IN THE SUPREME COURT IN AND FOR THE STATE OF FLORIDA

JAMES W. HAZEN Appe11ant	:	
vs.	:	**CASE** NO. 84,645
STATE OF FLORIDA	:	Cir. Court Case N0.93-3302CF
Appellee	:	

INITIAL BRIEF OF APPELLANT

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APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL IN CONTRAVENTION OF ARTICLE I, SECTIONS 9 AND 16 AND AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION

TABLE OF CITATIONS

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JAMES W. HAZEN
Appellant

:

vs.

CASE NO. 84,645
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STATE OF FLORIDA
Appellee

PRELIMINARY STATEMENT

This is an appeal from **a** sentence of death.

Appellant, James W. Hazen, was **the** defendant in the trial court below and will **be** referred to in this brief as appellant or Hazen.

References to the record, transcript, and supplemental transcript will be referred to as "R", "T", and "S"respectively, followed by the appropriate page number. There is also a volume dated September 23, 1994 which is not consecutively numbered and which contains the sentencing proceedings. This volume will be referred to as S followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellant, James Hazen, along with Curtis D. Buffkin and Johnny Kormondy, was indicted for premeditated and/or felony first degree murder of Gary McAdams, three counts of sexual battery against Cecilia McAdams by threatening with a weapon(a firearm) or the use of actual physical force likely to cause serious personal injury, one count of burglary and committing a battery while therein, and one count of armed robbery (R 2-4). Hazen was tried separately from Buffkin and Kormondy.

The case proceeded to jury trial.

Harold Cole testified that he lived next door to Gary and Cecilia McAdams in the Thousand Oaks subdivision (T 504-505). On July 11, 1993 Cole was awakened about one or one-fifteen in the morning by his wife who heard a noise. A few seconds later Cole saw Cecilia McAdams come out of her garage door hysterical, dressed in a towel which was wrapped around her, and screaming that Gary had been shot. Cole approached Ms. McAdams and asked if there was anyone else in the house. Ms. McAdams answered no, at which point Cole and Ms. McAdams went through the garage and kitchen door into the McAdams home (T 506-508; T 516-517).

Cole observed Mr. McAdams lying on the kitchen floor.

Cole escorted Ms. McAdams to her bedroom so that she could dress. Cole then went back to Mr. McAdarns. Cole observed gasping or lip movement from Mr.McAdams and saw Mr. McAdams

pupils dilating (T 510). Ms. McAdams was coming back up the hall, screaming and asking if Gary was dead. Cole went to the kitchen door and yelled to his wife on their front porch to call 911 and a neighbor, Mr. Andrews (T 511).

Ms. McAdams was stating that they had raped her. Cole was trying to calm her down. Cole's daughter arrived and took Ms. McAdams into a back bedroom (T511-513).

Larry Andrews, a neighbor, went to the McAdarns' house in response to Ms. Cole's phone call at 1:45 in the morning of July 11, 1993. Andrews saw Cole standing in the house visibly upset, and Mr.McAdams on the floor, still breathing. Andrews left for a moment to get his glasses. When he returned, Ms. McAdams was standing three or four feet away from Mr. McAdams. She was repeating 'why did they do this, they told us if we did what they told us, they wouldn't hurt us." She also said that they even raped me. Andrews told Cole's daughter not to let Ms.McAdams back in the kitchen (T 518-521).

Andrews observed the bedroom to be in total disarray and almost knee deep, every drawer looked like it was piled up on the floor.

In the kitchen there was a bottle of Corona beer lying on the floor against the wall. There were also some Whataburger breakfast sandwiches lying on the counter that looked like they were partially eaten (T 520-521).

Mr. Fred Kennedy, an Escambia County Deputy, was in charge of the identification and crime scene units. Kennedy found no identifiable prints at the scene other than those that could be matched to Cecilia McAdams and Gary McAdams. Kennedy found two smudges that were consistent with fabric marks on the telephone receiver and on the Corona beer bottle. Kennedy could not identify the exact fabric. On direct examination by the state, Kennedy agreed the fabric was consistent with socks (T 524-528).

Kennedy also testified that he assisted in putting together a video tape of the scene. Over appellant's objection, the video, State's Exhibit 2-B, was admitted into evidence (T 528-529).

Kennedy narrated, through questioning by the state, as the video was shown to the jury. The video included a picture of Mr.McAdams "as we found him" (T 530) with what appeared to be droplets of blood at his feet (T 531).

Also included in the video was an open breakfast sandwich, tacquita sauce, a Corona beer bottle, and a pair of ladies shoes (T 532-533). In the first bedroom on the right, which appeared to be an office or guest room, there was a phone whose wire had been torn, jerked out, or violently removed. A partially obscured phone in a second bedroom was in working order (T 534).

The master bedroom was in disarray and everything appeared to be strewn around. A ladies silk dress was in the vanity area.

A telephone in the bedroom was jerked out of the wall (T 535).

Kennedy then observes on another portion of the video, toward the end of the video, that Mr. McAdams' body has been turned over, and there are splatter marks on the wall (T 536-537).

