Mr. Kinser in this particular case.
>
> Because Kinser is the one they are going to be trying to blame in this case as the co-defendant individual in this case. Mr. Kinser had no reason to come forward and give that information. He had no reason coming forward.
>
> I do not believe that the State at that point in the case would have ever been able to charge or convict Mr. Kinser because they had no idea who committed the robbery.
>
> Mr. Kinser says I was the getaway driver. I know who committed the robbery. He's in Alabama. I can tell you where he is and how to find him. It goes to Mr. Kinser's testimony in this matter that in fact he was truthful and reliable in this particular case as to giving that information.

(SR 913-914).

Before Kinser went to the police to confess, the state had no solid leads. In other words there was no case without Kinser's cooperation/confession. Kinser's knowledge about details of the crime, including the Alabama crime, was an integral part of the case/investigation. Kinser was both the state's main witness and Pomeranz's defense. How the police were able to focus in on Pomeranz could not be properly explained without admission of the Alabama robbery. (R 2004, 2015-2016, 2020, 2173). The Alabama robbery helped place the entire episode in proper perspective. Therefore, its admission was proper. See Williamson v. State, 21 Fla. L. Weekly S383) (Fla. Sept. 19, 1996) (upholding admission of

defendant's prior murder conviction to explain suspicious actions of state's key witness who was initially a suspect in the crime).

To the extent that it was error to admit evidence regarding the Alabama robbery, any error must be considered harmless. The jury received a cautionary instruction and Pomeranz cross-examined Mr. Amarabijad extensively regarding the dissimilarities between the murder and appellant's "signature robberies." Moreover, the state was allowed to present appellant's involvement in three other burglaries/robberies without objection. Thus, the evidence of the Alabama robbery was merely cumulative to this unchallenged evidence. See Lawrence v. State, 614 So. 2d 1092, 1095 (Fla. 1993) (finding admission of collateral crime evidence harmless in light of curative instruction, extensive cross-examination, and admission of other unchallenged collateral offenses); Reaves v. State, 639 So. 2d 1, 4(Fla. 1994) (finding admission of unrelated drug offense which culminated in defendant's arrest for murder harmless error);Hartley v. State, 21 Fla. L. Weekly S391 (Fla. September 10, 1996)(admission of improper evidence harmless where evidence came in through opening statement of defense counsel).

Appellant next argues that Judge Cianca erred in refusing to enforce Judge Shack's limitations on the Alabama robbery evidence. As a result, the state was allowed to characterize the collateral crime as a "robbery," and was allowed to elicit sympathy for the Alabama victim, in direct contravention of Judge Shack's order. Appellant claims that the trial court's "unwillingness" to preclude the state from violating the terms of the prior ruling was due in

large part to the fact that the trial judge had not presided over the motion in limine. Appellant also argues that the court was under the mistaken belief that the evidence was admitted as "similar type fact material."

The record reveals, however, that Judge Cianca was well aware of Judge Shack's order, as he made reference to it immediately prior to Mr. Amarabijad's testimony. (R 1537-1538). Moreover, defense counsel failed to renew his objection to such evidence, but merely requested a cautionary instruction. Finally, and more importantly, the circumstances surrounding admission of the Alabama robbery had changed since Judge Shack's ruling, given defense counsel's affirmative use of appellant's prior collateral crimes. Thus, Judge Shack's order was subject to modification. See Allen v. State, 662 So. 2d 323, 328 (Fla. 1995); cf. Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983) (finding defendant's failure to object to admissibility of evidence after counsel elicited the "objectionable testimony" precluded review on appeal); Wuornos v. State, 644 So. 2d 1012 (Fla. 1994) (same).

As for the state's characterization of the Alabama crime as a "robbery," the record reveals that defense counsel repeatedly used the words "robbery" and "burglary" to describe numerous collateral offenses committed by appellant. (R 560-977). In fact, during opening statement, defense counsel described the Alabama crime as a robbery. (R 1186-1187). Thus, any unobjected-to reference by the state to the Alabama crime as a "robbery" was not error. (R

3914-3919). See Allen v. State, 662 So. 2d 323, 328 (Fla. 1995); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983).

Appellant also complains that the state impermissibly elicited sympathy for the victim. (R 1543, 3914-3915). Again there was no objection to this alleged error. More importantly, it was defense counsel who first referred to Mr. Amarabijad as a victim worthy of sympathy:

> DEFENSE COUNSEL: Now, Mr. Amarabijad when he comes to court and I do feel sorry for him and he is a victim, Mr. Amarabijad, despite hating Mr. Pomeranz will admit that Mr Pomeranz could have killed him but didn't.

(R 1185-1186). Given the lack of objection and appellant's use of Mr. Amarabijad's victim status for his defense, review is precluded. See Allen v. State, 662 So. 2d 323, 328 (Fla. 1995); cf. Parker v. Dugger, 550 So. 2d 459 (Fla. 1989) (finding victim impact claim procedurally barred if not objected to at trial). In any event, the isolated comments were harmless at best. See Bush v. Dugger, 579 So. 2d 725, 727 (Fla. 1991).

Finally, conceding that he failed to object to their admission at trial, appellant claims that the trial court committed fundamental error in allowing the state to introduce evidence of three other collateral burglaries/robberies. However, as noted previously, not only did defense counsel not object to the introduction of this evidence (pretrial or at the time of its admission), he utilized it as a cornerstone of appellant's defense. During voir dire, defense counsel was the first to tell the jury about Appellant's "dozens of convictions for robbery and burglary."

(R 559-974). These crimes were then discussed by defense counsel during opening argument. (R 1176, 1179, 1180). Finally, prior to the state's admission of any evidence regarding the three other robberies, defense counsel elicited evidence about these three crimes during the cross-examination of Detective Reader and Officer Hannon. (R 1316, 2192-2196).

During redirect examination of Officer Hannon, the state sought to discuss further the specific facts of the collateral crimes. (R 2199). Only at that time did defense counsel object. However, the basis for the objection was not the prejudicial nature of the collateral crime evidence. Rather, defense counsel merely wanted the same opportunity to discuss the facts. (R 2200). And, in fact, defense counsel discussed the collateral crimes during cross-examination and recross-examination of various state witnesses. (R 1316, 2617-2618,2258-2267, 2892, 2945). Finally, during closing argument, defense counsel reminded the jury about the comments he made in voir dire regarding the dissimilarities between the murder of Mr. Patel and appellant's prior robberies and burglaries. (R 3944, 3957-3958, 3985-3991). Given appellant's strategy and pervasive use of this evidence at trial, he cannot now on appeal claim fundamental error in the state's use of this evidence. This claim must be denied. See Allen, 662 So. 2d at 328.

ISSUE XIII

WHETHER THE TRIAL COURT ERRED IN GIVING A JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE AS IT RELATES TO PREMEDITATION.

Appellant claims that the trial court erred in giving the jury an instruction regarding premeditation which informed the jury that premeditation may be inferred through the manner in which the homicide occurred, and the manner and nature of the wounds. (R 4041). Appellant wanted the court to add an additional instruction relating to circumstantial evidence. The court refused to do so because the case was not based entirely on circumstantial evidence. As noted by the prosecution, there was eyewitness testimony and appellant's statements to others. (R 3692, 3697-3699). The trial court's ruling was proper.

