IN THE SUPREME COURT OF FLORIDA

MEMWALDY CURTIS,

Appellant,

v. Case #: 84,293

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
Assistant Attorney General
Florida Bar #0797200

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

Table of Contents

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

Cases

Rules & Statutes

Miscellaneous

IN THE SUPREME COURT OF FLORIDA

MEMWALDY CURTIS,

Appellant,

v. Case #: 84,293

STATE OF FLORIDA,

Appellee.

_____/

PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, MEMWALDY CURTIS, the defendant in the lower court, will be referred to in this brief as Curtis. All references to the instant record on appeal will be noted by the symbol "R," and references to the transcripts by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

Due to time and page limitations, the state accepts Curtis's statement of the case and facts as reasonably accurate. The state objects to those portions of Curtis's statement which are argumentative. See, e.g., Initial Brief at 3 ("the judge forced Curtis to be judged by a juror whom Curtis had peremptorily challenged.") (emphasis supplied).

SUMMARY OF THE ARGUMENT

Issue I: The trial court did not abuse its discretion in denying defense counsel's motion for a continuance because Curtis expressly stated that he did not want his case continued. Because Curtis was present, was questioned extensively by the trial court, and was vociferous in his intent to proceed to trial, the trial court properly permitted Curtis to make this choice.

Issue II: The trial court did not abuse its discretion in sustaining the state's objection to Curtis's peremptory challenge of white male juror Kelley. The state showed that there was a substantial likelihood that this challenge was based solely on a racial reason, thereby shifting the burden to Curtis. Because Curtis did not meet his burden in showing that this challenge was racially neutral, the trial court properly denied his strike.

Issue III: Curtis's conviction for attempted first degree murder is proper. Because the state did not proceed solely under a theory of first degree felony murder, Gray does not apply.

Issue IV: The trial court did not abuse its discretion in admitting into evidence the prior consistent statement of Albert Fountain, as related through the testimony of Detective Robinson. The state laid the proper predicate for admitting the prior consistent statement by proving that it was made before the

existence of any motive to fabricate -- before plea negotiations, before the entry of any plea, before any conviction, and before sentencing.

Issue V: The trial court did not abuse its discretion in prohibiting Curtis from commenting in closing argument on the state's failure to produce Anthony Howard at trial. Such comments would have been in violation of Haliburton, because Howard had no special relationship with the state and was equally available to both parties.

Issue VI: The trial court did not abuse its discretion in denying Curtis's various motions for mistrial based on allegations of prosecutorial misconduct during argument. Curtis failed to preserve most of these comments for appellate review, and those which were preserved are without merit.

Issue VII: The trial court properly denied Curtis's motion for a judgment of acquittal as to premeditated murder as the state proved this charge beyond a reasonable doubt. If this Court determines otherwise, no reversal is necessary because the state proved felony murder beyond a reasonable doubt.

Issue VIII: The trial court did not abuse its discretion in permitting the state to introduce evidence of Curtis's drug dealing. This evidence, limited in nature, was relevant to prove

Curtis and Howard's motive for robbery and murder, i.e., in order to pay off a debt to their drug supplier, they committed the instant crimes.

Issue IX: The trial court did not abuse its discretion in denying Curtis's request to conduct an in camera jury interview on the claim that a juror had discussed this case before the end of trial. Although the trial court heard testimony from the person who allegedly heard information from a juror's father, Curtis was wholly unable to prove that this information even emanated from one of his jurors, much less prove juror misconduct.

Issue X: The trial court did not abuse its discretion in admitting evidence of an unconvicted crime via impeachment of Curtis's fiancée in the penalty phase. The question about Curtis's pending robbery charge constituted proper impeachment on a topic broached by defense counsel on direct examination, i.e., whether Curtis's fiancée had knowledge about Curtis's possession of guns.

Issue XI: The trial court did not abuse its discretion in the penalty phase by permitting the state to introduce hearsay contained in Howard's presentence investigation report. The evidence of Howard's mental and emotional problems spoke to the comparative sentences of the codefendants and rebutted the testimony of Curtis's mother that he was not a leader.

Issue XII: The trial court did not abuse its discretion in the penalty phase by permitting the jury to consider only the first two paragraphs of Howard's plea agreement as mitigation for Curtis. Despite the relaxed evidentiary standards of Florida's death penalty statute, only relevant evidence may be admitted, and the final two paragraphs of the plea agreement were not relevant.

Issue XIII: The trial court properly found the prior violent felony and pecuniary gain aggravating circumstances. The state proved each of these factors beyond a reasonable doubt.

Issue XIV: The trial court properly considered, found, and weighed mitigating evidence concerning age, the sentence of codefendant Howard, remorse, Curtis's poor education, and Curtis's status as a father. Because Curtis simply disagrees with these findings, this Court should reject his arguments.

Issue XV: Curtis's death sentence is proportionate to death sentences affirmed by this Court in other cases involving similar facts and a similar balance of aggravating and mitigating factors.

ARGUMENT

Issue I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION FOR CONTINUANCE IN LIGHT OF CURTIS'S EXPRESS DESIRE TO PROCEED TO TRIAL.

The granting or denying of a motion for continuance is within the discretion of the trial court, and this Court will not set aside such a ruling absent a showing of abuse of discretion. Williams v. State, 438 So. 2d 781 (Fla. 1983); Magill v. State, 386 So. 2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927 (1981). The trial court did not abuse its discretion in denying the motion for continuance of Curtis's counsel, because Curtis did not want a continuance.

On April 26, 1994, the state informed the trial court that Curtis refused to waive his right for a speedy trial, and requested a June 6th trial date (T 46). Defense counsel stated that he had explained to Curtis that he did not feel he could be prepared by that date "since it's a first degree murder case where the State is seeking the death penalty." (T 47). Defense counsel also explained to Curtis "the issues which largely deal with scientific ballistic evidence" (T 47). The trial court conducted an inquiry of Curtis, who remained firm in his desire to have a June 6th trial

date, "even though [his] lawyer sa[id] he can't be ready" (T 47). The trial court denied defense counsel's motion for continuance (T 47).

On June 3, 1994, defense counsel again moved for a continuance, stating that he initially had devoted all of his efforts toward a pending unrelated armed robbery charge but had changed his focus due to the state's indication that it would pursue the murder case first; that the murder case involved 20 to 30 witnesses and complex forensic and ballistics issues; that the state had filed a notice of collateral crime evidence relating to Curtis's involvement in drug dealing; that he had not yet deposed codefendant Anthony Howard; that the state had not indicated until "this past Tuesday or Wednesday" that this case would be a death penalty case; that he had been devoting his efforts toward 20 or 25 motions relating to the death penalty as opposed to other areas in the case; that he had received just that day the transcripts of various depositions and needed time to review those; that two or three police officers had not shown up for deposition and he wanted to resubpoena them; that the state had listed several witnesses for whom it could not provide addresses; and that he wanted to retain a ballistics expert to rebut the state's expert (T 62-67).

The state responded that the death penalty motions would take no time at all because they had been addressed by the court a number of times; that every witness the state intended to call had been deposed, and any who had not shown would not be called in the state's case in chief; that defense counsel had had several months to prepare; that, although it understood the state's position, Curtis apparently was willing to waive those aspects of the case; and that it was his understanding that Curtis did not wish to have his case investigated further, but wanted to have his day in court and be over with it (T 67-69). The trial court conducted a full inquiry of Curtis (T 69-72), and Curtis indicated unequivocally that he wanted to proceed to trial on June 6th (T 72-73).

On June 6, 1994, defense counsel renewed his motion for continuance, and the trial court again inquired of Curtis (T 168-69). Curtis once again stated clearly that he wanted to be tried "this week" (T 169). On July 22, 1994, at a hearing on Curtis's motion for a trial, the state pointed out that paragraph 2(h) of this motion dealt with defense counsel's motion for continuance, not Curtis's (T 1353). The trial court recounted that he had attempted to talk Curtis into going along with counsel's motion as he "thought it was well taken." (T 1354).

Curtis argues that, because a continuance is strictly a tactical decision resting solely within defense counsel's purview, the trial court could not deny the continuance, despite Curtis's expressed wish to the contrary. Initial Brief at 39-40. Such a position is untenable.

Admittedly, there are various cases which hold that a continuance request constitutes a speedy trial waiver, which does not require a defendant's presence, and that the acts of counsel in this regard are binding on a defendant even if done without consulting with the defendant or done against the defendant's wishes. See, e.g., State v. Abrams, 350 So. 2d 1104, 1105 (Fla. 4th DCA 1977) (decision made without knowledge of defendant); McArthur v. State, 303 So. 2d 359, 360 (Fla. 3d DCA 1974) (same); State v. Earnest, 265 So. 2d 397, 400 (Fla. 1st DCA 1972) (same). But see State ex rel. Gutierrez v. Baker, 276 So. 2d 470, 472 (Fla. 1973) (while counsel for defendant may seek a continuance when he believes delay could benefit the defendant, "it would be preferred that an accused be informed of, and involved in, all stages of negotiation between his attorney and the State").

This is not a situation, however, where Curtis was unaware of his counsel's intent to seek a continuance. In this case, Curtis was an active trial participant, interacting with counsel during

jury selection, speaking out regarding the continuance motion, and testifying. Curtis conferred with counsel several times about the continuance request. The trial court questioned Curtis at length, explaining what counsel hoped to glean from a continuance:

> I'm hearing that the codefendant, Mr. Howard, has pled guilty and agreed to testify against you. And that Mr. Eler is going to get to talk to him for the first time this afternoon; and there's no telling what Mr. Howard is going to say that Mr. Eler might need to investigate. He may say things that Mr. Eler may find a way, with the investigation, to refute or he may bring up things that create leads to other testimony that might help you.
>
> If we try your case Monday, then one of that will happen, because the case will be over with. They have got a ballistic expert that says in his expert opinion the ballistics tie you into the killing. And Mr. Eler would like to have a ballistic expert to put on the stand to rebut that, and he doesn't have one yet. If we try your case Monday, we wouldn't have one by then.
>
> Mr. Howard has told them a whole bunch of activities relating to the trafficking of cocaine that tie into the motive for this killing. And Mr. Eler would like to have some time to investigate whether or not those allegations can be refuted. Because, otherwise, the jury isn't going to hear Mr. Howard tell them that he committed this murder. The jury is going to hear Mr. Howard telling them you committed this murder because of drug dealings, and you won't have anything to refute it with.

The State's now seeking the electric chair. The decision that you make now has a life or death sentence for you because the State is seeking to put you in the electric chair.

There are witnesses who didn't appear for their depositions. He would like to get a chance to get them, it wouldn't happen before Monday. And some of the people who at one time were listed as suspects are out of the state right now, but he's got a lead on reaching them in Georgia. And if he finds them, maybe he can point the finger at them with some evidence in an attempt to get the jury to look at the possibility that somebody else did it; that's what I'm hearing him say.

And he's saying that he is not ready for trial on Monday and doesn't want to go. And he's saying that you want to go, and I know he has talked to you about it. And the last time you were here you told me you want to go on Monday.