Deputy Paul Rice found a towel, marked as State's Exhibit 37-A, on the bed of the master bedroom (T 549). Also recovered from the scene was a green silk dress [State's Exhibit 21] from the dressing room immediately off the master bedroom (T 551-552). A bullet fragment, [State's Exhibit 9] was found underneath the carpet and pad in the vanity area of the master bedroom. The fragment was located by a large blackened area on the surface of the carpet (T 552).

Taylor attended the autopsy of Mr. McAdams, and identified State's Exhibit 10 as the bullet that Dr. McConnell removed from Mr. McAdams' brain (T 553).

Dr. McConnell, the medical examiner, who performed the autopsy on Mr. McAdams, testified that Mr. McAdams died from a contact gunshot wound to the head going in to the back side of the left side of the head and traveling in a forward direction.

McConnell identified State's Exhibit 10 as the bullet he recovered during the autopsy. He stated the bullet was flattened into a mushroom shape because of the bullet's contact with the front of the skull.

McConnell further testified that the wound was a contact wound. Extensive soot was on the entrance wound and on the bone underlying the wound. Soot occurs in this manner when the barrel is pressed tightly against **the** skin and the unburned powder is carried into the wound. McConnell also found a split in the wound where the gases went into and underneath the scalp. This occurs in a contact wound **because** the scalp is attached to the underlying bone, and the gases from the firing of the firearm get underneath the **skin**, blow it apart, and cause the skin to split in that area. (T 560-566).

McConnell further testified that the wound would have immobilized **Ms.** McAdams immediately, causing immediate loss of memory and physical function. Despite the fact that Mr. McAdams made some noises or sounds after the gunshot wound, McConnell opined that Mr. McAdams was probably brain dead at the time and it was not unexpected that some breathing would occur subsequent to brain death (T 567-568).

Mr. McAdams blood alcohol level was .02; there was an alcohol level of .78 in the stomach. This indicated that the alcohol intake was still in the absorption stage at the time of death. Mr.McAdams was not legally intoxicated. The alcohol level findings were consistent with a person who had a drink **or** two earlier in the evening and also had a drink right before his death (T 568-569).

Ms. McAdams testified that on July 11, 1993 she and her husband attended a high school reunion. They left the reunion at 12:40 a.m., went through the drive-thru at a Whataburger restaurant, bought two Taquitas and a cup of coffee, and then returned to their home at 11561 Havenwood Road in the Thousand Oaks Subdivision (T 576-581).

Mr. McAdams used the automatic garage door opener and drove their car in the garage. They left the garage door up because they were going to be taking their dog out for a walk. After going through the kitchen door, Ms. McAdams kicked her shoes off, she and her husband put the food and some odds and ends on the kitchen bar, and Mr.McAdams went into the bathroom to pick up the dog (T 582-584).

They were standing in the middle of the kitchen floor when they heard a knock at the kitchen door. Mr. McAdams asked who it was and a voice answered, "It's me". Mr. McAdams opened the door and they saw a man standing there in the garage with a gun pointed at them.

The man, who Ms. McAdams identified at trial as Darryl Buffkin, by identifying a photograph [State's Exhibit 161 of Buffkin, told the McAdams' to put their heads down or he would blow their head off (T 584-587). The McAdams stared at Buffkin in shock. Buffkin then repeated his order, and the McAdams got down on the floor and put their heads down.

Ms. McAdams heard two other people enter the house. She saw two more sets of feet, and was told by "them" that "they" were closing the blinds and ripping out the phone cord. "They" then asked for money and car keys. Mr. McAdams threw what he had in his pocket on the floor-- his wallet, money, and car keys and Ms. McAdams told them her purse was on the counter and her keys were in it.

Buffkin stayed and was telling them to keep their head down and to what they were told. Ms. McAdams could hear the others in the back of the house. She could hear drawers being pulled out.

One of the individuals came back, presumably with a pistol Mr. McAdams kept in his drawer, and asked "who do you think you're going to hurt with this". Mr. McAdams replied, "No one", "They" then walked up behind Ms. McAdams, ran the pistol up her hip, and told her to come with "them". Ms. McAdams avoided looking at the men because she had been told not to look and was fearful she and her husband would be killed if she did look (T 588-590).

Both Mr. and Ms. McAdams begged them not to do this. Ms. McAdams told her husband to do what they told him because she would be alright.

Ms. McAdams was taken to the vanity area of her bedroom and sexually assaulted. Ms. McAdams stated that when she first went to the vanity area she was wearing a green silk dress. Before

the sexual assaults, she removed the dress. One of the perpetrators forcibly removed a tampax from her. One of the perpetrators put his penis in her mouth, and threatened to kill Ms. McAdams if she let it out of her mouth. At the same time, another individual assaulted her by putting his penis in her vagina. The two men bragged about it as they were assaulting her (T 590-592; T595-596).

Ms. McAdams observed that one of the two men assaulting her had mousy, dishwater-blond, stringy hair and something pulled up over his head which covered part of his face. Ms. McAdams did not notice if the other person had a mask on. When asked by the prosecutor if "anyone of them had gloves or socks on their hands", she replied "socks on their hands" (T 592-593).