Appellant must establish that the trial court abused its discretion in denying the requested instruction. Branch v. State, 21 Fla. L. Weekly S497 (Fla. Nov. 21, 1996). Since the jury was properly instructed regarding burden of proof and reasonable doubt, there was no need to give any further instruction. Id. Furthermore, since the evidence presented was not entirely circumstantial in nature, there was no need for any additional instruction. Cf. Hawthorne v. State, 470 So. 2d 770 (Fla. 1st DCA 1985). Therefore, this claim should be denied.

ISSUE XIV

WHETHER THE TRIAL COURT ERRED IN GIVING A JURY INSTRUCTION ON PRINCIPALS TO THE CHARGE OF FELONY MURDER WITH THE UNDERLYING FELONY BEING ROBBERY.

Appellant claims that the trial court erred in giving the state's requested principal instruction on the theory of felony murder. The state requested the instruction based on appellant's defense that Kinser was the shooter. The state only sought the instruction as it related to felony murder. (R 3699-3706). Appellant objected on the ground that the theories argued by both sides, as well as the evidence presented, did not even suggest that Pomeranz was a principal, but rather that Kinser committed the murder. (R 3699-3706).

Regardless of the propriety of the trial judge's ruling, appellant is not entitled to have his conviction reversed. The cases relied upon by appellant do not establish reversible error in the instant case. In Lovette v. State, 654 So. 2d 604 (Fla. 2d DCA 1995), and Hair v. State, 428 So. 2d 760, 763 (Fla. 3d DCA 1983), the erroneous instruction on principals created confusion and uncertainty. In Lovette, the confusion was clearly evident since the jury came back with a question on the very issue. 654 So. 2d at 606. No such confusion or uncertainty exists in the instant case.

The trial court's ruling was proper. The state's theory was unquestionably that Pomeranz was the actual killer. The state argued this to the jury in opening arguments, explaining that

Pomeranz was guilty of premeditated murder since he personally shot and killed Mr. Patel. (R 1120-1135). The state's main witness, Jay Kinser, testified that Pomeranz was the actual shooter. (R 2780-2873). At no time did the state argue that Kinser was the actual shooter and that Pomeranz was merely a principal.

In total contradiction to the state's theory, appellant's opening argument centered on the theory that Kinser was the actual shooter and that Pomeranz was home asleep, waiting for Kinser to give him a ride to his girlfriend's home. (R 1165-1200). Appellant even told the jury that Kinser should be in the electric chair. (R 1200).

Closing arguments were consistent with the aforementioned theories. The state argued that Pomeranz was guilty of premeditated murder and that Kinser was guilty as a principal. (R 3893, 3901, 3932, 3936, 4031). Appellant argued that Kinser was the killer, and that he was innocent. (R 3944, 3990).

Given that Pomeranz was portrayed either as the shooter or as a total innocent, and never as a mere principal, any error in giving a principal instruction for the theory of felony murder was harmless error. See Desilien v. State, 595 So. 2d 1046, 1048 (Fla. 4th DCA 1992) (finding instruction on "willful blindness" harmless where evidence showed only actual knowledge or no knowledge, but not willful blindness); Lawson v. State, 522 So. 2d 257 (Fla. 4th DCA 1989) (finding lack of instruction on element of "knowledge" for cocaine possession harmless where defendant's "guilty actions" made lack of knowledge inconceivable). Under the facts of this

case, it is unreasonable to presume that the jury would convict under a theory which lacked evidence to support the charge. Cf. Sochor v. Florida, 504 U.S. __, 119 L. Ed. 2d 326, 112 S. Ct. 2114 (1992) (finding it proper to assume that a jury would disregard a theory unsupported by the evidence); Occhicone v. State, 618 So. 2d 730 (Fla. 1993) (same). Therefore, this claim must be denied.

ISSUE XV

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO ROBBERY SINCE THERE WAS SUFFICIENT EVIDENCE OF CORPUS DELICTI.

Appellant alleges that the trial court erred in denying his motion for judgment acquittal with respect to the robbery charge since, absent his own statement, the state failed to prove the element of taking. He further argues that the evidence wholly failed to establish the commission of a robbery. As will be demonstrated below, the state proved not only the corpus delicti, but the elements of robbery as well.

In State v. Allen, 335 So. 2d 823, 825 (Fla. 1976), this Court explained the policy reason behind the corpus delicti rule: "The judicial quest for the truth requires that no person be convicted out of derangement, mistake or official fabrication." In proving the corpus delicti of a crime, the state may rely upon circumstantial evidence. Sochor v. State, 619 So. 2d 285, 289 (Fla. 1993). Furthermore, the state is not required to prove same beyond a reasonable doubt. Id. All that is required is substantial proof. The proof need not be uncontradicted or overwhelming. Burks v. State, 613 So. 2d 441, 443 (Fla. 1993).

Contrary to appellant's assertion otherwise, his confession was not the only evidence relied upon in establishing the robbery offense. Kinser testified that he observed the following actions by Pomeranz:

> When he got in the car, he had the gun in one hand and a handful of money. As he was

> loading the gun he put the money on the floorboard between his feet. After he got done playing with the gun, he was laughing and joking, you know, I didn't take him serious. He told me he killed somebody, but here he's laughing and kidding around about it. He had the money, counting it out and he makes the remark, "God damn, I can't believe I killed somebody over fifty-one bucks. He had a handful of ones, couple of fives and a ten dollar bill.

(R 2830-2831). Kinser's observations of Pomeranz counting and straightening the money immediately after running from Mr. Patel's store with a gun are sufficient evidence to establish the corpus delicti of the crime. The facts are sufficient to remove the danger of Pomeranz being "convicted out of derangement, mistake or official fabrication." Cf. Burks v. State, 613 So. 2d 441, 443 (Fla. 1993); Sochor v. State, 619 So. 2d 285, 289 (Fla. 1993).

ISSUE XVI

WHETHER THE TRIAL COURT ERRED IN CONDUCTING TWO PRETRIAL CONFERENCES IN APPELLANT'S ABSENCE.

Relying on Florida Rule of Criminal Procedure 3.180(a)(3), appellant seeks reversal of his conviction because he was absent from two pretrial conferences. However, this issue is not preserved for appeal since neither defense counsel nor appellant specifically requested his presence or objected to his absence. See Gunsby v. State, 574 So. 2d 1085 (Fla. 1991).

Regardless, appellant cannot demonstrate that he is entitled to relief. The first hearing at which Pomeranz was not in attendance was on September 22, 1992. While appellant's counsel was in court on another matter, the judge asked Mr. Krasnove if he was going to represent appellant on the murder charge. (SR 2). If he were not, the judge wanted to appoint someone else as soon as possible. (SR 2, 70). Contrary to appellant's assertions to the contrary, Krasnove indicated that he was, in fact, going to represent Pomeranz on the murder charge. (SR 3, 6-7). The court made it clear that he did not want to turn the discussion into a formal hearing and that his only concern was that Pomeranz be represented by someone, if not Krasnove. Once it was ascertained that Krasnove was representing appellant, a hearing date was set for the arraignment and the discussion was concluded. (SR 6-10).

At appellant's arraignment, the judge informed Pomeranz as follows:

> JUDGE: --you have a right to a lawyer and who's going to be your lawyer in this case. A you know, I tried to immediately contact Mr. Krasnove because I had -- I knew he was representing you on the other and if he wasn't going to represent you here, my first move was to appoint a lawyer for you because of the nature of the charge and, so, fortunately, it worked out that he does represent you.
>
> And then I guess, we didn't bring you over the other day when we had this brief discussion cause you -- Mr. Krasnove had already seen you, but I'm -- I'm reminding you again not to discuss any aspect of this case with anyone other than your lawyer;--

(SR 69-70).