I am ready to go. I don't care what you choose. I can try it Monday. If I don't try this one, I've got something else to try. I'm not in any way, shape or form trying to influence your decision. I'm telling you what I hear so that you're clear on what he's asking about. And I also want to tell you, after me telling you all of this, if you say you want to go to trial in spite of this, you can't come back after you get convicted and say I want my conviction overturned because Mr. Eler didn't do these things right, you understand that?

. . . .

It wouldn't make sense. Now, don't let him do it. You say, I want to go to trial,

> and then come back later and say I didn't have a fair trial because he didn't depose these people. So, you understand all of that?

(T 69-71). Curtis insisted on proceeding to trial as scheduled, even in light of the trial court's subsequent statement: "If you don't try it Monday, I can try it relatively quickly. We're not talking about trying it a long, long time away." (T 73). Contrast Sweet v. State, 624 So. 2d 1138 (Fla. 1993) ("Sweet had a fundamental misunderstanding of the State's case against him and of the nature of the preparation of a defense. He obviously did not understand that the fact there were no depositions taken of State witnesses did not inure to his benefit, but to the benefit of the State.").

In addition to the line of cases cited above, there are also cases which assert the right of the defendant to control his litigation personally or to control his attorney in the handling of procedural matters. See 7A **C.J.S.** Attorney & Client § 194. This line of reasoning is particularly persuasive in this case, where the defendant was present, aware of counsel's proposed course of action, and expressly disagreed with it. In those cases where the defendant is not present and not aware of counsel's proposed action, it is understandable that, if counsel acted in good faith, his actions should be attributable to the defendant.

By affirmatively asserting below that he did not want a continuance, and by now claiming that giving him exactly what he wanted below was error, Curtis has placed the trial court in a no-win situation, as foretold by the trial court itself. Below, Curtis insisted on proceeding to trial on June 6th. The trial court obliged his wish, and Curtis was convicted and sentenced to death. Now, on appeal, Curtis has reevaluated the situation and determined that the trial court should not have granted his wish; instead, the trial court should have followed counsel's wishes. This Court can well envision the appellate argument had the trial court followed the latter course of action. This issue would then be addressed to how the trial court erred in overriding Curtis's wishes.

In Landry v. State, 20 Fla. L. Weekly S486 (Fla. Sept. 21, 1995), this Court affirmed a defendant's right to choose to proceed to trial, even without engaging in discovery:

> [T]he mere fact that a defendant charged with first-degree murder decides to forego discovery in exchange for a speedy trial cannot serve as an independent basis for striking a demand as invalid, because there is not requirement that a defendant participate in discovery. There is no question that there are legitimate strategic reasons why a defendant might wish to forego discovery in exchange for a speedy trial. For example, a defendant who believes that he had little to

> gain from discovery might choose to forego discovery in order to avoid having to disclose the names of defense witnesses or other information that a defendant who elects to participate in discovery must disclose to the State . . . . Or, as in this case, a defendant might choose to forego discovery in exchange for a speedy trial in order to be brought to trial before the State can work out deals with codefendants whose testimony might be the State's primary evidence against the defendant.

Id. at S488.

Similarly, in the instant case, Curtis chose to proceed to trial without retaining a ballistics expert or giving defense counsel more time to examine Howard's deposition and find other witnesses. This was Curtis's choice to make, and the trial court properly recognized that. Curtis can show no abuse of discretion on this point, particularly in light of the facts that: (1) the state did not call Howard as a witness; (2) defense counsel did an adequate job cross examining the state's ballistics expert (T 666-76); (3) Curtis adequately attacked Howard's statement with his own version of events; and (4) based on counsel's involvement dating from at least January 5, 1994 (T 15) and extensive discovery having taken place (R 12, 21, 23, 32, 40, 42, 282, 445-704), Curtis adequately rebutted the state's evidence and presented his own case.

Issue II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTION TO CURTIS'S PEREMPTORY CHALLENGE OF MR. KELLEY, A WHITE JUROR.

A trial court is vested with broad discretion in determining whether peremptory challenges are racially motivated. Files v. State, 613 So. 2d 1301 (Fla. 1992); Fotopoulos v. State, 602 So. 2d 784, 788 (Fla. 1992); Reed v. State, 560 So. 2d 203, 206 (Fla.), cert. denied, 498 U.S. 882 (1990). See also Roberts v. State, 21 Fla. L. Weekly D24 (Fla. 5th DCA Dec. 22, 1995). In this case, the trial court did not abuse its discretion in denying Curtis's peremptory challenge of Mr. Kelley, a white male juror, because Curtis failed to articulate a race neutral reason for the strike.

When defense counsel exercised a peremptory challenge on Mr. Carr, the state objected on Neil/Slappy[1] grounds (T 400). Defense counsel responded that Mr. Carr's statement that "the punishment should fit the crime" indicated that Mr. Carr would automatically vote for death (T 400). The trial court denied the state's challenge, expressly finding that defense counsel had offered a racial neutral reason for the strike (T 400).

---

[1] State v. Neil, 457 So. 2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So. 2d 565 (Fla. 1986), clarified, State v. Slappy, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988), limited by, Jefferson v. State, 595 So. 2d 38 (Fla. 1992).

Defense counsel next struck Mr. Copeland, stating the reasons for its strike before the state registered any objection, i.e., Mr. Copeland worked at a funeral home, had given CCR a number of times, stated that the punishment should fit the crime, and was a multiple victim of crimes involving the home and vehicle (T 401-02). Defense counsel then struck Mr. Boudreau, and the state objected (T 403). Defense counsel explained, without being directed by the trial court, that Mr. Boudreau had indicated that his daughter worked at the State Attorney's Office; he was a victim of auto theft; and he was strongly in favor of the death penalty (T 403). The trial court found that defense counsel had enunciated a nonracial reason for the strike, and denied the state's challenge (T 403).

The state objected on "the grounds as earlier indicated" when defense counsel struck Ms. Parker, but the trial court did not direct defense counsel to answer and defense counsel did not (T 404). When the trial court noted that they had chosen 12 jurors and asked if Curtis accepted the panel, defense counsel struck Mr. Kelley (T 405). The state registered a Neil/Slappy challenge, and the trial court asked defense counsel for an explanation (T 405). Defense counsel responded: "[M]y client indicated. . . he did not feel as though he would adequately represent a fair cross-section

of the community in this particular case and requested that I strike Mr. Kelley for a peremptory." (T 405). The trial court stated that that was not a race neutral reason, and denied the strike (T 405).[2]

Curtis argues that, despite this Court's pronouncement in State v. Johans, 613 So. 2d 1319 (Fla. 1993),[3] that a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner, the state should not glean the benefit of Johans when objecting to a black defendant's strikes of white venire persons, because they are part of a majority group. Initial Brief at 51-52. In light of the fact that Johans applies prospectively only, see id. at 1321, and the record makes clear that the trial court did not rely on Johans,[4] this is a nonissue.

Because Johans does not apply in this case, Neil controls, and the only issue is whether the state proved a substantial likelihood that Curtis's challenge of Mr. Kelley was exercised solely on the

---

[2] The trial court then asked Curtis whether he accepted the jury panel, other than his objection to Mr. Kelley (T 410). Curtis responded affirmatively (T 410).

[3] See also Taylor v. State, 638 So. 2d 30 (Fla.), cert. denied, 130 L. Ed. 2d 424 (1994); Valentine v. State, 616 So. 2d 971 (Fla. 1993).

[4] Johans issued in 1993, and Curtis committed the instant offenses in December 1992 (R 9).

basis of race. 457 So. 2d at 486. The record shows that the state met its initial burden, enunciating that "Mr. Kelley didn't answer anything. He answered the questions real plain. There is absolutely no race/gender neutral reason to strike this individual. . . . That is a Neil/Slappy challenge." (T 405). The record also indicates that Mr. Kelley was the fifth white juror challenged. While numbers alone are not dispositive, they are part of the equation in determining the substantial likelihood that peremptory challenges are being exercised solely on the basis of race. See Reynolds v. State, 576 So. 2d 1300, 1302 (Fla. 1991).

Because the state registered a proper objection, the burden then shifted to Curtis to show that the challenge of Mr. Kelley was not exercised solely on the basis of race. Neil, 457 So. 2d at 486-87. Curtis clearly did not meet his Neil burden: The only reason enunciated by defense counsel was that Curtis "did not feel as though [Mr. Kelley] would adequately represent a fair cross-section of the community in this particular case" (T 405). This reason wholly fails to "show that the challenge[] w[as] based on the particular case on trial, the parties or witnesses, or characteristics of the challenged person[] other than race . . . ." Id.

Curtis states that counsel's "cross section" explanation could have embraced a number of considerations. Initial Brief at 56. Indeed, it could have. The term "cross section" simply means a representative sample intended to be typical of the whole. Thus, "cross section" could refer to gender, race, religion, economic status, etc. See Taylor v. Louisiana, 419 U.S. 522 (1974) (accepting the fair-cross-section requirement as fundamental to the right to jury trial and holding: "'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . .") (citation omitted). However, speculation as to what Curtis intended the phrase to mean here presents no ground upon which this Court can resolve an issue. And the fact remains that, although Curtis could have meant a number of things by "cross section," he explained the comment no further.

Finally, Curtis asserts that "feelings do count." Initial Brief at 58. See (T 405) (in denying Curtis's strike of Mr. Kelley, the trial court stated that Curtis's feelings did not count). Trial courts should be most reluctant to accept "gut feelings" as a race neutral explanation for a peremptory challenge, especially if there is nothing to support this explanation other than counsel's own statement. Barfield v. Orange County, 911 F. 2d

644 (11th Cir. 1990), cert. denied, 500 U.S. 954 (1991). While Curtis also asserts that he had a right to strike one juror to reach another under Kibler, he apparently overlooks Kibler's language that the stricken juror still must be stricken on racially neutral grounds in order to reach the other juror, and the fact that he never stated which juror he intended to reach or why.

Although it is clear that Johans does not apply in this case, the following argument is presented in response to the many pages devoted to this case in Curtis's brief. Curtis's argument regarding Johans is not only unfounded, but logically unsound in its ramifications, which would result in an unlevel playing field.

In Georgia v. McCollum, 120 L. Ed. 2d 33 (1992), the United States Supreme Court was quite clear in its holding: "[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges." Id. at 51. That same year, in State v. Aldret, 606 So. 2d 1156 (Fla. 1992), this Court answered the certified question of whether the state may object to a defendant's use of peremptory challenges in an allegedly discriminatory manner

with a citation to Georgia v. McCollum and a quotation from State v. Neil, 457 So. 2d 481 (Fla. 1984): "[B]oth the state and the defense may challenge the allegedly improper use of peremptories. The state, no less than a defendant, is entitled to an impartial jury." Aldret, 606 So. 2d at 1157 (emphasis in original) (quoting Neil, 457 So. 2d at 487).

In reaching its decision in Johans, this Court was aware of its own Aldret decision and Georgia v. McCollum, both of which issued prior to Johans. By enunciating its rule in general terms and not expressly stating that its rule applied only to defendants and that the state must carry an enormous burden in establishing racially motivated strikes, it is fair to infer that this Court intended its rule to apply equally to all players on the field.