Upon viewing State's Exhibit 15, a picture of Shane Kormondy, Ms. McAdams said she recognized part of his hair and his facial features. She was also able to say it was not the hair of the man that came in the door with the gun [Buffkin] nor the hair as depicted in a picture of Hazen [State's Exhibit 17] (T 593).

Ms. McAdams was taken naked back to the kitchen and kneeled down in front of her husband. She reached out to take her husband's hand but "they" yelled at her to let him go, that "they" had not said she could touch him, so she dropped his hand (T 596).

"They" found a beer in the refrigerator, slammed it down between Mr. and Ms. McAdams, and said, "drink it" (T 596). Mr. McAdams drank some of the beer (T 596).

Ms. McAdams was then taken back to the bedroom. When they got back in the bedroom, the person who took her back there said, "I don't know what the other two did to you, but you're going to like what I'm going to do" (T 596-597). He then sexually assaulted Ms. McAdams by putting his penis in her vagina. During this time, Ms. McAdams heard a gunshot and screamed her husband's name. She did not get a response (T 597). "They" then called out for the person in the bedroom. He jumped up, threw a tan colored towel over Ms. McAdams head, and then Ms. McAdams heard a gunshot in the bedroom (T 598).

Ms. McAdams ran into the kitchen and found Mr. McAdams lying on the floor with blood around his head. She thought he was alive because there his mouth was moving. She at first tried to call for help, but then remembered the phones had been pulled out. She covered herself with the tan towel and ran outside. At that time she ran into her neighbor who was on his way across to her yard. Ms. McAdams was screaming and the neighbor asked her to please quit screaming. Ms. McAdams returned to her house and stayed until the emergency medical services and law enforcement officers arrived (T 597-599).

There were items taken from the home, including numerous

purses, jewelry, watches, rings, a pistol, cash, and car keys (T 607-608).

Mrs. McAdams was examined at the hospital at about five in the morning. Mrs. McAdams told the examining nurse that she had been orally assaulted and that one of the perpetrators had ejaculated in her mouth and forced her to swallow it. Vaginal swabs were taken (T 601).

Prior to the state calling Ms. McAdams as a witness, the defense attorney moved in limine to preclude Ms. McAdams from making any statements in regard to identifying Hazen based upon having seen Hazen in court previously. The prosecutor agreed that Ms. McAdams was expected to testify that she recognized Hazen from seeing him in court, but not from seeing him at the house when the crime was committed. The trial judge commented that since Ms. McAdams was not going to say she had seen Hazen before at the house, that "I don't know that that's particularly harmful" (T 572). The defense attorney responded that the testimony was not relevant, that the jury could conclude it was a type of an identification, and that there was no need for the testimony. The trial judge then ruled, "I'm not going to preclude the State from doing that provided it's absolutely clear in your questioning that the identification was such that it was, that she recognizes him from other court appearances pertaining to this case" (T 572).

Mrs. McAdams **testified** that **she** attended a court hearing in Courtroom 401 where Buffkin, Kormondy, and Hazen were scheduled for a court appearance with their attorneys. Mrs. McAdams was sitting in the audience section behind the prosecutor's table. The courtroom was crowded and there was standing room only (T 602-604). Mrs. McAdams immediately recognized Curtis Buffkin. She also saw 'the individual in the other photograph [the prosecutor] showed [her] with the long scraggly hair or [someone] who looked like him" (T 603).

The prosecutor then elicited the following testimony from Mrs. McAdarns:

> Q: [prosecutor] Now while you were seated in that courtroom, did anybody who you did not recognize, someone who you didn't apparently believe you knew, anybody look strange at you.
>
> **A**: [Ms. McAdams] Yes sir, they did.
>
> ***Q:*** If you see that person in the courtroom today would you point to them and speak their name as you know their name?
>
> A: James Hazen.
>
> Mr. Edgar [prosecutor]: Your Honor, I would like the record to reflect the witness identified this defendant as the person she saw in the court on this case.
>
> A: Yes, sir.
>
> The Court: The record will so reflect (T 604).
>
> ....

Q: Would you **tell** the jurors what you noticed about him noticing you?

A: Okay, I was sitting there in the seat and this person kept looking at me but not really willing to make eye contact **with** me. Whenever I would catch him looking at me, he would look away and **it** was more of worried look or a --- (T 605)

...

Q: Would you characterize in your description this defendant's manner in which he looked at you in court?

A: He was, he appeared uncomfortable. **He** was unwilling to make ***eye*** contact with me. Whenever I looked at him because I could see that **he** was looking at me, he would look away. I would look away and then I would catch him looking at me again and it was a worried, uncomfortable look (T 606).

...

Q: *And* at that time did you think you knew this person?

A: No, sir.

Q: Did you wonder about that?

A: Yes, sir.

Q: Later during that same court proceeding while you were sitting there, did **they** call that person's name, this defendant's name.

A: Yes, sir, they did.

Q: And you heard the name?

A: Yes, sir (T 606-607).