Appellant makes a conclusory allegation that his presence was essential at that hearing because "his presence could have affected the hearing." (Initial brief at 59). He speculates that had he been there he may have asserted his right to counsel. As already noted above, Mr. Krasnove indicated that he was representing Pomeranz at that time on the murder charges. Thus, appellant did not need to assert his right to counsel, and his presence would not have been helpful. Pomeranz has failed to establish that any error occurred, let alone harmful error. See Garcia v. State, 492 So. 2d 360 (Fla. 1986); Roberts v. State, 510 So. 2d 855 (Fla. 1987).

The second hearing at which Pomeranz was absent was held on June 4, 1993, during which appellant's motion for change of venue was discussed. Pomeranz claims that had he been present, his counsel may not have agreed to move the case from Martin County to St. Lucie County. (Initial brief at 60-61). Appellant's

accusations are not borne out in the record. The hearing commenced as follows:

> PROSECUTOR: Can we put on the record the Defendant is not present either, have a waiver or not have this hearing unless there's going to be a waiver of his presence.
>
> COURT: Defendant is not present, I agree. Can you waive his appearance for the sake of discussing some deposition we're going to do?
>
> DEFENSE ATTORNEY: Yes, and I could also discuss--
>
> COURT: Location of the trial.
>
> DEFENSE ATTORNEY: And also somehow could you call it administrative proceedings with respect to this case like where we stand and stuff like that?
>
> COURT: What I'm doing is actually getting brought up to date having a little conference discussion and you're going to waive Mr. Pomeranz' presence. We're not going to get into any motions.

(R 333-334). Consistent with the above exchange, the only two issues discussed at the pre-trial hearing related to moving the trial to a different facility/courtroom[8] and rescheduling a deposition. (R 339-341, 348-361). The discussions concluded with defense counsel favoring the move, but no move would be made without the consent of appellant. (R 361-362). Again, consistent with those assertions, on June 18, 1993, Pomeranz was made aware of the judge's concern regarding the inadequate courtroom in Martin

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[8] Contrary to appellant's assertions, there was no discussion about the pending motion for change of venue. The trial court expressed concern over the inadequate facility in Martin County and therefore suggested that the trial be moved to St. Lucie County where there was a more accommodating facility/court. (R 339-340).

County. (R 372, 392-404). That hearing ended with the court directing Pomeranz to further discuss the options with his attorney. (R 402-404). Five days later, Pomeranz agreed that the trial should be moved from Martin County to St. Lucie County. (R 409-414). Consequently, defense counsel's waiver of his presence at the initial discussion, along with the fact that Pomeranz was consulted and agreed to the move demonstrates that this issue is without merit. See Roberts v. State, 510 So. 2d 855 (Fla. 1987).

ISSUE XVII

WHETHER APPELLANT WAS UNREPRESENTED FOR TEN DAYS AND, IF SO, WHETHER HE WAS PREJUDICED THEREBY.

Pomeranz was arrested and indicted on September 18, 1993. He claims that he was not appointed counsel until September 28, 1993, when Mr. Krasnove filed an appearance. The record reveals, however, that Mr. Krasnove was representing appellant on an unrelated robbery charge before appellant was even extradited from Texas. When asked at an informal hearing on September 22, 1993, if he was representing appellant on the murder charge, Mr. Krasnove indicated that he was. (SR 3-10). In any event, even if Pomeranz was without counsel on the murder charge for the four preceding days, appellant has failed to allege, much less prove, how he was prejudiced. No evidentiary or legal developments occurred within the four-day period which affected Appellant's presentation of his case. Relief must be denied. Walker v. Wainwright, 409 F.2d 1311 (5th Cir. 1969) (requiring defendant to establish prejudice regarding unrepresentation in order to obtain relief); Harris v. State, 208 So. 2d 108 (Fla. 1st DCA 1968) (same); Lewis v. State, 188 So. 2d 585 (Fla. 3d DCA 1966) (same).

ISSUE XVIII

WHETHER THE TRIAL COURT ERRED IN ADJUDICATING APPELLANT FOR BOTH FIRST DEGREE MURDER AND ROBBERY.

Appellant claims that his convictions for both first degree murder and robbery violate double jeopardy. Although he concedes that such is permissible under State v. Enmund, 476 So. 2d 165 (Fla. 1985), he claims that the Unites States Supreme Court decision in United States v. Dixon, 509 U.S. __, 113 S. Ct. 2849, 125 L. Ed.2d 556 (1994), overruled Enmund. Appellant is in error.

Enmund held that multiple convictions are permissible for purposes of double jeopardy as long as the Blockburger test is satisfied. 476 So. 2d at 167. In Dixon, the United States Supreme Court reaffirmed the test announced in Blockburger.

Appellant's argument that Enmund should not be followed after the 1988 amendment to section 775.021(4), Florida Statutes, is also incorrect. See Davis v. State, 590 So. 2d 1071 (Fla. 2d DCA 1991); State v. Smith, 547 So. 2d 613, 616 (Fla. 1989). Finally, Appellant's reliance on Wright v. State, 586 So. 2d 1024 (Fla. 1991), is misplaced, since the issue in Wright involved the retrial of an offense after an acquittal.

ISSUE XIX

WHETHER THE TRIAL COURT HAD THE DISCRETION TO IMPOSE A SENTENCE OF DEATH FOLLOWING THE JURY'S LIFE RECOMMENDATION AND THE STATE'S RECOGNITION OF THE EXACTING STANDARD OF TEDDER.

Appellant claims that the state's "abandonment" of the death penalty, along with the jury's life recommendation, compelled the trial court to impose a life sentence. Appellant's argument, however, is neither supported by the law or the facts of this case. First, section 921.141(3), Fla. Stat. (1989), establishes the trial court's responsibilities:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . . .

Thus, by law, the trial court must make a reasoned and independent assessment of the evidence, and weigh the appropriate aggravating and mitigating factors irrespective of the jury's recommendation. Lucas v. State, 417 So. 2d 250 (Fla. 1982), rev'd on other grounds, 568 So. 2d 18 (Fla. 1990).

The case law and the statute make clear that the findings of the jury do not abrogate the court's responsibility in determining the appropriate sentence. *A fortiori*, any recommendation for sentencing by the state cannot nullify the court's duty to conduct an independent weighing of the aggravating and mitigating factors. Were that true, the trial court would be bound to impose a sentence of death if the state so recommended it. Clearly, that is not the law.

Appellant's reliance on State v. Bloom, 497 So. 2d 2 (Fla. 1986), is misplaced. In Bloom, this Court held that the state has complete discretion in deciding whether to prosecute a case as a capital case, and the trial court may not determine pretrial whether a case should proceed as such. Id. at 3. Bloom does not, on the other hand, preclude the trial court from performing its sentencing function once the state has vigorously pursued the death penalty as it did in this case.

Appellant's reliance on Santos v. State, 629 So. 2d 838 (Fla. 1994), and Cannady v. State, 620 So. 2d 165 (Fla. 1993), is equally misplaced. In Santos, the state conceded to the existence of two statutory mitigating factors after this Court vacated Santos' death sentence and remanded for the trial court to explain why it rejected certain mitigation that this Court believed was supported by the evidence. 629 So. 2d at 840. In Cannady, the state's failure to present argument or evidence to either the jury or the trial court regarding the existence of a certain aggravator amounted to a waiver of that particular factor. 620 So. 2d at 170.