Curtis directs this Court to a trio of cases from the First District Court of Appeal, which hold that the state carries an enormous burden in establishing that a defendant's strikes of majority race venire persons are racially motivated -- Rome v. State, 627 So. 2d 45 (Fla. 1st DCA 1993), McClain v. State, 596 So. 2d 800 (Fla. 1st DCA 1992), and Elliott v. State, 591 So. 2d 981 (Fla. 1st DCA 1991). Significantly, McClain and Elliott issued prior to Johans. And presumably, because Johans issued in February

1993 and Rome in November 1993, the Rome parties did not have the benefit of Johans at trial.

Elliott, McClain and Rome rest on two remarks in Elliott: (1) "[T]he burden may be greater on the complaining party to establish racial motivation when Neil is used to protect white jurors," 591 So. 2d at 983; and (2) "[M]ore likely than not, where the peremptory challenges are being used to strike members of the majority race, the state, as the objecting or complaining party, carries an enormous burden to establish invidious racial motivation." Id. at 986. These unsupported remarks cannot survive case law from this Court. Although this Court used "minority" language in State v. Slappy, 522 So. 2d 18 (Fla. 1988), and Reynolds, 576 So. 2d at 1300, it clearly viewed "minority" status as simply a factor to be considered in whether the Neil burden should be shifted to the challenging party to give race neutral reasons for the strikes. See id.; Kibler v. State, 546 So. 2d 710 (Fla. 1989). A few years later, this Court reaffirmed that Neil challenges are equally available to both parties in Aldret. Finally, one year later, this Court pronounced a new rule in Johans that Neil inquiries were to be made on objections, not just those of defendants, that strikes were being exercised in a racial manner. Thus, the minority/majority distinction so critical to

Elliott and its progeny no longer appears to exist, because the Neil burden shifting no longer exists. See Ratliff v. State, Case No. 94-2644 (Fla. 1st DCA Jan. 23, 1996) ("[N]ow that our supreme court has done away with any prerequisite -- beyond timely objection alleging discrimination against a protected class -- for an inquiry into the challenger's motives, it may be time to reconsider whether the party exercising the challenge should continue to bear the burden of proof (at least for state constitutional purposes) on the question of discriminatory intent -- as opposed to shouldering only the lesser burden to articulate 'a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.'" Ratliff, slip op. at 17 (quoting Batson v. Kentucky, 476 U.S. 79, 98 n.20 (1986)).[5]

[5] In Ratliff, the First District Court of Appeal certified a question of great public importance to this Court on this issue: "WHEN A LITIGANT OBJECTS THAT AN OPPOSING PARTY SEEKS TO EXERCISE A PEREMPTORY CHALLENGE FOR CONSTITUTIONALLY IMPERMISSIBLE REASONS, WHO HAS THE BURDEN TO PROVE (OR DISPROVE) FACTS ON WHICH THE OBJECTOR RELIES?" Slip op. at 18. Because Johans does not apply in this case, as admitted by Curtis, Initial Brief at 54, the appropriate vehicle for resolution of the tension alleged to exist between Johans and various cases from the First District, Initial Brief at 55 n.12, appears to rest in Ratliff.

Issue III

WHETHER CURTIS'S CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER IS PROPER.

Curtis claims this his conviction for attempted first degree murder cannot stand because the state's theory was based solely on felony murder, and the crime of attempted first degree felony murder does not exist in Florida pursuant to State v. Gray, 654 So. 2d 552 (Fla. 1995).[6] This argument is based on the inaccurate assumption that the state's only theory was felony murder.

The record reveals that the state also proceeded under the theory of premeditated first degree murder. The grand jury indicted Curtis for first degree murder,[7] attempted first degree murder,[8] and armed robbery (R 9-11). The jury found Curtis guilty of first degree murder "as charged in the indictment," guilty of attempted first degree murder with a firearm "as charged in the

---

[6] Gray, dated May 4, 1995, is applicable to all cases pending on direct appeal or not yet final. 654 So. 2d at 554. Curtis filed his notice of appeal on August 25, 1994.

[7] The indictment charged that Curtis "unlawfully and from a premeditated design to effect the death of Najwan Khair-Bek, or during the commission, attempt to commit, or escape from the immediate scene of a robbery . . . ." (R 9).

[8] The indictment charged that Curtis "did attempt to unlawfully kill Fouad Taaziah . . . by shooting the said Fouad Taaziah, with a pistol, with a premeditated design to effect the death of Fouad Taaziah . . . and during the commission of the aforementioned Attempted First Degree Murder the said MEMWALDY CURTIS carried or had in his possession a firearm . . . ." (R 9).

indictment," and guilty of robbery with a firearm "as charged in the indictment." (R 321-25). These facts alone distinguish Gray.

In Gray v. State, 654 So. 2d 934 (Fla. 3d DCA 1994), the defendant was charged with armed robbery and attempted first degree felony murder. Notably, nowhere in the charging instrument was there language regarding premeditation as to the attempted first degree murder count. On appeal from the Third District Court of Appeal, this Court receded from Amlotte v. State, 456 So. 2d 448 (Fla. 1984), to conclude that the crime of attempted felony murder does not exist in Florida. State v. Gray, 654 So. 2d 552, 553 (Fla. 1995). Because the charging instrument in the present case charged both attempted felony murder and attempted premeditated murder, Gray by its own terms does not apply.

Issue IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE THE PRIOR CONSISTENT STATEMENT OF ALBERT FOUNTAIN.

The decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in admitting Robinson's account of Fountain's statement to him, because the state proved that Fountain gave his statement prior to the existence of any motive to fabricate, a prerequisite to admitting a prior consistent statement.

Albert Fountain testified that, although Curtis told him the details of the instant murder on the night of the murder, Fountain did not tell police until about a year later when he was arrested for an unarmed robbery unrelated to the instant crimes (T 698). Fountain stated that he told Detective Robinson at the time of his arrest that "he had me to the right, and I was facing a lot of time and I told him if I tell him about the murder and the armed robbery that happened at the Safeco Store will he work out a deal with me, and he said 'Yeah.'" (T 699). Fountain stated that he had hoped

for some type of "better treatment" or assistance from the detective (T 699); since that time, Fountain pled guilty, was currently in jail, and was "fac[ing] up to a 15-year-cap." (T 700). Fountain recalled that he had pled guilty to the crime as charged, that his sentence would be no more than 15 years, that the sentence would be up to the judge, that the only recommendation the state attorney's office would make would be to not seek sentencing under the habitual felony offender statute, and that his sentence would be based upon his telling the truth at Curtis's trial (T 700-01).

During cross examination, Fountain again admitted to being a six time convicted felon, that he would not be classified as a habitual felony offender on his pending charge if he testified truthfully, that his sentence would be 15 years at the maximum, and that his sentence would be straight prison time on which he would accrue more gain time than if classified as a habitual felony offender (T 702-03). When defense counsel asked if the state would make a sentencing recommendation, Fountain replied that "[t]hat has already been decided, not to seek the H.O." (T 703). Defense counsel then asked if Fountain would face a 15 year sentence; Fountain replied that the judge would decide (T 704). Defense counsel queried whether Mr. Maltz would make a sentencing

recommendation; Fountain stated that he did not know (T 704). Defense counsel then sought to impeach Fountain with his sworn statement (T 704-05).

Fountain maintained his position that the only recommendation the state would make regarding sentencing would be not seeking a habitual felony offender sentence. When defense counsel asked Fountain his understanding of the 15 year maximum, Fountain stated that he would get no more than 15 years, but he might "even get 15 years." (T 705). Fountain stated that he did not know if he "st[ood] to get less than 15 years" if he testified (T 705). Defense counsel pursued this line of questioning and continued impeachment with Fountain's sworn statement during the course of cross examination (T 713-14, 718-19, 722, 725-26, 731).

On redirect examination, Fountain stated that, when he first gave information to Detective Robinson, his case had not gone to court and he had not pled guilty to the 15 year maximum (T 732). The prosecutor asked Fountain if he remembered the question in his sworn statement, that, if his testimony were not truthful, he could receive the maximum sentence and be charged with the crime of perjury; Fountain stated that he recalled (T 732-33). During recross examination, defense counsel asked Fountain if he had "a

lot to lose" if his testimony at trial differed from his sworn statement; Fountain responded affirmatively (T 737).

Detective Christopher Robinson testified next, recounting his conversation with Fountain after Fountain was arrested for unarmed robbery (T 743). When the prosecutor asked Robinson what information Fountain gave him about the Safeco store murder, defense counsel objected that the testimony was cumulative, was hearsay, and was "an attempt by the State to bolster the character of Mr. Fountain which is improper under the Rules of Evidence." (T 743). The prosecutor responded that, because defense counsel implied to the jury that Fountain had a reason to fabricate his testimony, Robinson's testimony constituted an exception to the hearsay rule as "a prior consistent statement made prior to the time in which a motive or a reason to fabricate arose." (T 743). The trial court agreed with the state and overruled defense counsel's objection (T 757).

Curtis claims that, because Fountain's motive to falsify existed at the moment of his arrest on December 7, 1993, the trial court erred in admitting Robinson's testimony as prior consistent testimony. Initial Brief at 62. This Court's case law supports the trial court's admission of Detective Robinson's testimony.

In Dufour v. State, 495 So. 2d 154 (Fla. 1986), Taylor[9] made a statement about Dufour at the time of Taylor's arrest for armed robbery. This Court held that the trial court properly admitted Detective Hanson's testimony regarding Taylor's statement under **Fla. Stat.** § 90.801(2)(b) (1983): Because "the statement was made at the time of Taylor's arrest in October 1982, prior to the robbery plea negotiations, and the actual filing of the Georgia murder charge, the trial court properly found that the statement was made prior to the existence of Taylor's motive to fabricate." Id. at 160 (citation omitted).

In Stewart v. State, 558 So. 2d 416 (Fla. 1990), Smith, a friend with whom Stewart shared an apartment, testified that Stewart had told him the details of the murder. After Smith testified, Detective Marsicano testified as to Smith had told him when Smith was arrested in connection with other offenses. Defense counsel objected on hearsay grounds, and the prosecutor countered that the prior consistent statement was not hearsay because it rebutted Stewart's claim that Smith had fabricated his testimony in return for favorable treatment by the state. On appeal, Stewart

---

[9] Taylor was Dufour's "associate" and co-defendant in a Mississippi murder prosecution, and was awaiting trial on murder charges in Georgia at the time he testified at Dufour's trial. 495 So. 2d at 156, 159.

claimed the Marsicano's testimony should not have been admitted because

> the same reason that was given for discounting Smith's in-court testimony existed at the time Smith spoke to Marsicano, and thus the prior consistent statement was not made before the reason to falsify came into existence. We disagree. During cross-examination of Smith, defense counsel indicated that Smith was not to be believed because he was attempting to obtain favorable treatment at sentencing on convictions that had been obtained on other charges. This was a recent situation; when Smith spoke to Marsicano, no convictions had been obtained and no sentences were pending. Marsicano's testimony was properly offered to combat Stewart's charge of recent fabrication.

Id. at 419.