Ms. Jane Hatcher, a registered nurse, performed an examination on Ms. McAdams. Hatcher identified State's Exhibit

38-A as the tampax collected from Ms. McAdams (which she had used subsequent to the assault but before the examination) and State's Exhibit 36-A as blood drawn from Ms. McAdams (T 640-643).

At a later time, Hatcher also drew blood from **Buffkin** (State's Exhibits 35-A), Kormondy (State's Exhibit 41), and Hazen (State's Exhibit 42) (T 644).

Magda Clanton, a forensic serologist with Florida Department of Law Enforcement, examined various items.

Clanton performed tests to determine the secretor status of the individuals she tested as well as their blood type.[1] Mr. and Mrs. McAdams were both non-secretors with blood type A (T 651). Kormondy was a secretor with blood type A, Buffkin was a secretor with blood type B, and Hazen was a secretor with blood type A (T 651-652).

Clanton found semen or sperm on the vaginal swabs, the tampons, and a tan towel (T 650). Clanton was unable to detect blood factors from **the** semen stain on the towel. Clanton opined that this could be due to an insufficient amount of semen for testing (T 652).

Present on the vaginal swabs and tampon were blood types A

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[1] **A "secretor" has detectable amounts of their blood type in their saliva, and** in **their vaginal** fluid **or semen. In a** "non-secretor", **blood type** cannot **be detected in their saliva, or in their vaginal fluid or semen.**

and B.[2]

Clanton requested DNA testing on the tampon, the vaginal swabs, the liquid blood samples, two panties from Mrs. McAdams, a blue throw rug, jeans and white socks belonging to Kormondy (T 658-661; T663).

Clanton testified that the results of DNA testing are sent from the testing lab to the State Attorney's Office. Clanton said she was not sure if the results were generally given to the defense (T 664).

Valerie Kormondy, wife of Johnny Shane Kormondy, testified that in July, 1993, Curtis Darrell Buffkin, a friend of her husband's, came and stayed several days at their home at 6813 Pine Forest Road. When anyone came to the door, Buffkin would hide (T 694-696).

On Saturday, July 10, 1993 Valerie went with Shane Kormondy to a family reunion in Cantonment. They drove Shane Kormondy's camaro.

Valerie described the camaro as silver, a black 2-28 bra on the front, a dent on the left-hand side, and a silver Bad Boy sticker on the back and identified State's Exhibits 18, 19, and 20 identified as pictures of the camaro (T 701).

Shane and Valerie ran into Hazen at the reunion. Shane

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[2] Also present was type H. This is present as a precursor building block and is present in Blood types A, B, and O (T 652-653).

Kormondy told Valerie that Hazen was going to come back to their house and Shane, Valerie, and Hazen drove back to the Kormondy house in Shane's camaro.

Amy Bradley and James Popejoy, friends of Valerie, stopped by the house. Around five or six in the evening, Shane Kormondy, Buffkin, and Hazen left the house. They were gone for one or two hours, and returned about seven. They left again about nine in the evening in Shane Kormondy's camaro (T 697-701).

Bradley and Popejoy left at midnight, and Valerie went to bed at one in the morning (T 702). Valerie woke up about five in the morning, and saw Shane Kormondy, Buffkin, and Hazen awake and dressed sitting in the living room (T 702). Valerie went back to bed and got up again about seven. She went to the family owned bait store in front of her house. Shortly after that, Lane Barrett, Shane Kormondy's mother, called on the phone for Hazen. Barrett asked Valerie to take Hazen to the Food Max on Pine Forest Road, because Barrett and Hazen were going fishing (T 705).

After showering and dressing, Valerie and Hazen went to the car. Valerie testified that she opened the door and saw a bag of jewelry. Valerie further testified, "and I asked him -- I'm not sure if these were my exact words. I said James, did y'all rob anyone last night? He said yes, we did. When I started to ask him more detailed questions about it, he started to shut up and

he said well, 1 really don't remember anything because I was drunk (T 706-707). In response to leading questions, Valerie agreed that Hazen acted nervous and different that morning (T 706-707).

Valerie dropped off Hazen and returned to her home. She woke up Shane Kormondy and told Shane that he and Buffkin had to leave (T 707).

Valerie heard and read news accounts of the break-in and shooting death of Mr. McAdams. She called Crime Stoppers and attempted to remain anonymous (T707-709). Valerie disputed that she called because there was a reward offered (T 708).

Over appellant's hearsay objection, and the court's finding that the statement was being admitted for something other than to prove the truth of the matter asserted, Valerie testified concerning her second call to the deputy at Crime Stoppers as **follows:**

> I told him that I believed I knew something about the *case* that they were investigating, the homicide, and I told him that one of the men were my -- was my husband and I was scared as for my child. I told him that the other two were hi5 friends, and one of the -- one of the guys' names was Darrell and that he had escaped from Camp 5. I told him that I wasn't doing it for the money. I told him their clothes. I described the clothes that they were wearing (T 711).

Valerie's mother was with her at the time and talked Valerie out of giving more information. Valerie stated that she wanted

to give the deputy all three names, i.e., Shane Kormondy, Hazen, and Buffkin (T 711).