No such concession or waiver was made in the instant case. The state vigorously participated in the penalty phase through the presentation of witnesses, the cross-examination of defense witnesses, and the presentation of rebuttal witnesses. (R 4112-4190, 4202-4229, 4278-4302, 4334-4624). In its legal memorandum to the trial court, after the jury's recommendation, the state professed its belief that the death penalty was appropriate in this case, but did not believe a death sentence would survive appellate

review under the standard of Tedder v. State, 322 So. 2d 908 (Fla. 1975). (R 643-644). At the allocution hearing, the prosecutor again professed his belief that death was the appropriate sentence, but ultimately recommended a life sentence because of its perception of the virtual impossibility of meeting the Tedder standard. (R 4753-57). In neither instance, however, did the state abandon its belief that certain aggravators were applicable, or concede that certain mitigators had been proven.

In Turner v. State, 645 So. 2d 444 (Fla. 1994), the state apparently recommended in a sentencing memorandum that the trial court follow the jury's life recommendation. On appeal, this Court referenced in a footnote the state's recommendation, but in no way relied on it exclusively to vacate Turner's death sentence. Rather, its analysis properly focused on the quality of the mitigation presented. As will be discussed in Issues XX, XXI, and XXII, infra, the quantity and quality of Pomeranz' mitigation was far less availing than in Turner and other cases relied upon by appellant.

Finally, appellant argues that the state's concession denied him due process and the effective assistance of counsel because defense counsel was deluded into believing that the only issue before the court was whether appellant's sentences should run consecutive or concurrent. The record reveals, however, that the trial court remained focus on its responsibility and made it very clear that it was required to review all the evidence and weigh the circumstances before rendering a sentence. Moreover, it repeatedly

invited the parties to present evidence/argument in support of their respective positions. (R 4750-4751, 4781, 4789, 4803, 4797). In response to the court's statements, appellant took the stand and professed his innocence, and his mother and sister testified on his behalf. (R 4789-4796, 4798-4802). Defense counsel filed a written memorandum is support of a life sentence after reviewing the state's memorandum. (R 650-654, 4747-4758). Thus, it cannot be said that appellant was not on notice that he could still have been sentenced to death, or that he was precluded from presenting evidence in support of a life sentence. Cf. Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994) (finding no error in trial court's preparation of sentencing order before allocution hearing given that most of arguments were already presented and court gave defendant further opportunity to present further evidence or argument). This claim should be denied.

ISSUES XX, XXI AND XXII

WHETHER THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

Pomeranz asserts that there are three reasonable bases for a life recommendation: (1) the sentence was disproportionate based on the nature of the offense; (2) there was a lack of aggravating factors; and (3) there was substantial mitigation. Regarding proportionality, appellant claims that "a standard robbery murder is a reasonable basis for a life recommendation." (Initial brief at 70). Characterizing his case as merely "a robbery gone bad," appellant compares his case to other robbery/murder cases where the jury recommended death.[9] The cases he relies upon, however, are factually and legally inapposite. For example, in Terry v. State, 668 So. 2d 954 (Fla. 1996), this Court was disturbed by the fact that "the circumstances surrounding the actual shooting [were] unclear." Here, on the other hand, the facts surrounding the shooting are very clear given the testimony of Sean Bouchard, who was in the store at the time of the robbery/murder, and Jay Kinser, to whom appellant confessed. Further, in Terry, there were only two aggravating factors--"prior violent felony" and "felony murder"-- which this Court found not to be of much weight since the

[9] Appellant relies on a jury override case, McCaskill v. State, 344 So. 2d 1276 (Fla. 1977), but in that case the appellants were not the triggermen, the triggerman was never prosecuted, and the aggravating factors--"great risk" and "during flight from a robbery"--were not sufficiently weighty to overcome the jury's life recommendation. Thus, this case is both legally and factually distinguishable.

"prior violent felony" was based on offenses contemporaneous to the murder. Id. at 965-66. Here, on the other hand, the trial court found four aggravating factors--"prior violent felony," "pecuniary gain/felony murder," "avoid arrest" and "CCP". And appellant's prior violent felony conviction was not based on a contemporaneous act. Rather, appellant robbed a man at an automatic teller machine one month after this robbery/murder, which under Terry's rationale should be of great weight. Thus, contrary to appellant's contention, Pomeranz' sentence of death is proportionally warranted. Cf. Smith v. State, 641 So. 2d 1319 (Fla. 1994); Melton v. State, 638 So. 2d 927 (Fla. 1994); Lowe v. State, 650 So. 2d 969 (Fla. 1995); Hayes v. State, 581 So. 2d 121 (Fla. 1991).

Appellant claims, however, that three of the four aggravating factors found in the instant case are invalid. First, he challenges the "prior violent felony" aggravator, which was based on appellant's conviction for armed robbery. Subsequent to this trial, the robbery conviction was overturned on appeal. Pomeranz v. State, 634 So. 2d 1145 (Fla. 4th DCA 1994). Appellant claims that reliance on a conviction that was subsequently reversed violates Johnson v. Mississippi, 486 U.S. 578 (1988), and Burr v. State, 576 So. 2d 278 (Fla. 1991). Although Pomeranz ultimately pled guilty to grand theft, (SR 967-968), he argues that the aggravator remains invalid because grand theft is not a violent felony.

Appellant's argument is without merit. The jury was presented with the testimony of Mark Meacham, a manager of Arthur Treacher's,

who testified that, on the night of May 1st, 1992, he attempted to make a night deposit at the First Union Bank. (R 4182). While he was getting out of his car to make the deposit, Pomeranz pointed a gun straight at him and said, "Don't move, Motherfucker, and drop the motherfucking bag or I'll blow your fucking head off." (R 4183-84). Meacham dropped the bag of money. (R 4184). He identified appellant as his assailant. (R 4183, 4184).

Although Pomeranz' conviction for armed robbery was reversed, and Pomeranz subsequently pled guilty to grand theft, the facts of the prior felony conviction remained the same. More importantly, the facts established, despite the facially nonviolent character of grand theft, that Pomeranz committed a prior violent felony offense. See Johnston v. State, 497 So. 2d 863, 871 (Fla. 1986) (sustaining prior violent felony aggravator based on conviction for burglary despite fact that harm did not come to intended victim); Brown v. State, 473 So. 2d 1260, 1266 (Fla. 1985) (sustaining prior violent felony aggravator based on conviction for arson of an unoccupied structure); Mann v. State, 453 So. 2d 784 (Fla. 1984) (sustaining prior violent felony aggravator based on conviction for burglary with intent to commit unnatural carnal intercourse). Unlike the facts in Johnson v. Mississippi, the jury in the instant case was not exposed to any inaccurate information. Moreover, in Florida, unlike in Mississippi, the underlying facts and circumstances regarding a prior violent felony are admissible and relevant to the sentencing body. Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989).

Also unavailing is appellant's reliance on Burr. In Burr the state relied upon collateral crime evidence to establish two aggravating factors. Burr v. State, 550 So. 2d 444, 446 (Fla. 1989). The defendant was subsequently acquitted of that collateral crime, and thus the jury had been exposed to inaccurate information. In the instant case, Pomeranz has never been acquitted of the violent acts committed against Mark Meacham. His conviction for armed robbery was not reversed based on the lack of evidence. Pomeranz, 634 So. 2d at 1146. Furthermore, and more importantly, Pomeranz admitted to committing the violent acts against Meacham when he pled to the grand theft charge. Therefore, his "prior violent felony" aggravating factor remains valid.