In Anderson v. State, 574 So. 2d 87 (Fla. 1991), FDLE agent Velboom testified about two out-of-court statements made by Beasley, Anderson's girlfriend. This Court concluded that these statements were properly admitted as prior consistent statements:

> During cross examination, defense counsel attempted to impeach Beasley by suggesting that she fabricated her trial testimony after negotiating a favorable plea. Thus, if Beasley statements to Velboom were made *before* her alleged motive to falsify arose, the state was entitled to present Beasley's prior consistent statements to rebut the implication of recent fabrication, pursuant to section 90.801(2)(b).
>
> In this case, the defense implied that Beasley changed her story after making her

> plea agreement. Because Beasley made her July 1 statement to Agent Velboom *before* the July 24 plea agreement, Velboom's testimony was not hearsay and was properly admitted. In contrast, the trial court erred in admitting Velboom's testimony about Beasley's August 20 statement because it was made *after* the plea agreement, when the alleged motive to falsify arose. We are persuaded, however, in light of the entire record that in this case there is "no reasonable possibility that [this] error contributed to the conviction."

Id. at 92-93 (citations omitted; emphasis in original).

All three of these cases support the trial court's action in this case. Fountain gave his statement at the time of his arrest -- before any plea negotiations, before the entry of any plea, before any conviction, before sentencing. Thus, Fountain made his statement before the existence of any motive to fabricate. Because defense counsel indicated through questioning during cross examination that Fountain should not be believed by the jury because he was attempting to gain favorable treatment from the state at sentencing on other charges, the trial court properly permitted Detective Robinson to testify concerning Fountain's prior consistent statement.

If this Court determines otherwise, any error committed on this point was harmless. Even without Fountain's prior consistent statement, the jury heard Fountain's own testimony. Despite

Fountain's six time convicted felon status, and defense counsel's rigorous cross examination, Fountain maintained his version of events. In light of the record on appeal, there is no reasonable possibility that any error on this point contributed to the jury verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING CURTIS FROM COMMENTING IN CLOSING ARGUMENT ON THE STATE'S FAILURE TO PRODUCE ANTHONY HOWARD.

The trial court, in the exercise of its discretion, controls the comments made in closing arguments, and this Court has held repeatedly that the trial court's rulings on these matters will not be overturned unless a clear abuse of discretion is shown. Hooper v. State, 476 So. 2d 1253, 1257 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986); Davis v. State, 461 So. 2d 67, 70 (Fla. 1984). The trial court here did not abuse its discretion because Anthony Howard was equally available to both parties.

In its first motion in limine, the state asked the trial court to prohibit argument, testimony or evidence regarding the state's failure to call any witness "unless and until it is determined that such witness is peculiarly within the State's power to call and that such witness's testimony would elucidate the transaction." (R 26). During the charge conference, the state renewed this motion, and defense counsel argued that the instant case differed from Haliburton v. State, 561 So. 2d 248 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991):

> Here you have a co-defendant, Your Honor, who has an accomplice -- this Court is going

to give an accomplice instruction who, for whatever reason, the State has chosen not to call -- so I think that elevates -- I think in the Hal[i]burton case, it was a witness and no a co-defendant, Your Honor, so I think that elevates it.

And out of a sense of fundamental fairness, I should be allowed to argue it.

[State]: He is nothing but a witness. He was a co-defendant at one time; he pled guilty. His status changed. He was a witness. He is equally available to both parties. He is not peculiarly available to one side or the other.

If they wanted to use him, he was in the courthouse or in the jail yesterday. They could have called him; therefore, it is rightly within the parameters of Hal[i]burton.

[Court]: He responded to your subpoena when you subpoenaed him to depose him?

[Defense]: Yes, sir.

[Court]: I am not sure how he did, but he got over here from the jail.

[Defense]: What I am suggesting to the Court is that while Hal[i]burton holds that a witness can be subpoenaed by the Defense or the State, that it would be inappropriate to comment on that. I agree that is the law.

I think that the status of Mr. Howard in this particular case is the shooter who acknowledged killing Mr. Khair-Bek. In the State's strategy, good or bad, they put on their case, why should that prohibit me from arguing that?

You are going to give an instruction on reasonable doubt. In that instruction, you are going to advise this jury that they can find a reasonable doubt from the evidence, from a conflict in the evidence, or from the lack of the evidence, Your Honor.

[Court]: Right.

[Defense]: And that is where the conflict comes in. And I think in a case of this magnitude, a First Degree Murder case where he could get the death penalty, I think that for the sake of fundamental fairness, I should be allowed to argue.

. . . .

. . . .

[Court]: The only answer I have to give you is that they can do that because Hal[i]burton says they can do it. Before that case, every trial I was ever involved with as a lawyer or a judge, on side or the other, usually the Defense in a criminal case, said look at their witness list.

There are 40 people on it, and they only called these five. Where are these other people? It was standard. It was just part of the defense attorney's argument until that case was handed down. That case changed the law.

And now the law is unless you couldn't call him for some reason, you can't -- you can't say that their not calling him is a lack of evidence.

Other than that case, I can't give you a reason for it, but they changed the law. As far as I know, that is still the law.

[Defense]: As I understand the Court's ruling, I am not going to be allowed to comment on the fact that they didn't call --

[Court]: Right. See, if --

[Defense]: -- but I am still allowed to comment on his written statement?

[Court]: Sure, that is in evidence. If he had refused to answer your questions at the deposition or refused to respond to the subpoena, or if he had taken the Fifth Amendment or something and said, I'm afraid of Federal prosecution or something where he was refusing to participate as a witness, that would be a different point.

What he has done is everything just like any other witness, you know. And even last night, had you said I would like a continuance to bring Mr. Howard over, I would have given it to you.

And I would have been surprised for you to do that; there [are] some negative sides for both sides testifying, apparently. If you didn't do that and you could have, it probably would have been malpractice for you to put him on the stand. He was available physically and legally available. So because of Hal[i]burton case, you can't do it.

(T 970-73).

In Haliburton, this Court relied upon State v. Michaels, 454 So. 2d 560 (Fla. 1984), where the defendant's daughter was a witness but was not called by the defense at trial, and the

prosecutor commented on this failure. This Court found no error and noted:

> The basis for the rule is that the trier of fact is entitled to hear relevant evidence from available and competent witnesses. When such witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness. Here, however, the witness was the daughter of the defendant. She was not "equally available" to the prosecution because of the parent-child relationship which would normally bias her toward supporting her father's defenses.

Id. at 562.

The Haliburton Court also relied upon Martinez v. State, 478 So. 2d 871 (Fla. 3d DCA 1985), where the trial court prohibited defense counsel from arguing the state's unexplained failure to call the co-defendant, who was listed as a state witness. The Third District found no error, and observed:

> The general rule is that an inference adverse to a party based on the party's failure to call a witness is permissible when it is shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction.
>
> "'Availability' of a witness to a party must take into account both practical and physical considerations. Thus whether a person is to be regarded as peculiarly within the control of one party may depend as much on

his relationship to that party as on his physical availability."

Such special relationships have been found where (1) the witness was defendant's daughter, (2) there was a friendship between the party and witness, (3) the witness was the employer of the defendant, (4) the witness was a police officer closely associated with the government in developing its case and had an interest in seeing his police work vindicated by defendant's conviction, (5) the witnesses were state employees who were present at alleged suggestive pretrial line-up and were still in state's employ at time of trial, and (6) the witness was an informer associated with government in development of case against defendant and there was no indication at trial of any break in the association.

We find in this record only that the codefendant entered a plea to the charges, was listed by the State as a witness, was brought to Miami from a prison elsewhere in the state in the event his testimony was desired by the State, and was deposed by the defendant. No special relationship can be found from these facts which make the codefendant less available to the defendant than to the State. A "special relationship" takes its substance from extraneous circumstances, natural or contractual, which give rise to testimonial predilection favorable to a party. Such special circumstances, suggestive of favoritism to the State, are lacking in this case. An argument could be made that in the natural order of things, absent some inducement to do otherwise, a codefendant whose case has been disposed of by trial or plea could be expected to give testimony favorable to the defendant -- which might explain the State's decision to not call him as its witness.

Id. at 871-72 (citations omitted).

Similarly, Anthony Howard had no special relationship with the state. Both the state and defense listed Howard as a witness (R 42, 47). A copy of Howard's negotiated plea indicated that he would plead guilty to all counts of the indictment and would receive a life sentence on the first degree murder count; that there was no agreed-upon sentence for counts two and three; that sentencing would be delayed; and that the state would make a sentencing recommendation to the court, conditioned upon Howard's providing truthful testimony in the Curtis case (R 43, 718-20). Further, defense counsel admitted to the trial court that he had subpoenaed and deposed Howard.

If this Court determines otherwise, any error on this point was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The court permitted Curtis to comment on Howard's statement and written plea agreement, of which defense counsel fully availed himself. Furthermore, the jury saw for itself that Howard did not appear, and could draw any number of inferences from that fact.

Issue VI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CURTIS'S VARIOUS MOTIONS FOR MISTRIAL BASED ON ALLEGATIONS OF PROSECUTORIAL MISCONDUCT.

The trial court, in the exercise of its discretion, controls the comments made in opening statements, the conduct of counsel during trial, and the comments made in closing arguments. Occhicone v. State, 570 So. 2d 902 (Fla. 1990), cert. denied, 111 S. Ct. 2067 (1991); Robinson v. State, 520 So. 2d 1 (Fla. 1988), cert. denied, 112 S. Ct. 131 (1992); Hooper v. State, 476 So. 2d 1253 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986). Absent a showing of a clear abuse of discretion, this Court will not overturn a trial court's ruling in this regard. Id. The trial court did not abuse its discretion in the instant case, because those comments which were objected to were not so prejudicial as to warrant a mistrial.

Curtis first complains that the prosecutor improperly argued during opening statement that Curtis had destroyed the victim's "American dream" and then "pounded that theme home" in closing argument. Initial Brief at 65-66. Curtis, however, neglects to inform this Court that defense counsel did not object to the "American dream" comments during the opening statement (T 441-42).

Accordingly, this issue is procedurally barred. Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990).

During closing argument, defense counsel objected to the "coffin" remark and moved for a mistrial; the trial court sustained the objection but denied the mistrial motion, noting: "I don't think it is prosecutorial misconduct or anywhere close to the kind of misconduct I have to have to state a mistrial." (T 1083). Because defense counsel did not request a curative instruction, this issue has not been preserved properly for appeal. Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Palmer v. State, 486 So. 2d 22 (Fla. 1st DCA 1986); Oliva v. State, 346 So. 2d 1066 (Fla. 3d DCA 1977).

In any event, the prosecutor's "American dream" argument was not improper. It did not ask the jurors to place themselves in the victim's shoes. Contrast Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989). And it did not constitute a plea for victim sympathy. Contrast Valle v. State, 474 So. 2d 796, 805 (Fla. 1985); Bush v. State, 461 So. 2d 936, 941 (Fla. 1984). Even if the "coffin" remark were improper, it was, as the trial court found, not so prejudicial as to have influenced the jury. Johnson v. State, 442 So. 2d 185 (Fla. 1983), cert. denied, 104 S. Ct. 2182 (1984).