Valerie was deposed twice before trial. Valerie stated that she did not tell the entire truth at the depositions, only answered the questions asked, and didn't tell everything she knew. Later, she told the entire truth after being asked to do so (T 712).

Valerie said she did not tell everything she knew initially because she was scared there was a chance they would get out, and also that anything that hurt any of the defendants would also hurt her husband. She said she now felt scared, wanted to do what was right, but felt caught in the middle (T 713-714).

On cross-examination, Valerie stated she had filed for divorce from Shane Kormondy (T 715).

Valerie said she knew at the time Buffkin came to stay at their house that he was an escaped prisoner. Buffkin arrived at their house about four days before July 11th. After Buffkin's arrival, Valerie saw Buffkin and her husband bring in VCR's, stereo equipment, and a gun, which Valerie knew were stolen. Valerie also saw Buffkin driving a car which she believed was stolen. Valerie agreed she did not call Crime Stoppers at that time and tell them that her husband had an escaped prisoner in the house or that they were stealing (T 715-717; T 719).

Valerie said Hazen was visiting the area from Oklahoma and

staying with relatives at a boathouse in Alabama. She and Shane Kormondy visited the boathouse at times, and other times Hazen visited at their home. Prior to the evening in question, Hazen had not been at their house while Buffkin was there (T 717-719).

On July 9, [Friday evening] Valerie left the house and stayed at her parents' home because of a fight with her husband. Valerie testified that the next day, Shane Kormondy picked her up at her parents house to take her to the family reunion in Cantonment. In contrast to her testimony on direct, Valerie testified that Lane Barrett, [Shane Kormondy's mother], took her and Shane to the reunion in Lane's car and that she did not know where Shane Kormondy's car was at the time (T 720-721). They stayed at the reunion about an hour. Valerie guessed that they went back to her house with Hazen in Lane Barrett's car (T 723).

Shortly after arriving back at the house, Valerie saw Buffkin in the house. A friend of Buffkin's stopped by and stayed about five minutes. Because Valerie was sick, Shane Kormondy, Buffkin, and Hazen went out and got Valerie some medicine about three or four in the afternoon (T).

Valerie said the jewelry she found in the car was in a zip-lock bag behind the driver's side near the back seat (T).

Valerie agreed that when she gave a statement to Investigator Allen Cotton on July 29, 1993, that she did not say anything to him about finding the bag of jewelry in the car, or

any statements that Hazen may have said about the robbery (T 731). Valerie also agreed that she did not say anything about the jewelry or Hazen's purported statement at a deposition held November 4, 1993 at which time the prosecutor and three defense attorneys were present (T 732).

Valerie said she was aware there was a $50,000 award offered for information at the time she called Crimestoppers. After November 4, 1993 Valerie became aware that other individuals were seeking the reward. Subsequent to that, at a deposition held June 8, 1994, Valerie told the defense attorneys' for the first time about the bag of jewelry.

Valerie agreed that she knew that in order to receive the $50,000 reward, that it required not only an arrest but also a conviction of the three people that were arrested (T 733-734). Valerie testified that she did not intend to claim the reward (T 708; T 732-733).

Valerie agreed that she had testified differently at her deposition on June 8, 1994 then she was testifying at the present trial. In confronting Valerie with her prior deposition testimony, the defense attorney asked:

> Q: Back then, on June the 8th, you told -- you told me -- my question was, "Did you ask him about the bag? What's in this? Did you guys rob somebody? Did you ask James [Hazen] about the bag?" You said yes. My question then was, "Did you show him the bag?"
> "No, I don't think so. I just remember asking him if they had robbed some houses or

anything, because I seen the jewelry. I don't know if I picked it up." Period. 'I know I didn't pick it up and show it to him and say, hey did you-all rob a house? I see this jewelry here." My question, "You didn't do that? You just asked him had they robbed a house, and you say he indicated yes?" (T 737-738).

During cross-examination, there was the following colloquy between defense counsel and Valerie Kormondy:

Q: Now, you said that you asked ... Mr. Hazen, ..., if he had robbed -- if they had robbed any houses?

A: Yes.

Q: What did you say his response was?

A: Yes.

Q: I think your testimony a few minutes ago, he said yes, we did. Is that what he said? [Emphasis supplied].

A: Yes, it is. I don't know how much I'm supposed to say here.

Q: Say the truth, ma'am.

A: Excuse me?

Q: Did he say yes, we did, or yes --

A: Yes, he did.

Q: Was his response yes, we did, or yes, they did?

A: Yes, we did (T 739).

Defense counsel then inquired concerning a statement previously made by Valerie Kormondy at deposition:

Q: Where we were, Mrs. Kormondy, before we took the break here, is that we were talking about your statement from June 20 -- I'm sorry, June 8th of 1994, on page 22 at line -- starting at line 15, the question, "Now, you indicated to Mr. Edgar that at some point after the murder, James Hazen had a conversation with you about it"? At line 18, your answer, "Well, when I went to take him to meet Lane that morning, I asked him if they had robbed any houses, because I seen a bag of jewelry in the car. He said yes, that they did." Did you make that statement on June the 8th of 1994? [Emphasis supplied].