Appellant also contends that there was insufficient evidence to establish the "avoid arrest" aggravating factor. Relying on the testimony of Darrin Cox and Jay Kinser, Pomeranz claims that the killing of Mr. Patel was precipitated by the victim's own actions. According to Kinser and Cox, appellant told them that the victim grabbed for the gun, and then appellant shot him. (R 2872, 3163-3164). Based on that testimony, Pomeranz claims that the trial court erred in finding this aggravating factor.

In applying this factor, this Court has required the evidence to show that the only or dominant motive for the murder was witness elimination. The ability of the victim to identify the defendant standing alone is insufficient. Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). This Court has also stated that proof of this factor does not require an admission by the defendant.

Circumstantial evidence, and the accompanying logical inferences drawn therefrom, will support a finding of "avoid arrest." Preston v. State, 607 So. 2d 404, 409 (Fla. 1992); Swafford v. State, 533 So. 2d 270, 276 (Fla. 1988).

Here, the evidence established that Pomeranz was seen around the store earlier that evening by several people. Pomeranz loaded a gun immediately prior to entering the store. (R 2822, 2944). Without attempting to hide his identity, Pomeranz went into Mr. Patel's store and shot him three times. After hearing Mr. Patel moaning, Pomeranz then shouted, "Does anyone else want to die, motherfucker." He then shot Mr. Patel two more times at close range. (R 670). Even if Mr. Patel initially attempted to grab for the gun, Pomeranz had the wherewithal to shoot Mr. Patel three times in the chest, wait fifteen to twenty seconds, then either climb or lean over the counter and shoot his victim two more times while he was lying on the floor. (R 1472-1473, 1490-1491). Given the fact that Mr. Patel lay on the floor immobile, Pomeranz could have successfully left the store with the money without having to jump over the counter and shoot Mr. Patel two more times. There was little or no reason to kill Mr. Patel other than to eliminate him as witness to the robbery. Under these facts, the trial court properly found the aggravating factor of "avoid arrest." See Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994) (sustaining "avoid arrest" aggravator where defendant killed victims after already successfully obtaining money).

Next, Pomeranz claims that there was insufficient evidence to establish the "cold, calculated and premeditated murder" aggravating factor. Pomeranz alleges that the murder, "a robbery gone bad," negates any claim that there was a pre-planned intent to kill Mr. Patel. Although acknowledging the fact that "the first three shots can be attributed to a planned robbery gone awry," (R 672), the trial court rejected appellant's argument based on Pomeranz' actions after the first three shots were fired. The trial court found that Pomeranz had sufficient time to deliberate and form the heightened premeditation necessary to find this factor. For example, Pomeranz deliberately chose to make sure Mr. Patel was dead when he fired two more shots at close range into the already wounded victim. Right before he did so he asked/threatened to kill anyone else who may have been present in the store. (R 672). The execution of Mr. Patel was committed in a cold, calculated and premeditated manner. See Squires v. State, 450 So. 2d 208, 212 (Fla. 1984) (sustaining "CCP" factor where robbery victim was shot five times at close range, once in shoulder with shotgun and four times in head with pistol, despite defendant's statement that he had to "dust one" after running into trouble during robbery); Wickham v. State, 593 So. 2d 191 (Fla. 1991) (sustaining "CCP" factor where murder escalated into highly planned prearranged crime even though it began as caprice to obtain money from victim). If this Court finds insufficient evidence to sustain a finding of "CCP," however, any error must be considered harmless. See State v. Hill, 643 So. 2d 1071, 1074 (Fla. 1994) (death

sentence still valid after striking "CCP" where aggravation consisted of murder of police officer in course of robbery to avoid prosecution); Young v. State, 579 So. 2d 721 (Fla. 1989) (striking "CCP" harmless error in light of remaining aggravating factors that murder was committed to avoid arrest during course of robbery).

Appellant's third basis for vacating his sentence is his belief that there was substantial mitigation presented upon which the jury could have reasonably relied. On appeal, appellant presents nine areas of proffered mitigation. However a review of what was actually presented below demonstrates that there was no credible or meaningful evidence presented in mitigation. Consequently, the trial court's override was proper. See Foster v. State, 21 Fla. L. Weekly S325, 327 (Fla. July 18, 1996) (uncontroverted opinion testimony can be rejected when it is hard to reconcile with other evidence presented).

Pomeranz presented the testimony of two people at the penalty phase. The first was Barry Norman, the mother of appellant's girlfriend. At the time of her testimony, Ms. Norman had known appellant for one and a half years. (R 4193). In that time, Pomeranz had treated her and her daughter very well. (R 4193, 4206). Based on her "relationship" with him, she opined that Pomeranz could be rehabilitated. (R 4260). Though initially unaware of appellant's extensive past criminal behavior, Ms. Norman remained undaunted in her opinion that Pomeranz was nonviolent and possessed the potential for rehabilitation. (R 4206, 4222).

The second witness to testify for Pomeranz was his maternal aunt, Mrs. Mayerback. She testified that appellant's father used to physically strike him. (R 4271). Appellant's father left the home when appellant was three and a half years old. Appellant and his mother moved in with appellant's maternal grandmother who provided a very loving and good home. (R 4292). Mrs. Mayerback had not seen appellant for the past five years prior to the murder. She stated that Pomeranz was a good nephew and son, was loving, and would never hurt anyone. Ms. Mayerbach did not believe that Pomeranz killed anyone. (R 4296).

In an effort to rebut Ms. Norman's testimony regarding appellant's rehabilitation potential, the state presented the testimony of Dr. Glen Caddy. Dr. Caddy testified that Pomeranz is a manipulator, who takes pride in his criminal behavior. (R 4345, 4396). He is a thrill seeker, who enjoys committing crimes. Pomeranz is a sociopath with an anti-social personality. (R 4409,4403). Appellant's goal is to be a good robber. He does not think about the consequences of his actions, nor does he possess any thought for or remorse for his victims. Dr. Caddy repeatedly stated that appellant's prognosis for rehabilitation was not good. (R 4404-4405, 4422, 4465).

The state also called Sergeant Warren Quinn from the corrections division of the Martin County Sheriff's Office. (R 4599). Sergeant Quinn testified that, since appellant's incarceration, he has attempted to bite and hit officers, and has attempted to throw human feces and urine at them. He has

repeatedly threatened to kill officers and their families if he ever gets out of prison. (R 4604-4605). Appellant has been in confinement since the third week after his arrest. (R 4609).

Defense counsel argued to the jury during closing argument that (1) appellant was a minor participant in the crime and Kinser actually committed the murder (R 4708); (2) appellant was not treated well by his father or step-father (R 4717); (3) Pomeranz, who was only twenty years old at the time of murder, suffered from attention deficit hyperactivity at an early age (R 4717-4718); (4) appellant has remained a devoted family member; and (5) appellant possesses the potential for rehabilitation (R 4720-4721). The jury was instructed on two statutory mitigators--"minor participation" and age. The trial court rejected both statutory mitigators. With regards to appellant's alleged minor participation, the trial court properly rejected same, finding that Kinser was the wheel man and Pomeranz was the actual shooter. (R 673-674).