Curtis next complains that the prosecutor improperly suggested to the jury that it should send the community a message by convicting Curtis. Initial Brief at 67.[10] Although this Court has held that it is improper for a prosecutor to ask the jury to send a message to the community, Bertolotti v. State, 476 So. 2d 130 (Fla. 1985), the prosecutor in this case did not make such "an obvious appeal to the emotions and fears of the jurors." Id. at 133.[11] Instead, the prosecutor argued only that the jury was the criminal justice system and it was the jury's responsibility to "do the right thing," i.e., convict Curtis (T 1078). This is not the equivalent of asking the jury to send a message to the community. See (T 1082) (The trial court held: "The improper thing is 'sending a message,' the prosecutor would be telling jurors to let something other than the evidence influence their verdict . . . let community response be the reason for finding guilt[].").

Curtis also complains that the prosecutor improperly commented on his right to remain silent and right not to incriminate

---

[10] Although Curtis objected to this comment several pages later, he made no "contemporaneous objection" within the meaning of Nixon v. State, 572 So. 2d 1336, 1341 (Fla. 1990).

[11] In Bertolotti, the prosecutor argued: "Anything less in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only the victim gets the death penalty." Id. at 133 n.3.

himself.[12] Initial Brief at 67. The record clearly shows that defense counsel objected only on the basis of Curtis's right to remain silent (T 1084); accordingly, Curtis's new claim that the comments violate his right not to incriminate himself is procedurally barred. Nixon v. State, 572 So. 2d 1336 (Fla. 1990). In explaining his comments, the prosecutor observed that Curtis himself testified that he did not call the police and tell them his story (T 1084). The trial court correctly found no comment on Curtis's right to remain silent. Viewed in context, these comments were not fairly susceptible of being interpreted as remarks on Curtis's exercise of his right to remain silent. Instead, they are comments responsive to the issue of Curtis's credibility, as he admitted that he never told the police about Howard's threatening him (T 881, 885, 895-96, 903-04, 912).

Next, Curtis complains that the prosecutor "crossed the line" by demeaning Curtis's character as a liar. Initial Brief at 67-68. Curtis, however, neglects to inform this Court that he did not object to any of the "lying" or "ridiculous" comments (T 1059, 1063, 1068, 1071). Accordingly, this issue is procedurally barred. Nixon v. State, 572 So. 2d 1336 (Fla. 1990). In any event, "[w]ide

---

[12] Again, although defense counsel objected, the objection is some 20 pages after the comment by the prosecutor (T 1084), and is not "contemporaneous" within the meaning of Nixon.

latitude is permitted in arguing to a jury. Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments." Breedlove v. State, 413 So. 2d 1, 8 (Fla. 1982) (citations omitted). See also Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985) (proper closing arguments "review the evidence . . . and explicate those inferences which may reasonably be drawn from the evidence."). As a complete contextual look at the prosecutor's closing reveals, these comments were made as the prosecutor reviewed Curtis's testimony and permissibly pointed out the "major flaw[s] in the logic of the defendant's testimony." (T 1068).

Finally, Curtis complains that the prosecutor demeaned the reasonable doubt standard. Initial Brief at 68. Again, Curtis does not indicate his failure to object to this argument below; accordingly, it is procedurally barred. Nixon v. State, 572 So. 2d 1336 (Fla. 1990). In any event, as is evident, the prosecutor did not misstate the law on this point.

Despite the fact that Curtis did not object to many of these comments, he claims that this Court may consider them under the rationale enunciated in Whitton v. State, 649 So. 2d 861 (Fla. 1994), cert. denied, 1995 WL 335122 (U.S. Oct. 2, 1995). There, this Court found a statement by the prosecutor to be fairly susceptible of being interpreted by the jury as a comment on

Whitton's right to remain silent; because it found error, this Court proceeded to examine whether the error was harmless. Id. at 864. In examining those statements which were not objected to, this Court did not enunciate a new rule that unpreserved issues must be examined. Instead, this Court simply followed a long line of cases since State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), in acknowledging that, when error is found, the entire record must be examined in determining whether the error is harmless.

Because there was no error under this issue, this Court need not examine the unpreserved claims. Even if this Court were to conduct such an examination, it would reveal that, beyond a reasonable doubt, these claimed errors would not have affected the jury's verdict. None of these comments were emphasized unduly, and considered either "individually or collectively, did not deny [Curtis] his right to a fair trial." Reichmann v. State, 581 So. 2d 133, 139 (Fla. 1991).

Issue VII

WHETHER THE TRIAL COURT PROPERLY DENIED CURTIS'S MOTION FOR A JUDGMENT OF ACQUITTAL ON PREMEDITATED MURDER.

Curtis alleges that the state did not charge him with the premeditated murder of Khair-Bek, citing to the December 22, 1993, information which charged him with second degree murder (R 5). This statement is incorrect, in light of the January 5, 1994, indictment which charged Curtis with first degree murder, felony or premeditated (R 9). Although Curtis points to the closing argument of the prosecutor who argued that the state had proven only felony murder (T 1037), Curtis is left with his counsel's own admission that the state had proven a prima facie case of premeditation worthy of being presented to the jury (T 848).[13]

---

[13] This prima facie case showed that, while Curtis stood beside Khair-Bek at the cash register, Howard shot Taaziah in the stomach area; Taaziah then heard two more shots (T 498-500). Khair-Bek was shot twice in the chest, and once in the foot (T 606). One .32 caliber full metal jacket projectile pierced Khair-Bek's chest (T 608), while the other .32 caliber full metal jacket projectile did not (T 621). These two bullets were not fired from the same gun (T 660). The bullet which pierced Khair-Bek's chest was fired from a .32 caliber semi-automatic pistol (T 662), the type of gun carried by Howard (T 694-95). The nonpiercing bullet was fired from a revolver (T 669), the type of gun carried by Curtis (T 693). Dr. Lipkovic did not find a separate bullet which penetrated Khair-Bek's foot (T 630), and opined: Assuming that Khair-Bek was standing when shot, and that there were no intermediary target other than his foot, the bullet which penetrated the chest would have been the first shot. When Khair-Bek fell as a result, his foot was up in the air when the second shot was fired; thus, the bullet passed through the foot and clothes and simply bruised the chest without penetrating (T 633-35).

Even if the trial court erred in denying Curtis's motion for judgment of acquittal as to premeditated murder, no reversal is necessary because the state proved first degree felony murder beyond a reasonable doubt.[14] See Mungin v. State, 20 Fla. L. Weekly S459 (Fla. Sept. 7, 1995). Specifically, the state proved that the Khair-Bek was dead; that he died while Curtis and Howard robbed the convenience store; and that, although Howard's bullet killed Khair-Bek, Curtis also shot Khair-Bek, and was present and fully participating in the robbery. Furthermore, even if the evidence did not support premeditation, the trial court committed no error in instructing the jury on both premeditated and felony murder where the jury returned a general verdict. Id.

---

[14] The elements of this crime include: (1) The victim is dead; (2) the death occurred while the defendant was engaged in the commission of armed robbery; and (3) the victim was killed by a person other than the defendant; but both the defendant and the person who killed the victim were principals in the commission of robbery. **Fla. Std. Jury Instr. (Crim.)** Felony Murder -- First Degree at 64 (June 1992). See also (T 1107).

Issue VIII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF CURTIS'S DRUG DEALING.

The decision to admit evidence is committed to the sound discretion of the trial court, and such a decision should not disturbed on appeal absent a showing of abuse of discretion. Muehleman v. State, 503 So. 2d 310, 315 (Fla. 1987); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982). In the present case, the trial court did not abuse its discretion in admitting evidence that Curtis and Howard had a drug operation, because it was relevant to prove their motive for robbery and murder.

On May 25, 1994, the prosecutor filed a notice of other crimes, seeking to introduce evidence that Curtis and Howard had conspired to sell, deliver, or distribute cocaine between January 1 and December 21, 1992 (R 41). On June 2, 1994, Curtis filed a motion to strike and a motion in limine, asking the trial court to disallow such evidence, because (1) it was not relevant to prove intent, knowledge, purpose, plan or design; (2) it was not relevant to prove any material fact in issue and would prove only Curtis's bad character; and (3) any probative value would be outweighed by prejudice (R 151-58).

At the hearing on Curtis's motions, the state explained that the narcotics conspiracy was the motivation for the robbery:

> Anthony Howard and Albert Fountain . . . indicated that it was this defendant's idea to commit this robbery which subsequently resulted in this murder. Because Memwaldy Curtis and Anthony Howard as a result of their drug dealings that they were involved in, lost some of the drugs or used up some of the drugs and owed somebody money. So, they had to go out and do this robbery in order to get the money.

(T 108). The prosecutor noted that such evidence was permissible under **Fla. Stat.** § 90.404 (1993) to prove motive, intent, absence of mistake, etc., and urged its admission as proof of motive for the instant robbery/murder: "The motive being that as a result of losing the drugs and having to pay their supplier back . . . they had to go out and do this robbery, and that's why this murder took place." (T 109).

Defense counsel argued that the evidence proved Howard's motive, not Curtis's, because Curtis owed no one money, and that there was a problem with remoteness, since the murder occurred in December 1992 and the notice alleged a time period from January through December 1992 (T 112). The prosecutor countered that he had no intent to make this evidence a feature of the trial (T 116). The trial court denied Curtis's motions (R 234, 236; T 116-17).

The state elicited this collateral crime evidence through its witness Albert Fountain:

> [State]: Did [Curtis] say why he and Anthony Howard went to rob the store?
>
> [Howard]: Yes, sir.
>
> [State]: What did he say about that?
>
> [Howard]: Because they owed somebody. They owed somebody else for drug monies on the drugs that they had messed up on, they owed somebody else, so they had to go and get the money.
>
> [State]: Did he say who he owed money to?
>
> [Howard]: To his supplier.
>
> [State]: Did he ever identify the person?
>
> [Howard]: No, sir.

(T 690-91).

Although motive itself may not have been an ultimate issue in this case, it certainly supplied the basis from which Curtis's jury could infer that Curtis intended to commit the robbery and murder, as the prosecutor explained. Accordingly, the trial court properly admitted this evidence as probative of motive. See Maharaj v. State, 597 So. 2d 786, 790 (Fla. 1992), cert. denied, 113 S. Ct. 1029 (1993); Craig v. State, 510 So. 2d 857, 863 (Fla. 1987), cert.

denied, 484 U.S. 1020 (1988); Cohen v. State, 581 So. 2d 926, 928 (Fla. 3d DCA 1991).

If this Court determines that error occurred on this point, any such error was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The state carefully restricted its questioning in this regard, and did not comment on this point in its 47 page closing argument (T 1035-80, 1085-86).

Issue IX

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CURTIS'S REQUEST FOR AN IN CAMERA JURY INTERVIEW ON THE CLAIM THAT A JUROR HAD DISCUSSED THE CASE BEFORE THE CONCLUSION OF TRIAL.

Curtis asserts that the trial court was required to conduct an in camera interview of juror Sherman to determine whether misconduct warranting a new trial had occurred. Initial Brief at 72-73. Because the trial court conducted a hearing to investigate his claim of juror misconduct, Curtis can prove no abuse of discretion by the trial court. Shere v. State, 579 So. 2d 86, 95 (Fla. 1991).