A: I guess so.

Q: Yes or no, ma'am. Did you make that statement.

A: Yes (T 750-751).

On re-direct examination, the prosecutor brought out another part of the deposition asking Valerie, "Do you recall being asked the question on line 12, and it reads, 'Did you ask him about the bag, what is this?' Did you rob the guys -- 'Did you guys rob somebody? Did you ask James about the bag'. What was your answer to Mr. Albritton?" (T 756). Valerie responded that her answer to Mr. Albritton had been, "yes" (T 756).

On re-direct, Valerie also testified that the information she added after the November 3, 1993 deposition was after she was called into the prosecutor's office. Present were Mr. Edgar and another employee of the state attorney's office, a victim advocate named Arlene Fragale. Valerie said she was told if she knew anything else, she needed to come forward with it. At that

point, she was ready to tell everything she knew (T 758-759).

Outside the presence of the jury, the prosecutor summarized testimony which he wished to present at trial, stating, "The state would proffer the testimony of Arlene Fragale, who will testify that she was present in my office when Kay Kormondy spontaneously responded with the information about the gun and the conversation without any prompting, with some reluctance, only upon being asked to tell if there's anything more that she know because it is suspected that she knows more. So the circumstances of her [Valerie Kormondy] telling that are important to rebut the notion of the Defense that she's merely fabricated it after the fact, okay, for purposes of collecting a reward. So her prior consistent statement and circumstances surrounding that statement are relevant in this case (T 766).

The judge considered the issue of whether or not the testimony from Fragale was to rebut the implication of recent fabrication (T 766)

The defense attorney argued in that case, a proper predicate had not been laid. The testimony about Valerie Kormondy's knowledge of the reward, and the reward being contingent on a conviction, occurred sometime after November 3, 1993 [the first deposition] and June 8, 1994 [the second deposition].

The state agreed that it had not been established that the statement made to the prosecutor, in the presence of Arlene

Fragale and outside the presence of the defense attorneys, and a few days before the June 8, 1994 deposition, was a statement made before Valerie Kormondy became aware that there was an award of $50,000 which was being sought by other people and which required a conviction (T 771).

The trial judge ruled any prior consistent statement made to Arlene Fragale by Valerie Kormondy to be admissible (T 77).

Arlene Fragale testified that she was a victim witness counselor with the State Attorney's Office. She was asked by the prosecutor to sit in and witness an interview between the prosecutor and Valerie Kormondy. Fragale stated that her understanding of the interview was that there was another deposition scheduled, that Valerie had not given a complete statement before, and was going to do it at that time. Fragale said Valerie was asked general questions. Defense counsel's objection to the question, "Was she [Valerie] urged to tell the truth?" was overruled. Fragale responded, "She [Valerie] was urged to tell the truth". Fragale then testified in response to the next question that Valerie then gave information. After the trial judge overruled defense counsel's objection to the question, "Was she [Valerie] led in any way particular area or was she generally asked to provide what she knew?", Fragale responded that Valerie was generally asked. Fragale also testified that Valerie was reluctant and felt bad (T 780-784).

Kenneth Hoag, a latent fingerprint examiner with the Florida Department of Law Enforcement, found a fingerprint of appellant's on a Hardee's bag which was found inside Kormondy's Camaro (T 791). Kormondy's prints were found on several items in the car (T 793).

The jury was shown, without objection, a video of the Kormondy home (T 798-800).

Fred Kennedy, a latent print examiner, examined fingerprints lifted from the Kormondy home. Kennedy identified two fingerprints from Buffkin on a liquor bottle, several prints from Kormondy, and none from Hazen (T 800-801)

Paula Sauer, a fiber analyst with the Florida Department of Law Enforcement, examined a green silk dress and compared it to vacuum sweepings taken from Kormondy's Camaro. Sauer found eight green silk fibers that were microscopically consistent with the green silk fibers of the dress. One green silk fiber was from the vacuumings from the front driver's seat, one from the vacuumings from the driver's floor, three from the vacuumings from the front passenger's seat, one from the vacuumings from the front passenger floor, and two from the vacuumings from the rear seat (T 814; T816-817).

Sauer also compared fibers from the seat covers of the Camaro with debris taken from the carpet in the McAdams' bedroom area. She found two gray fibers consistent with the carpet on

the seat covers (T 817).

Sauer said the meaning of microscopically consistent was that the items could have come from the compared item, that they were microscopically similar, but that she could not say they were a match (T 820).

Three law enforcement witnesses testified that Shane Kormondy was arrested for the murder of Gary McAdams. Kormondy was seen leaving his place of employment at about two in the afternoon on July 19, 1993 in a Dodge Ram Charger. The officers attempted to stop Kormondy as he was driving away. Kormondy fled the vehicle and was apprehended about an hour later and formally arrested between three and three-fifteen (T 824-834).

Allen Cotton, an investigator with the State Attorney's Office, met with Kormondy's family at the sheriff's department in the late afternoon or early evening hours after Kormondy's arrest on July 19, 1993.