Although Pomeranz devotes much his brief to discrediting the testimony of Kinser, it must be remembered that Kinser's confession was not prompted or forced by the police. To the contrary, the police had no leads or any idea who was responsible for the murder. Kinser was never considered a suspect prior to his decision to turn himself in. (R 2020, 2728). Without Kinser's confession, there was no evidence to link appellant to the crime.

Aside from Kinser's eyewitness testimony, the following evidence supports the judge's conclusion that Pomeranz was the actual killer. Sean Bouchard, the stock boy who was hiding in the

store at the time of murder, testified that the killer had a Spanish accent. (R 1867-69, 1872). Six other people testified that Pomeranz speaks Spanish or has spoken Spanish during other robberies.[10] (R 1401, 1402, 1412, 1796, 1840, 2294, 2545, 2662). During the murder/robbery, Bouchard did not hear any other voice but that of the killer. (R 1892). Numerous witnesses testified that appellant was seen on the night of the murder either walking around the store, in the store, or at the phone booth immediately outside of the store, within an hour and a half of the murder. (R 1939, 1955-1956, 1942, 1952, 2470, 2520). Several witnesses described the clothes appellant was wearing that night: cut-off shorts and a long-sleeve shirt with a dark T-shirt on underneath. (R 1905, 1937, 2571). Bonnie Johnson and her family were driving by the store at the exact time the first three shots were fired. She heard the shots and then saw a man standing partially in the doorway with his left arm extended into the store. (R 1899-1902) The man was looking at her as she drove by. (R 1905-1906). The description of the man matched that of Pomeranz. (R 1904, 1927). Johnson's description of the man's clothing was consistent with the description other witnesses gave regarding appellant's attire that evening. (R 1904). Johnson identified appellant in court as the man she saw in the doorway the night of the murder. (R 1918). She later stated that, although she could not positively swear that it was appellant, she was positive that the man she saw was not

[10] One of those people was Mrs. Wright, another robbery victim of Pomeranz. (R 2289-2296).

Kinser. (R 1927). She did not see anyone else in the store, nor were there any other cars parked in the parking lot. (R 1902-1903). As she continued to drive past the store, she heard two more shots. (R 1905-1907). Darrin Cox testified that Pomeranz told him that he killed a guy for $51.00. (R 3162).

The evidence presented leads to only one reasonable conclusion: Pomeranz was the killer. Also noted by the trial judge, the phone records, the fact that Pomeranz did not own a vehicle, did not possess a driver's license, and used Kinser as his source of transportation establishes that Kinser was the driver and Pomeranz was the shooter. (R 681). There is no reasonable basis to conclude otherwise. Thus, the judge properly rejected Appellant's claim that he was a minor participant in the crime. See Engle v. State, 510 So. 2d 881, 884 (Fla. 1987) (override was proper where no reasonable basis to support finding that appellant was not actual killer).

The second statutory mitigator argued by Pomeranz was his age. Relying on Perry v. State, 522 So. 2d 817 (Fla. 1988), and Caruso v. State, 645 So. 2d 389 (Fla. 1994), appellant suggests that the jury could have concluded that his age qualified for the statutory mitigator under § 921.141(6)(g), Fla. Stat. However, in the instant case, appellant failed to establish any significant connection between his age and either his actions during the murder or his character. In Perry and Caruso there was evidence presented regarding the defendants' psychological/mental health problems. Perry, 522 So. 2d at 821; Caruso, 645 So. 2d at 397. No such

evidence exists in the instant case. As this Court has explained, "[a]ge is simply a fact, every murderer has one." Echols v. State, 484 So. 2d 568, 575 (Fla. 1985). Without some causal connection or evidence to demonstrate the relevance between his age and his actions, appellant's age did not qualify as a valid mitigator, and therefore was not a reasonable basis for a life recommendation. See Mungin v. State, 21 Fla. L. Weekly S66 (Fla. Feb. 8, 1996) (no evidence to sustain finding that age was a statutory mitigator given that defendant performed well in school, left home at eighteen, and did not exhibit any evidence of neurological impairment); Sims v. State, 21 Fla. L. Weekly S320 (Fla. July 18, 1996)(same).

The evidence presented at the penalty phase demonstrated that Pomeranz has an IQ of 106 and does not possess any signs of mental illness. His impulsive character does not amount to any type of mitigating evidence. Nothing in his psychological background even suggests that he is unable to discern the difference between right and wrong. (R 675, 4433, 4439). His impulsive nature is something that you would expect to see in an eleven of twelve year old child. (R 4412, 4423). Dr. Caddy made it clear, however, that he was not saying that Pomeranz was emotionally an eleven or twelve year old child, (R 4415), but simply that appellant is very impulsive. The trial court properly found no evidence to indicate that appellant's age should form the basis for mitigation.

The remainder of the trial court's sentencing order contains an analysis regarding the nonstatutory mitigation of (1) non-

violent behavior; (2) potential for rehabilitation; (3) childhood abuse; (4) anti-social personality; (5) attention deficit disorder; (6) age; and (7) Kinser's life sentence. (R 675-676). Appellant's nonviolent behavior, as espoused by Mayerbach and Norman, is belied by the record. Pomeranz, an admitted career robber, was convicted of murder and had been convicted of a prior violent felony. The uninformed, biased opinion of friend and family does not support this claim. Thus, the trial court properly rejected it. See Foster v. State, 21 Fla. L. Weekly S325, 327 (Fla. July 18, 1996).

The next area of mitigation was appellant's alleged potential for rehabilitation. Again, the biased and uninformed opinion of family or friends does not establish this claim. Furthermore, as noted by the trial court, Dr. Caddy found that appellant does not possess the potential for rehabilitation. (R 678-679). The state also presented the testimony of Sergeant Quinn, who related appellant's despicable behavior in prison. The trial court properly rejected this mitigator. See Foster v. State, 21 Fla. L. Weekly S325, 327 (Fla. July 18, 1996).

The next area of mitigation centers around the different sentences received by Pomeranz and Kinser. Pomeranz claims that the jury could have reasonably believed that Kinser was the actual shooter. Relying on Douglas v. State, 575 So. 2d 165 (Fla. 1991), Barrett v. State, 649 So. 2d 219 (Fla. 1994), and Cooper v. State, 581 So. 2d 49 (Fla. 1991), appellant suggests that the jury could have found Kinser not to be credible and that he was the actual triggerman. The instant case is factually dissimilar to the cases

relied upon by Pomeranz. First, the murder in Douglas involved a love triangle between Douglas, the victim, and the victim's wife. This Court has stated that a domestic relationship may be considered as nonstatutory evidence. Second, Pomeranz misreads Douglas. The jury did not reject the testimony of the state's witness. To the contrary, the jury believed the testimony of the victim's wife:

> There was guilt phase evidence which the jury could have reasonably found to be mitigating. The state's primary witness was the wife of the victim. The credibility of her testimony concerning the circumstances surrounding this murder could have reasonably influenced the jury's recommendation.

Id at 167.

Cooper and Barrett are also of no moment. In both cases the defendant admitted to being a part of the murderous episode, but there was conflicting evidence as to who pulled the trigger. Cooper, 581 So. 2d at 52; Barrett, 649 So. 2d at 220. That was not the situation presented in the instant case. Appellant's defense at trial was that of complete innocence. He claimed that Kinser committed the crime by himself.[11] That version of events was obviously rejected by the jury at the guilt phase. Pomeranz does not explain why it would be reasonable to believe that the jury changed their opinion at the penalty phase.