On July 14, 1994, defense counsel moved the trial court to permit Juror # 178, Ms. Sherman, to be interviewed, based on a telephone call to defense counsel from someone, who alleged that Ronnie Jones stated that Ms. Sherman and other jurors had been discussing the case during the guilt phase, prior to deliberations (R 379-80; T 1356). The prosecutor explained that he

> sent an investigator out to talk to Mr. Jones, I have his report right here. . . . [H]e talked to Ronnie Jones at his mother's house at 816 East Ashley Street, he basically would not talk to me about the case, was very evasive.
>
> He did say that I was not at the courthouse during the trial. He also stated

> he was, I guess, at friends -- he was friends with the people making the statements.
>
> When I asked him who they were, he refused to answer. Mr. Jones stated he was not coming down to testify until he was under subpoena.
>
> Then, he also has a criminal history attached. I would submit that to the Court.

(T 1357).

At the July 28, 1994, hearing, Ronnie Jones testified that Joe McCrae told him that his daughter was on Curtis's jury and that Curtis looked like he was in "bad shape" (T 1397). Jones specifically stated that McCrae did not tell him anything Ms. Sherman said (T 1397). Jones admitted that he did not know Mr. McCrae's daughter's name, did not know, other than McCrae telling him, whether she served on Curtis's jury, did not visit the courthouse during Curtis's trial, did not see Curtis's jury, did not witness anything that any jurors did, and did not hear anything any jurors said (T 1398-99). Jones admitted to pleading guilty to giving false information or identification and to being convicted of petit larceny (T 1401-02). After argument by counsel (T 1404-08), the trial court held:

> The evidence before me, based on Mr. Jones' testimony, does fall far short of the level that would be required to penetrate the historical sanctity of jury secrecy. In almost every case I could find on the issue

where this was done, it was, in fact, a juror who made a revelation about something that happened that cause the juror or other jurors to be deposed.

And certainly if it wasn't a juror, it was someone who saw a juror do something or heard a juror do something verbally. Mr. Jones is able to -- or Mr. Jones testified that he knows a man name McCrae who says his daughter was on Waldy's case.

It's interesting that he chooses the same diminutive for the defendant's name that his dad refers to him by when he was speaking in court and said that he was in bad shape. He didn't see the daughter, didn't hear the daughter, didn't know what the daughter said, if anything, to this Mr. McCrae, and he doesn't actually know if this Mr. McCrae's daughter was actually on the jury or not.

But the key thing, if I believed his testimony totally at face value, he can't -- he didn't testify to anything that this Ms. Sherman did or didn't do. The fact that -- you know, even if I believed that our Ms. Sherman who was the juror has a father name Mr. McCrae and that he came to see Mr. Jones and said, My daughter is on Waldy's jury and he's in bad shape, that doesn't constitute any misconduct on the part of Ms. Sherman. It doesn't even constitute an allegation on Ms. Sherman. Mr. McCrae has every right to his opinion about what was happening in this courthouse.

That doesn't mean he got it from his daughter. So I think that even if I took it at face value it would not meet the burden that's required to be met in order to penetrate the secrecy of this jury. I'd have

> to say that I do not take any face value, I find Mr. Jones' testimony to be very suspect.
>
> He has been convicted of several crimes involving dishonesty and he does admit to being a very close friend with the defendant's father. But assuming that I believed what he said as gospel and true, it wouldn't be sufficient for the process of bringing the jurors down here and letting them be deposed.
>
> I'll grant the defendant's -- excuse me, I will deny the defendant[']s motion for jury interview.
>
> Let me make one other finding. I also find that Mr. Jones did not know who this man's daughter was until you pointed out the name to him, Mr. Eler. I will deny the defendant's motion for jury interview.

(T 1408-10).

In Shere, the defendant filed post trial motions for a juror interview and for a new trial under **Fla. R. Crim. P.** 3.600(a)(3). This Court affirmed the trial court's denial of these motions, which were based on an anonymous letter sent to a newspaper after Shere's trial had ended. This Court found significant the facts that the letter was unsupported by sworn affidavits or other evidence; it failed to name any jurors it accused; and there was no way for the trial court to have identified the accused jurors to single them out for interviews. Likewise, in Gilliam v. State, 582 So. 2d 610 (Fla. 1991), this Court affirmed the trial court's

denial of a motion to interview jurors because "[n]o affidavits were attached to the motion demonstrating personal knowledge of misconduct by any juror [and the defendant] failed to establish a prima facie case of any juror's exposure to an allegedly prejudicial newspaper article." Id. at 611.

In this case, Curtis can prove no abuse of discretion by the trial court. At the hearing below, Curtis was wholly unable to even meet the threshold requirement of establishing juror misconduct, see **Fla. R. Crim. P.** 3.600, as nothing Jones heard was alleged to have come directly from a juror. Furthermore, Jones could not establish with certainty that the information he heard emanated from an actual juror. Street v. State, 636 So. 2d 1297 (Fla. 1994), is inapposite as that case presented a scenario where four jurors heard an outsider say "guilty" in their presence. Accordingly, the trial court conducted interviews to determine who had knowledge of the incident. Again, here, there simply is no claim that directly involved any juror, or any misconduct. See State v. Hamilton, 574 So. 2d 124 (Fla. 1991) (with an unreasonable allegation of juror misconduct, the trial court need not conduct an inquiry; a defendant must allege facts establishing a prima facie argument for prejudice).

Issue X

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF CURTIS'S PENDING ROBBERY CHARGE VIA IMPEACHMENT IN THE PENALTY PHASE.

The admission or exclusion of evidence in the penalty phase of a capital trial is within the trial court's discretion, and a ruling in this regard will not be disturbed on appeal absent a clear showing of an abuse of discretion. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). In the instant penalty phase, the trial did not abuse its discretion in allowing the state to ask Curtis's fiancée about her knowledge of Curtis's possession of a gun during a robbery, as the question constituted proper impeachment on a topic broached on direct examination by defense counsel.

Just before the penalty phase, defense counsel sought a ruling regarding the state's intention to introduce evidence of Curtis's prior juvenile record and the pending robbery charge if Curtis asserted the mitigating factor of no significant criminal history (T 1172). The trial court agreed with the state that, if Curtis asserted the mitigating factor of no significant prior criminal history, the state would be permitted to offer evidence of criminal activity -- not those that had been nolle prossed, but "the one

that went to Youth Mediation . . . and the evidence of the pending robbery" charge (T 1176).

Later, defense counsel stated that he would not be presenting evidence of the mitigating factor of no significant criminal history because that would open the door to the other crimes, but advised the court that Curtis wanted him to present that mitigating factor nevertheless (T 1230-32). The trial court permitted defense counsel to choose the strategy not to present evidence of this factor, based on "the end result . . . that the State would get in . . . aggravation evidence which would be more damaging than the value that [Curtis] could expect to receive from . . . any mitigation that would come from this evidence." (T 1232-33).

Andrea Jones, Curtis's fiancée and mother of Curtis's children, testified that Curtis was sweet and kind, had never displayed a violent temper in front of her, and that she had never known Curtis to possess any guns (T 1195-96). Defense counsel approached the bench to ask the trial court if he could ask Jones to describe Curtis's personality or sleeping disorders since June 1993, when Jones and Curtis lived together (T 1200). Defense counsel queried whether this would open the door to the state's introducing the 1993 robbery of Krystal's, which occurred in March 1993 (T 1200-01). The trial court stated the question would not

open the door (T 1201). The state agreed, but asked whether other defense questions had opened the door, i.e., whether Curtis had possessed a gun or displayed a violent temper (T 1201). The trial court held that those questions had opened the door:

> [N]umber one, it goes to credibility. If [she] say[s], "No, I heard about him having an Armed Robbery charge, that he had a firearm," then that [] would indicate to the jury that her first statement was less than accurate, at least because she had heard of a violent act and he had carried a firearm.
>
> It definitely goes to her credibility, the answers she gave to your questions. She could have said, "Well, he got arrested for an Armed Robbery; other than that, I never heard of him having a gun."
>
> . . . .
>
> I will allow that. I don't think it opens the door any further than to do that, because, in other words, I don't think what has come in has opened the door to you[r] putting on the robbery detective to testify about the Krystal's robbery.

(T 1204). The state then asked Jones, in light of Curtis's present convictions and pending robbery charge, whether she had heard of Curtis's possession of guns (T 1207). Jones responded affirmatively, but stated "not until this happened, until he got arrested." (T 1208).

The prosecutor's very limited question in this regard constituted proper impeachment through contradiction. Section 90.608(1)(e), Florida Statutes (1993), recognizes that the credibility of a witness may be attacked by evidence which tends to contradict a material fact stated in the testimony of the witness. Accordingly, on cross examination, facts may be elicited which are contrary to the witness's testimony on direct examination. See e.g., Pate v. State, 529 So. 2d 328 (Fla. 2d DCA 1988). See also Coco v. State, 62 So. 2d 892 (Fla. 1953), cert. denied, 349 U.S. 931 (1954) (one of the overriding purposes of cross examination is to weaken or discredit testimony given on direct examination).

This Court has spoken on the extent of cross examination:

> When the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief . . . .

Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978). See also Blair v. State, 406 So. 2d 1103, 1106 (Fla. 1981).

Contrary to Curtis's claim, the state did not transform impeachment evidence into substantive evidence by arguing it to the jury. Initial Brief at 76-77. "[W]here the testimony becomes pertinent because of prior testimony and does not bear on an issue made by the pleadings, such testimony is for impeachment." Fogel v. Mirmelli, 413 So. 2d 1204, 1207 (Fla. 3d DCA 1982).

Geralds v. State, 601 So. 2d 1157 (Fla. 1992), cited by Curtis, is inapposite. There, defense counsel elicited testimony from Geralds's neighbor that he personally had never had a confrontation with Geralds. On cross examination, the state questioned the neighbor about whether his opinion of Geralds in this regard would be different if he were aware of Geralds' "multiple convictions." This Court found this line of questioning erroneous for two reasons. First, the state had agreed in the trial court not to present additional evidence in the penalty phase in reliance on defense counsel's promise not to present evidence regarding the statutory mitigating factor relating to the absence of a significant criminal record. Second, defense counsel's question about Geralds's playing with his children laid no predicate for the impeachment of the neighbor by introducing Geralds's prior convictions.

In this case, the state and defense counsel had no such agreement regarding the penalty phase. And, more significantly, Jones's statement that Curtis had never possessed weapons did lay a predicate for the state to impeach her with her knowledge that Curtis in fact possessed a gun in a robbery subsequent to the instant offenses.

Were this Court to determine error by the trial court on this point, any such error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Beyond a reasonable doubt, the state's reference to Curtis's pending robbery charge did not affect the jury's verdict because the reference was carefully limited and was presented strictly in the context of impeaching Jones's testimony.

Issue XI

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN THE PENALTY PHASE BY ADMITTING HEARSAY CONTAINED IN HOWARD'S PRESENTENCE INVESTIGATION REPORT.

The admission or exclusion of evidence in the penalty phase of a capital trial is within the trial court's discretion, and a ruling in this regard will not be disturbed on appeal absent a clear showing of an abuse of discretion. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). In the present case, the trial court did not abuse its discretion in permitting the state, in its case in rebuttal in the penalty phase,[15] to introduce evidence of Anthony Howard's mental and emotional problems through the testimony of the preparer of Howard's presentence investigation report (PSI), because this evidence explained the comparative sentences of the codefendants and rebutted the testimony of Curtis's mother that Curtis was not a leader.