Sometime after Kormondy's arrest, Cotton requested that James Hazen be located and arrested. Hazen was arrested in Ponca City, Oklahoma on the evening of the 19th. Cotton identified State's Exhibit 17 as a picture of James Hazen taken on July 21, 1993, the date that Hazen arrived back in Pensacola (T 838). This picture was subsequently admitted into evidence over appellant's objection that the picture was irrelevant, prejudicial, and had no probative value (T 844-845).

Cotton also testified that after the arrest of Mr. Hazen or during this time, he also directed authorities to try to locate and arrest Curtis Darrell Buffkin. Buffkin was arrested in North Carolina.

Cotton met with Kormondy's family at the sheriff's department in the late afternoon or early evening hours of June 19th. Cotton did not reveal to the Kormondy family who else he was attempting to arrest (T 835-837).

Cotton stated he also reviewed pertinent media coverage and did not see Mrs. McAdams picture published in the paper or on television (T 838).

Stephen Huth, North Carolina Police Department, arrested Buffkin in Cary, North Carolina. At the time of Buffkin's arrest, Huth found a pistol [State's Exhibit 28-A] (T 840-841) and his back-up recovered a gold wedding band [State's Exhibit 30] from Buffkin's sister (T 840-841; 849-850). James Chaney testified that in early July his home was burglarized. A pistol, State's Exhibit 28-A, was one of the items taken as well as State's Exhibit 30, a wedding band (T 846-847).

Edward William Love, a firearms examiner with the Florida Department of Law Enforcement, said the pistol taken from Buffkin was a .44 special Charter Arms Bulldog model [State's Exhibit 28-A]. The fragmented projectile found in the floor of the McAdams' bedroom was consistent with a .44 caliber bullet. Due to the

damaged condition of the projectile, Love could not say whether or not the .44 caliber pistol recovered from Buffkin had fired the bullet which was found in the bedroom; Love could say that it was fired from a revolver with the same class characteristics (T 860-861).

Love also testified, in the following colloquy, as to the manner in which the bullet was fired into the bedroom carpet.

> Q [prosecutor]: Okay. Could you tell from the carpet the proximity of the firing?
>
> A: Yes sir, I could.
>
> Q: What was the proximity?
>
> A. This piece of carpet -- or the, excuse me, firearm was at or near contact with the piece of carpet at the time of discharge.
>
> Q: Have you previously examined photographs of a carpet with appears to be gunshot residue in this case?
>
> A: Yes sir, I have.
>
> Q: Sir, do you have an opinion as to whether the firing of that bullet into the carpet was one that was accidental or deliberate?
>
> A: It was difficult to tell just from the photographs themselves. However, it's not something that I've ever seen before where someone would deliberately fire a near-contact shot into carpet, into a floor or a slab with this type of -- any type of firearm, for that matter.
>
> ...
>
> Q; Knowing the characteristics of the

type of pistol before you, the .44-caliber pistol, how likely is it that if someone fell down and was holding that pistol, that it would fire in the manner in which we see there on that carpet and the manner of carpet that you examined?

A: It would not be very -- to me, it would be very unlikely.

Q: It would be more likely or more consistent with someone deliberately firing into the floor?

A: Yes, sir (T 862-863).

Love also testified that the bullet recovered from Mr. McAdams was a .38 special or .357 caliber bullet, The bullet could have been fired from a Smith & Wesson .38-caliber model 10 with a four-inch barrel. The bullet was not fired from the .44 Charter Arms bulldog pistol (T 859-860).

Love stated that the Smith and Wesson .38 caliber model has two internal safeties and that both of these safeties were designed to keep the gun from discharging if the hammer were to fall and the finger was not on the trigger. It was a double action revolver meaning that it could be fired simply by pulling the trigger -- i.e., pulling the trigger will cock the hammer and fire the gun. On that model, if the gun is first cocked and then the trigger is pulled, it takes three to five pounds of pressure; pulling the trigger without cocking the gun first requires nine to twelve pounds of pressure (T 863-867).

Johnny Shane Kormondy was called by the state as a witness

outside the presence of the jury. The state offered Mr. Kormondy use immunity. Kormondy refused to testify. Kormondy was held in civil contempt and sentenced to jail until such time as he elected to testify (T 900-902).

Curtis Darrell Buffkin was called as a state witness. Prior to the jury being brought in, and over Hazen's objection, the trial judge ruled that Buffkin's attorney Mr. Kevin Beck, also a witness, could be present while Buffkin testified. This was true even though Mr. Buffkin had another attorney who could have been used to present the testimony the state wanted to elicit. The ruling was made in the following colloquy:

> THE COURT: All right, Mr. Buffkin if at any point in time you wish to cease your testimony and take a break let me know and we can do that and we can send the jury out. Is counsel for Mr. Buffkin present here?
>
> MR. EDGAR: Mr. Beck is present outside.
>
> MR. ALLBRITTON: Your Honor, Mr. Beck has been listed as a witness in this case and the rule has been invoked.
>
> THE COURT: By both counsel?
>
> MR. ALLBRITTON: Yes, sir.
>
> MR. EDGAR: I think that the rule can be waived in that respect by the Court because of the unique circumstances of this case.
>
> MR. ALLBRITTON: I don't think it can.
>
> MR. EDGAR: I think the Court has discretion to do whatever.
>
> THE COURT: Mr. Buffkin, do you wish your

attorney to be present in the courtroom when you testify or are you satisfied that you can proceed without his presence?