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[11] The only evidence presented by appellant in support of this claim at either phase of the trial was the questionable testimony of Elizabeth Hernandez. Called as a court witness, due to her lack of credibility, she testified that Kinser was in the store sometime between 9:15 and 9:35 p.m. (R 2522).

In a somewhat analogous argument, Pomeranz suggests that the jury's recommendation could have reasonably been based on disparate treatment. In support of this argument he relies on Fuente v. State, 549 So. 2d 652 (Fla. 1989), and Brookings v. State, 495 So. 2d 135 (Fla. 1986). Both cases are distinguishable. In Fuente, the actual triggerman, and the defendant who had arranged for the killing, received total immunity from prosecution. Id. at 658. In Brookings, the woman who hired the defendant to kill the victim received second degree murder, and the active participant received total immunity. Id. at 143. In the instant case, Kinser, a career criminal, was convicted of first degree murder and was sentenced to life without the possibility of parole for twenty-five years. Based on his other convictions, Kinser received an additional ninety-nine year sentence. Even with gain time, he would be serving at least forty-five years. (R 3145-3148). There was no direct evidence presented to demonstrate that Kinser was the actual shooter. As noted elsewhere, the trial court's findings regarding the respective actions of each defendant clearly demonstrate that appellant's sentence of death is justified given his greater culpability. (R 673-674, 681-682). No disparate treatment occurred in the instant case given appellant's far greater and more serious participation in the killing of Mr. Patel. See Cook v. State, 581 So. 2d 141, 143 (Fla. 1991) (rejecting claim of disparate treatment given that defendant's level of participation was greater than that of codefendants); Steinhorst v. State, 638 So. 2d 33, 35 (Fla. 1994) (same). Consequently, the jury could not

have reasonably relied upon "disparate treatment" since it did not exist. The trial court properly rejected appellant's claimed mitigation regarding Kinser's sentence. See Craig v. State, 510 So. 2d 857, 870 (Fla. 1987) (override proper where jury's consideration of disparate treatment was unreasonable given evidence that defendant was the major participant in the murder).

The remaining nonstatutory mitigation centers on appellant's mental health issues. Relying on Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992), Pomeranz suggests that the jury could have reasonably found the existence of mental health impairment to justify imposition of a life sentence. He opines that the testimony of state witness Dr. Caddy could have lead the jury to reasonably believe that appellant's "neurological disorder" formed the basis of the statutory mental mitigators. Appellant mischaracterizes the testimony of Dr. Caddy as well as ignores his own defense before the jury that mental issues were not applicable at the penalty phase.

A review of the record belies any notion that the jury could have reasonably relied upon any alleged mental deficiencies in recommending life. Throughout the penalty phase proceedings, Pomeranz repeatedly stated that mental health issues were not an issue. (R 4380, 4386, 4346, 4436, 4449, 4481). Defense counsel never argued to the jury that either of the mental mitigators applied, nor was the jury ever instructed regarding those mitigators. (R 4707-4722, 4727). Consequently, there can be no logical assumption/inference that the jury relied upon an area of

mitigation that was never presented or explained. See Jones v. State, 652 So. 2d 346, 351-352 (Fla. 1995) (trial court not required to find mitigation that was never mentioned or argued during penalty phase).

Regarding the alleged "neurological impairment," the trial court properly rejected same. Dr. Caddy testified that Pomeranz was a sociopath and had an antisocial personality. (R 4403, 4432). Pomeranz does not consider the consequences of any his actions and he finds committing criminal acts to be exciting. His hyperactivity and attention deficit problems were manifested in his inability to pay attention in school. (R 4424-4425). To the extent his hyperactivity and impulsivity may be neurological in origin, Dr. Caddy testified that those conditions were not "so profound to cause him not to be able to make a decision between whether an act is legal or illegal." (R 4439). Caddy testified that whatever neurological impairment Pomeranz may have it certainly is minimal since his IQ of 106 is in the high end of the normal range. (R 4438).

Dr. Caddy also stated that Pomeranz does not suffer from schizophrenia or bizarre thinking. He does not suffer from any mental illness that would call into question his sanity. (R 4432-4433). There is a total lack of relevance between Appellant's "mental health problems" and his murderous actions. His hyperactivity and impulsivity in no way compare to the extensive mental problems suffered by the defendant in Scott. Scott was abandoned by his mother as a child, suffered from brain damage, had

borderline intelligence, was unable to read, and had long-term drug and alcohol abuse, physical abuse, and self-destructive behavior. Id. There is simply no evidence of mental health problems which could reasonably warrant a life recommendation. See Washington v. State, 653 So. 2d 362, 366 (Fla. 1995) (defendant's past criminal behavior as well as behavior in jail to date rebut expert and lay opinion that defendant has potential for rehabilitation); Thompson v. State 553 So. 2d 153 (Fla. 1989) (same); Torres-Arboledo, 524 So. 2d 403, 413 (Fla. 1988) (defendant's intelligence and potential for rehabilitation provide insufficient weight to reasonably outweigh aggravating factor); Carter v. State, 576 So. 2d 1291, 1292 (Fla. 1991) (mental health expert's characterization of defendant as a sociopath is not mitigation).

The next alleged area of mitigation offered by Pomeranz is the physical and emotional abuse experienced in childhood. Appellant's aunt gave a very cursory and conclusory statement that appellant was abused by his natural father. Ms. Mayerbach also stated that appellant's father and mother divorced when appellant was three and half years old. Before that time, appellant and his mother lived with his grandmother. (R 4291, 4271). Despite being subjected to some abuse by his natural father, most of appellant's early years was spent among a very loving family. (R 4273, 4275, 4277, 4292). Dr. Caddy stated that he could find no evidence of any physical abuse. (R 679). Ms. Mayerbach treated appellant as if he were her own. (R 4275). Ms. Mayerbach had little or no knowledge regarding the last ten years of appellant's life, specifically with regards

to his criminal activities. As a matter of fact, Mayerbach had had no contact with Pomeranz for the last five years. (R 4280).

The accuracy and objectivity of Mayerback's opinion is also suspect given her continued belief, in the face of contrary evidence and opinion, that Pomeranz would never, and did not, harm anyone. Mayerback's testimony, the bulk of which encompassed events from seventeen to twenty years ago, cannot reasonably support the jury's recommendation. See Washington v. State, 653 So. 2d 362, 366 (Fla. 1995) (testimony of mother and expert regarding rehabilitation potential of defendant not reasonable basis for jury's recommendation given contrary evidence); Jones v. State, 648 So. 2d 669, 680 (Fla. 1994) (trial judge properly gave little weight to evidence of abused childhood given the fact that it is so remote in time from the offense); Kight v. State, 512 So. 2d 922, 933 (Fla. 1987) (permissible to attach little weight to abusive childhood given lack of testimony to establish that murder was influenced by childhood experiences).

On appeal, relying on Scott, and a special concurrence in Cooper v. State, 581 So. 2d 49, 52 (Fla. 1991), Pomeranz argues that his loving relationship with various family members constitutes a valid/reasonable basis for the jury's recommendation. Appellant did not argue this "mitigation" to the judge or jury; consequently, it is unreasonable to claim its existence on appeal. See Jones, 652 So. 2d at 351-352. As noted elsewhere, the facts of Scott are distinguishable from the instant case given the quantity and quality of mitigating evidence presented therein.