On direct examination, Curtis's mother testified that, as a child, Curtis was " a kid who would always try to stay away from trouble because those were the values that we instilled in him" (T 1240); that Curtis was not a leader (T 1240); that he always had

[15] The state presented only a case in rebuttal (T 1193).

problems in school (T 1241); that he repeated a couple of grades in school (T 1242); that Curtis's only problem in school was "the interference with the children harassing him all of the time" (T 1242); that, after Curtis's parents "split up," Curtis stopped going to school for awhile and dropped out in tenth grade (T 1244); and that Curtis was "just moral. He carries out moral behaviors to the extreme . . . . He always tries to direct someone else to go the right way instead of doing something wrong . . . ." (T 1248). Curtis's mother also testified that Curtis met Anthony Howard when they moved into a house "[r]ight next-door," and that Howard always came to their house (T 1248-49).

On cross examination, the prosecutor asked Curtis's mother whether she was aware of Howard's emotional and mental problems from Howard's visits to her house; she stated no (T 1258-59). In its case in rebuttal, the state called David Hall, who testified that he had prepared a presentence investigation report (PSI) on Anthony Howard (T 1261). When the state asked Mr. Hall about Howard's psychological background, defense counsel objected on relevancy and hearsay grounds (T 1262).

The state indicated that it did not intend to introduce Howard's PSI into evidence, and intended to ask only whether Howard's psychological background had been investigated, and if

yes, what was determined (T 1264). The trial court found this question relevant because defense counsel had asked the jury to consider the comparative sentences of the co-defendant, and because Curtis's mother had "certainly implied, if not directly said, that the two boys are the same with regard to their abilities, and she directly said that her boy was never a leader, and the implication is clear[ly] there that Howard would be the leader." (T 1264). Defense counsel then stated: **"Well, if that is the Court's ruling, that is fine . . . ."** (T 1264) (emphasis supplied). Subsequently, Mr. Hall testified that Howard had been determined to be educably mentally handicapped, with severe emotional problems and an I.Q. of 70 - 72 (T 1265).

The record clearly shows that defense counsel acquiesced in the question as proposed by the state and as limited by the trial court. Accordingly, Curtis should not be heard now to complain. See Sullivan v. State, 303 So. 2d 632 (Fla. 1974) ("It is well-established law that where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal.") (footnote omitted). See also Parker v. State, 456 So. 2d 436, 442 (Fla. 1984); White v. State, 446 So. 2d 1031, 1035 (Fla. 1984).

In any event, the trial court properly permitted this question. Evidence of Howard's mental condition rebutted the testimony of Curtis's mother that Curtis was not a leader and the inference that Curtis was not the leader in the instant robbery/ murder. See Fletcher v. State, 619 So. 2d 333 (Fla. 1st DCA 1993); Dixon v. State, 592 So. 2d 1241, 1242 (Fla. 3d DCA 1992). Additionally, it spoke pertinently to an issue urged in mitigation by defense counsel in the penalty phase, i.e., the comparative sentences of the codefendants. See **Fla. Stat.** § 921.141(6)(d) & (e) (1993).

Curtis's cursory claim that this evidence should not have been admitted because it constituted hearsay is unsupported. Section 921.141, Florida Statutes (1993), provides that any relevant evidence is admissible during the penalty phase of capital trials, regardless of its admissibility under the evidence code. Accordingly, the hearsay nature of this evidence, by statute, did not preclude its admissibility; and, as shown above, this evidence was relevant.

In any event, if any error occurred on this point, it was clearly harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Beyond a reasonable doubt, this line of questioning did not affect the verdict of the jury, as the trial court properly restricted it

to relevant portions of the PSI, i.e., those that related to rebuttal of the "leader" testimony of Curtis's mother and to explicating the comparative sentences of the codefendants.

Issue XII

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN THE PENALTY PHASE BY PERMITTING THE JURY TO CONSIDER ONLY THE FIRST TWO PARAGRAPHS OF HOWARD'S PLEA AGREEMENT.

The admission or exclusion of evidence in the penalty phase of a capital trial is within the trial court's discretion, and a ruling in this regard will not be disturbed on appeal absent a clear showing of an abuse of discretion. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). The trial court in the instant appeal did not abuse its discretion in permitting the jury to consider only the first two paragraphs of Howard's plea agreement, because those were the only paragraphs that were relevant to mitigation in Curtis's sentencing.

Prior to the penalty phase, defense counsel moved to have the court take judicial notice of Howard's plea agreement (T 1163). The state responded that its only problem was with the jury being informed about Howard's "cooperation" because it was an attempt "to elicit evidence regarding a witness's failure to testify" (T 1164). See also (T 1168) (the state pointed out that Howard's sentencing had not occurred and that sentences on the other counts was not relevant in Curtis's sentencing on the first degree murder count). Defense counsel objected to excising any portions of the plea

agreement (T 1165). The trial court found that Curtis would suffer no prejudice with the removal of the last two paragraphs, which were irrelevant, and took judicial notice of only the first two paragraphs (T 1170).

Curtis complains that, by excising the last two paragraphs, the trial court precluded him from showing the jury why Howard received a lesser sentence. Initial Brief at 80. This argument again overlooks the fact that Howard did not testify, and that comments on his failure to testify were not allowed. Nevertheless, the jury was fully aware that Howard received a lesser sentence, and observed that Howard was not called to testify. Certainly, the jury could draw its own inferences from these facts. Furthermore, Curtis himself testified as to Howard's "deal" with the state (T 880, 889-90); the jury heard both Howard's and Curtis's versions of events; the jury had defense exhibit one, Howard's plea agreement, to view (R 718-20); and defense counsel extensively argued the comparative culpabilities and sentences of the codefendants to the jury (T 1316-31).

Curtis claims that the rule of completeness mandated the submission of the entire document to the jury. Initial Brief at 81. That is not an accurate recounting of **Fla. Stat.** § 90.108 (1993), which has a limitation

> relat[ing] to whether the evidence admitted under this section must also be admissible under other evidentiary rules. In other words, the question is whether otherwise inadmissible hearsay is admissible under section 90.108. [While t]here is no agreement among the authorities on this question, . . . it seems undesirable to adopt a strict rule either that evidence offered under the rule of completeness must be otherwise admissible or that otherwise inadmissible evidence is automatically admissible. A trial judge should be very hesitant to admit otherwise inadmissible evidence under section 90.108, but should have the discretion to do so if "fairness" demands. The general unreliability of inadmissible evidence should be one of the court's consideration in determining whether fairness requires admission.

C. W. Ehrhardt, Florida Evidence Related Writings, § 108.1 at 35-37 (1995 ed.).

The excised paragraphs related the following information:

> Sentencing will be delayed. The sentence will be determined by the presiding judge. The State of Florida will make a sentencing recommendation to the court. The State's sentencing recommendation will be conditioned upon the defendant's cooperation in the case of State of Florida vs Memwaldy Curtis. Cooperation is defined as providing truthful testimony when called upon to do so by any party in the Memwaldy Curtis case. The truthfulness of the Defendant's testimony will be judged in accordance with the sworn statement he has given prior to the entry of this plea.

> The defendant feels that this disposition is in his best interest in that he is guilty of these charges.

(R 43). See also (R 718-20).

As is readily apparent, the excised paragraphs related solely to Howard's sentencing, and did not provide information relevant to Curtis that would have enlightened his jury as to mitigation. The first two paragraphs, on the other hand, showed the jury that Howard had received an agreed upon sentence of life imprisonment as to first degree murder charge. Defense counsel adequately explained to the jury that a defendant could receive either a death sentence or life imprisonment, with a 25 year minimum mandatory, for committing a first degree murder (T 1314), made clear that Howard had received a life sentence, and argued that Curtis should receive no more than that for his "relatively minor" role (T 1326). Accordingly, the jury heard the relevant portions of Howard's plea agreement, and no more was needed.

If this Court determines that the trial court's action in this regard was improper, it is clear that any error on this point was harmless beyond a reasonable doubt, in light of all other evidence elicited concerning Howard's negotiated plea. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Issue XIII

WHETHER THE TRIAL COURT PROPERLY FOUND THE PRIOR VIOLENT FELONY AND PECUNIARY GAIN AGGRAVATING CIRCUMSTANCES.

Curtis first argues that, because Curtis was convicted of attempted felony murder and there is no such crime in Florida, the prior violent felony aggravating factor, which was premised solely on the attempted felony murder conviction, can not stand. Initial Brief at 82. As the state showed in its argument under Issue III, Curtis was charged with attempted premeditated or felony murder, the state adduced evidence of both, and the jury convicted Curtis "as charged in the indictment." Accordingly, this claim is specious.

Curtis's cursory argument that the felony murder aggravating circumstance is unconstitutional because it is an automatic aggravating factor, Initial Brief at 82 n.14, smacks of "posing a question . . . and then dumping the matter into the lap of the appellate court for decision." Lynn v. City of Ft. Lauderdale, 81 So. 2d 511, 513 (Fla. 1955). Accordingly, this Court is under no duty to address the question. Id.

Although Curtis acknowledges that the trial court merged the pecuniary gain and committed-during-the-course-of-a-robbery aggravating circumstances, he claims that the state did not prove

pecuniary gain beyond a reasonable doubt. This argument is disingenuous because the trial court instructed the jury that pecuniary gain was subsumed within the committed-during-the-course-of-a-robbery aggravating factor (T 1333-34). Just as the state is not required to offer separate proof of lesser included offenses, which generally are proved through proof of the greater crime, see Brown v. State, 206 So. 2d 377, 380 (Fla. 1968); **Fla. R. Crim. P.** 3.490 & 3.510(b); **Fla. Std. Jury Instr. (Crim.)** 2.02(a) When There Are Lesser Included Crimes or Attempts (March 1989), the state should not be required to offer separate proof of an aggravating circumstance which is admittedly subsumed by a "larger" factor.

Nevertheless, the record shows that the state proved pecuniary gain beyond a reasonable doubt. Taaziah testified that, after Khair-Bek opened the cash register and started handing over the money, Curtis told Khair-Bek to give Curtis and Howard more money (T 494). Albert Fountain testified that Curtis told him that he and Howard went to the Safeco store, intending to rob it for the purpose of paying off a drug debt, and that it was Curtis's idea to rob it (T 689-90). Curtis admitted to Detective Hinson that he and Howard went to the Safeco store to commit a robbery, that Khair-Bek handed Curtis the money from the register, and that, after the robbery, Curtis and Howard divided the money (T 790-91). Finally,

Howard's written statement and Curtis's statement to Detective Hinson indicated that half of the proceeds included $25.00 in cash and $7.00 in food stamps (T 780, 791).

This evidence clearly established that the murder was committed for pecuniary gain. This Court requires a showing that the murder was committed to facilitate the theft, or that a defendant intended to profit from his illegal acquisition. Peek v. State, 395 So. 2d 492, 499 (Fla. 1980). Curtis obviously intended to profit from his illegal acquisition, stating that he intended to pay off a drug debt and splitting the proceeds with Howard. Curtis and Howard also killed Khair-Bek (and attempted to kill Taaziah) to facilitate their theft by making certain they left no witnesses to their crime.[16] See Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984).

In any event, Curtis's ability to prove prejudice is severely impaired, because the trial court merged these circumstances into one (R 410). Furthermore, the trial court found expressly that the committed-during-the-course-of-a-robbery aggravating circumstance

---

[16] Their crime went unsolved for about one year, until Fountain was arrested and gave police officers Curtis and Howard's names. Although Taaziah survived the robbery and murder attempt despite having been shot in the stomach (T 499), he could not identify Curtis due to Curtis's location behind a display and Taaziah's inability to see Curtis (T 492), and could not identify Howard due to memory loss (T 506-07).

alone was sufficient to justify the imposition of the death sentence (R 410).

Issue XIV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING ONE STATUTORY MITIGATING CIRCUMSTANCE AND THREE NONSTATUTORY MITIGATING CIRCUMSTANCES, BUT AFFORDING THEM LITTLE WEIGHT.

It is within a trial court's discretion to determine whether a mitigating circumstance has been established, and the court's decision in this regard will not be reversed merely because an appellant reaches a different conclusion. Lucas v. State, 613 So. 2d 408 (Fla. 1992). Moreover, whether a mitigating factor has been established is a question of fact, and a trial court's findings are presumed correct and will be upheld if supported by the record. Campbell v. State, 517 So. 2d 415 (Fla. 1990). In this case, the trial court fully considered all evidence of mitigation, found some evidence and rejected other, and weighed all of the evidence. Curtis's arguments on appeal constitute nothing more than his disagreement with these findings, and accordingly, should be rejected by this Court.

A. Age

Curtis claims that the trial court improperly denigrated this mitigating circumstance. Initial Brief at 88. However, the record clearly shows that the trial court carefully considered this

mitigating factor, but gave it little weight in the face of mature behavior exhibited by Curtis (R 411-12).

Specifically, the trial court found evidence of unusual maturity in Curtis's planning of this robbery in advance, full participation in the robbery and murder, and remaining silent about his participation until confronted by law enforcement officials. The court also was aware that, although Curtis had repeated a couple of grades (R 721-35), he had attended a skills center where he completed through 11th grade (T 784, 1244-45), could read and write (T 784), and had been taking electrical technician classes (T 1245). Finally, the trial court was aware that, despite his having become a father at an early age, Curtis apparently understood this role and some of its responsibilities (T 1197, 1249-50).

Curtis can show no abuse of discretion by the trial court on this point. In accordance with Ellis v. State, 622 So. 2d 991 (Fla. 1993), the trial court found age as a mitigating factor, but gave it little weight based on "other evidence showing unusual maturity." Id. at 1001. See also LeCroy v. State, 533 So. 2d 750, 758 (Fla. 1988) ("the sentencing judge specifically considered appellant's age but found him to be mentally and emotionally mature. This decision was consistent with the jury's advisory recommendation of death which was also reached after considering

appellant's age and potential immaturity."); Echols v. State, 484 So. 2d 568, 575 (Fla. 1985) (if age "is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the time such as immaturity or senility.").

B. Sentence of codefendant

The trial court made very clear findings in rejecting Howard's sentence as statutory and nonstatutory mitigating evidence (R 412-14). These findings were based on substantial evidence found in the record.

Notably, the weapons used in the instant robbery/murder belonged to Curtis (T 694-95). Despite the fact that Howard entered the store first (T 691), Curtis did not avail himself of the opportunity to leave, but also entered the store with a gun. Curtis pointed his gun at, and shot, Khair-Bek, took money from him, and demanded more money (T 493-94, 606, 664, 690, 780, 791, 793, 800). Curtis told Fountain that it was his idea to rob the store so that he and Howard could pay off a drug debt (T 690-91),[17] and Fountain saw the gun Curtis had with him -- a .32 revolver (T 693).

---

[17] Howard's statement corroborated that it was Curtis's idea to rob the store (T 779).

Accordingly, the trial court aptly reasoned:

> The mere fact that it was not the defendant's bullet that killed Mr. Khair Bek does not prove this mitigating factor. The law should not, and does not, reward bad aim or the fact that the victim's foot absorbed the brunt of the force of the bullet before it struck him in the chest. The defendant's involvement cannot be considered "relatively minor." The jury found beyond a reasonable doubt that the defendant intended for reasonable force to be used, and intended that a killing take place, by bringing a loaded firearm to the robbery, and by shooting Mr. Khair Bek. The law is clear that where the defendant was the instigator of the robbery and was a primary participant in the crime, this mitigating factor should not be found. This mitigating factor is not found to exist in this case.

(R 412). See also (T 414). This Court has upheld similar findings. See Groover v. State, 458 So. 2d 226, 229 (Fla. 1984) (other than his own testimony, there was evidence that Groover was not under the substantial domination of another, i.e., he was armed; had he really been threatened by the codefendant, he had an opportunity to defend himself; and he participated fully and willingly); Stevens v. State, 419 So. 2d 1058, 1064 (Fla. 1982) (witness testified that Stevens approached codefendant and proposed robbery; same witness stated that codefendant said robbery was Stevens's idea); White v. State, 403 So. 2d 331, 339 (Fla. 1981)

(White fully participated in robberies and stood by while the victims were shot one by one); Ruffin v. State, 397 So. 2d 277, 283 (Fla. 1981) (neither the jury nor the judge believed that Ruffin was a minor participant; claim was premised on self serving portion of confession, but not supported by record); Antone v. State, 382 So. 2d 1205, 1216 (Fla. 1980) (Antone was mastermind and supplied gun; without his participating, the murder would never have "come to fruition"); Jackson v. State, 366 So. 2d 752, 757 (Fla. 1978) (direct testimony of other victim rebutted claim that Jackson was under dominating influence of another; jury and judge weighed evidence and determined claim did not apply).

C. Remorse

Curtis alleges that the trial court did not find or reject remorse as a mitigating factor. Initial Brief at 93. This is incorrect. The trial court's statement that, "[i]f any weight is to be given to this non-statutory mitigating circumstance, it must be very minimal at best" is the equivalent of stating that the factor is found and given little weight (R 415).

The trial court accurately recounted the testimony of family members that they felt Curtis had remorse, but that Curtis himself had never actually stated that he had remorse about the murder. The trial court also pointed out that, although Curtis testified

and admitted to participation, he did not express remorse for his participation, instead alleging his involvement was premised on duress (Howard made him participate), despite substantial evidence that directly contradicted such an assertion. Because Curtis himself expressed no remorse, the trial court correctly gave this factor little weight. Contrast Stewart v. State, 420 So. 2d 862 (Fla. 1982), cert. denied, 460 U.S. 1103 (1983).

D. Poor education

The trial court considered Curtis's school records, and was fully advised that Curtis had repeated a couple of grades and had discontinued school. However, the trial court also was aware that Curtis could read and write, had enrolled at a skills center where he took electronic technician classes and finished school through the 11th grade, and that Curtis's only problem with school had been that "the children harassing him all of the time from time to time would interfere with him learning as well as he would have," not any learning abilities problem (T 1242). Accordingly, the trial court properly rejected Curtis's background of "poor education" as mitigation, because it did not "produce[] any effect upon him relevant to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death." Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987).

E. Good father

Although Curtis's family testified that Curtis was a good father, they based their opinion strictly on Curtis's taking the children with him on errands and taking the children to the doctor. Significantly, there was no evidence that Curtis provided for the children financially. Furthermore, as the trial court pointed out, if being a good parent was an overriding concern for Curtis, why would he plan and participate in a robbery/murder scheme to pay off drug debts? Because this evidence afforded no reason for reducing a death sentence, the trial court properly rejected this as mitigating evidence.

Issue XV

WHETHER CURTIS'S DEATH SENTENCE IS PROPORTIONATE.

In reviewing a death sentence, this Court "looks to the circumstances revealed in the record in relation to those present in other death penalty cases to determine whether death is appropriate." Watts v. State, 593 So. 2d 198 (Fla. 1992). Curtis's death sentence is proportionate to death sentences affirmed by this Court in other cases involved similar facts and a similar balance of aggravating and mitigating circumstances.

The trial court found two aggravating circumstances -- the murder was committed during the course of a robbery (which it merged with pecuniary gain) and previous conviction of another violent felony (the attempted first degree murder of Taaziah) (R 410-11). The trial court found one statutory mitigating circumstance[18] -- age -- but gave it little weight (R 411), and found three nonstatutory mitigating circumstances[19] -- remorse,

---

[18] The trial court also considered the claims that Curtis was an accomplice, that he was under extreme duress or the substantial domination of another, and that Curtis had no significant history of prior criminal activity, but gave these claims no weight (R 412-13).

[19] The trial court also considered, but gave no weight to, the following nonstatutory mitigating circumstances: Howard and Curtis were equally culpable and should have received the same sentences; Curtis received a poor education; and Curtis was a good father (R 413-14, 415).

assistance to a schoolmate, and adjustment to prison life -- but gave these very little weight (R 414-16).

This Court has affirmed death sentences in cases similar to this one. See Stein v. State, 632 So. 2d 1361 (Fla. 1994) (Stein and codefendant robbed Pizza Hut and shot two employees; four aggravating factors -- prior violent felony based on contemporaneous murder; committed during robbery; avoid arrest; and cold, calculated and premeditated;[20] one statutory mitigating factors -- lack of significant criminal history); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986) (victim shot when Teffeteller and others stopped him and demanded money; three aggravating factors -- committed under sentence of imprisonment; prior violent felony conviction; and committed during a robbery; no mitigation); Hoffman v. State, 474 So. 2d 1178 (Fla. 1985) (two victims killed by stabbing; codefendants received life sentences; three aggravating factors -- heinous, atrocious or cruel; prior violent felony conviction; and cold, calculated and premeditated; two statutory mitigating factors -- lack of significant criminal history and life sentences of codefendants); Parker v. State, 458 So. 2d 750 (Fla. 1984) (three victims were beaten and shot over drug debts; four

---

[20] The Florida Supreme Court struck the fifth aggravating factor -- heinous, atrocious or cruel.

aggravating factors -- prior violent felony conviction; avoid arrest; pecuniary gain; and cold, calculated and premeditated;[21] no mitigation); White v. State, 446 So. 2d 1031 (Fla. 1984) (one victim shot and killed, the other shot and paralyzed, in grocery store robbery; three aggravating circumstances -- committed during robbery and pecuniary gain (merged); cold, calculated and premeditated; and prior violent felony conviction based on contemporaneous attempted murder; no mitigation); Maxwell v. State, 443 So. 2d 967 (Fla. 1983) (Maxwell and codefendant robbed golfers on golf course and shot and killed one victim; two aggravating circumstances -- prior violent felony conviction and committed during robbery;[22] no mitigation).

---

[21] The Florida Supreme Court struck two aggravating factors -- committed during a robbery and heinous, atrocious or cruel.

[22] The Florida Supreme Court struck three aggravating factors -- pecuniary gain, heinous, atrocious or cruel, and cold, calculated and premeditated.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Curtis's conviction and sentence of death.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GYPSY BAILEY
Assistant Attorney General
Florida Bar #0797299

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CHET KAUFMAN, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 5th day of February, 1996.

GYPSY BAILEY
Assistant Attorney General