Irrespective of the absence of precedential value of a concurrence, the evidence in support of the defendant's loving relationships in Cooper was much more significant and extensive than what appears in the instant case. Simply because Pomeranz exhibited normal behavior, i.e., love to family members who in return showed him a great deal of love, should not be considered as significant mitigation. Appellant did not present any evidence regarding his background or character which would lessen his culpability and justify the jury's recommendation.

The next alleged area of mitigation suggested by appellant is that maybe the killing was committed only after very little reflection. Since appellant never argued this alleged mitigation to the jury, it is unreasonable to suggest that the jury relied upon it. See Jones, 652 So. 2d at 351-352. Moreover, there is simply no evidence to support this contention. Pomeranz went into the store with a loaded gun--a gun he loaded immediately prior to entering the store. He shot Mr. Patel three times, immobilizing him. He waited twenty to thirty seconds and then shot Mr. Patel two more times at close range while Mr. Patel lay on the floor. During the shooting, Pomeranz was yelling/threatening to kill anyone else in the store. (R 682).

In summation, the trial court properly rejected appellant's proposed nonstatutory mitigation of non-violent behavior, rehabilitation, and disparate treatment as there was absolutely no evidence to establish same. See Foster v. State, 21 Fla. L. Weekly S325, 327 (Fla. July 18, 1996); Wuornos v. State, 644 So. 2d 1000,

1010 (Fla. 1994). The trial court also was correct in giving little weight to appellant's "mental health problems." Dr. Caddy could not and did not offer any correlation/relevancy between appellant's hyperactivity/attention deficient problems and the actual offense. (R 682). Nor did Caddy offer any significance or correlation between the abuse appellant experienced by his father or step-father and the facts of the crime. As presented, the evidence could not reasonably have been relied upon to recommend a life sentence. Johnson v. State, 21 Fla. L. Weekly S343, 346 (Fla. 1995). Thus, the trial court's override was proper.

Also without merit is appellant's claim that the trial court applied the wrong standard when overriding the jury's life recommendation. Pomeranz alleges that the judge failed to follow the rule of Tedder and that the court merely substituted its judgment for that of the jury when weighing the aggravators and mitigators. A review of the trial court's detailed sentencing order belies this claim.

The order specifically discusses and applies the rule of Tedder. (R 683-684). The order discusses each category of mitigating evidence, both statutory and non-statutory. This Court has stated that evidence of mental impairment is relevant and must be considered if it has some bearing on the crime or the defendant's character. Walls v. State, 641 So. 2d 381, 389 (Fla. 1994); Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990). The trial court evaluated the proposed mitigation with those principles in mind as evidenced by the order's reference to and application of

the three part test of Rogers v. State, 511 So. 2d 526 (Fla. 1987). (R 683).

The order specifically explains the court's rejection of all the proposed mitigation. The order details the content of the testimony presented by both sides. Appellant's alleged nonviolent behavior, potential for rehabilitation and disparate treatment were all rejected for lack of any proof. (R 677, 680, 682). As for the remainder of the proposed mitigation the court found that the abuse, good nephew and son, possible neurological misdiagnosis as a child and some antics which suggest a lack of maturity do not shed any light on appellant's behavior on the night of the crimes nor have any bearing on appellant's character. (R 675, 679, 682). The alleged mitigation was either not established by the record or was not made relevant under the test of Rogers. The trial court applied the proper standards and case law in its analysis.

ISSUE XXIII

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE.

At the sentencing phase allocution hearing, the state wanted to submit victim impact evidence. Defense counsel stated that he had no objection to such testimony as long as the family members did not indicate or discuss the appropriateness of any particular penalty. (R 4782). The trial court heard from the victim's son, but specifically stated that it would not consider victim impact in its sentencing decision. (R 4780-83). Following the son's statement, defense counsel made no comments or objections. (R 4788).

On appeal, appellant alleges that the son's testimony was overly emotion, and was irrelevant to any aggravator or mitigator. In addition, appellant claims an ex post facto violation. Given defense counsel's affirmative agreement to allow such testimony, and his lack of objection following such testimony, this issue has not been preserved for appeal. Similarly, appellant's failure to raise an ex post facto argument below precludes review on appeal. See Occichone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991); Windom v. State, 656 So. 2d 432, 438 (Fla. 1995); Hardwick v. State, 648 So. 2d 100 (Fla. 1994). Regardless, appellant's ex post facto claim has been rejected by this Court. See Windom v. State, 656 So. 2d 432, 438 (Fla. 1995); Allen v. State, 662 So. 2d 323 (Fla. 1995).

In any event, the testimony of the victim's son followed the dictates of section 921.141(7). Niraj Patel testified about his father's dedication to hard work and the sacrifice he had made for his family. See Windom, 656 So. 2d at 438. Finally, any error must be considered harmless given the trial court's statement that, although he would allow the testimony, he would not take it into consideration at sentencing. (R 4780-4783). See Grossman v. State, 525 So. 2d 833, 846 n.9 (Fla. 1988). Therefore, this issue should be denied.

ISSUE XXIV

WHETHER SECTION 921.141(5)(d), FLA. STAT. (1993), IS UNCONSTITUTIONAL.

Appellant challenges the constitutionality of the "felony murder" aggravating factor based on the factor's alleged failure to narrow the class of persons eligible for the death penalty. The issue has not been preserved for appeal since it was not raised below. See Jones v. State, 648 So. 2d 669, 679 (Fla. 1994). Regardless, appellant's argument has been repeatedly rejected. See Lowenfeld v. Phelps, 484 U.S. 231 (1988); Kearse v. State, 662 So. 2d 677, 685 (Fla. 1995); Parker v. State, 641 So. 2d 369, 377 n.12 (Fla. 1994). Therefore, this claim should be denied.

ISSUE XXV

WHETHER ELECTROCUTION IS "CRUEL OR UNUSUAL" PUNISHMENT.

Appellant claims that death by electrocution is cruel and unusual punishment. This issue, however, was not preserved for appeal, as no objection or challenge was made to the trial court. Cf. Jones v. State, 648 So. 2d 669, 679 (Fla. 1994) (finding challenge to constitutionality of aggravating factor unpreserved where not challenged in trial court). Regardless, this claim has been previously rejected by this Court. E.g., Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990); Fotopoulos v. State, 608 So. 2d 784, 794 n.7 (Fla. 1992). Therefore, this claim should be denied.

ISSUE XXVI

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellant's challenge to the constitutionality of Florida's death penalty statute was not raised before the trial court; consequently, review is precluded. Fotopoulos v. State, 608 So. 2d 784, 794 & n.7 (Fla. 1992). Regardless, in Fotopoulos, this Court specifically rejected each of the numerous grounds raised by Appellant for challenging Florida's death penalty statute. See also Thompson v. State, 619 So. 2d 261, 267 (Fla.), cert. denied, 114 S. Ct. 445, 126 L. Ed. 2d 378 (1993). Appellant has provided no additional reasons upon which to find the statute unconstitutional. Therefore, this claim should be denied.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm Appellant's convictions and sentence of death.

Respectfully submitted,

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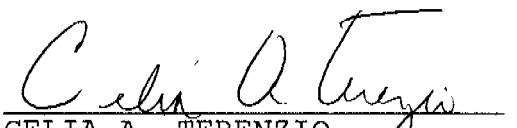
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Richard Greene, Assistant Public Defender, Criminal Justice Building, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 31st day of December, 1996.



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