THE DEFENDANT: Well, I would rather him be in here.

THE COURT: You would rather him be in here? Okay.

MR. ALLBRITTON: He has two attorneys, Your Honor.

MR. EDGAR: We'll be half a day finding the other one, he's campaigning for Judge. Mr. Buffkin, how about this, what if you got into a problem and you just mentioned to the Judge, Judge I need to take a break and then you can go talk to your lawyer. would that be okay, rather than have him sit here the whole time?

THE DEFENDANT: I would rather have him in here.

MR. EDGAR: Your Honor, it's your prerogative and discretion to waive the rule.

MR. ALLBRITTON: Your Honor, the problem I have is that Mr. Beck is listed as a witness to testify as to what occurred in this so called deal. Now, I may ask Mr. Buffkin some questions about that and Mr.Buffkin, if Mr. Beck is in here, would have a right to clarify that or at least get statements from his attorney. If his attorney was not listed as a witness then I would have no problems with it whatsoever but I think that's not fair to my client.

THE COURT: Let me ask you this, what do you believe the substance of Mr. Beck's testimony to be?

MR. EDGAR: Before I answer that can I say one thing? He was present at the deposition, Mr. Beck was. The deal -- the deal as he calls it, the agreement was a matter of

record. The substance of his testimony would be to rebut any notion that Mr. Buffkin made Mr. Hazen's involvement up. He didn't make it up because he told his lawyer about it before he went to trial and that's what Mr. --

THE COURT: This would be used in rebuttal or during your case in chief?

MR. EDGAR: During the case in chief if his motivation for involving Mr. Hazen -- if Mr. Allbritton tries to claim that Mr. Buffkin is not trying to tell the truth about Mr. Hazen being there, then I'm going to argue that he is telling the truth because he told his own lawyer that before the trial, that's a prior consistent statement and that's the only reason I would be calling him.

THE COURT: Okay. Mr. Beck is also an officer of this Court in addition to being a witness in this case which makes him qualitatively different than most witnesses. Also, counsel has been present during the entire deposition process of this witness. Counsel, you were present during that time, weren't you?

MR. ALLBRITTON: Yes, sir, I was present during the deposition, Judge.

THE COURT: Okay. I'll allow Mr. Beck to be here during this testimony. I think that the rights of this defendant clearly outweigh the exercise of the Court's discretion in imposing the rule, of, to sequester this particular witness.

Mr. Beck will please be called to the courtroom.

MR. ALLBRITTON: My objection is noted for the record, Your Honor~

THE COURT: Yes, sir, your objection is overruled.

...

MR. EDGAR: Mr. Beck is present.

THE COURT: All right, let the record reflect that counsel for Mr. Buffkin, Mr. Beck, is present. He's available to consult with his client in the event that his client wishes that (T 906-910).

Immediately after Mr. Buffkin began testifying, defense counsel approached the bench to advise the court that defense counsel had "watched the first two questions . When he [the prosecutor] asked a question, Mr. Beck went (indicating)." The trial judge stated he hadn't noticed it independently. The trial judge then advised Mr. Beck that "counsel suggests that you are guiding your witness [Buffkin] by making gestures to him either yes or no". Mr. Beck responded to the Court stating, "If I was, I will not make any gestures" (T 911-912).

During a break taken later in Buffkin's testimony, Buffkin was told that he could confer with his attorney Mr. Beck (T 977-978).

During his testimony, Buffkin agreed that he had been arrested, tried, and then plead guilty to the offenses of burglary, robbery, sexual batteries and murder in the death of Gary McAdams and was willing to testify (T 911).

Buffkin said that he had escaped from the county road camp on July 6th and went to Kormondy's house on July 8th. During the time Buffkin stayed with Kormondy, Buffkin and Kormondy broke into a house near Nine Mile Road and stole jewelry, money, and a

gun. Buffkin identified the .44 Charter Arms Bulldog pistol as the gun stolen [State's Exhibit 28-A] (T 912-914).

After stealing the gun, Buffkin and Kormondy talked about breaking into a house and robbing it when the owners were home, on the assumption that they would get more money that way. Earlier in the week, they had broken into some houses and stolen things and, in some ways,it was difficult to sell the items and get money for them (T 914).

Buffkin did not meet Hazen until July 10 when Hazen came back to the Kormondy house after a family reunion (T 915). At that time, Buffkin and Kormondy had already decided that they were going to break in a house and rob people (T 916).

Kormondy, Buffkin, and Hazen went to a store and bought some medicine for Mrs. Kormondy. After bringing back the medicine and staying around the house for awhile, Kormondy, Buffkin, and Hazen left again in Kormondy's car and went riding around. When asked by the prosecutor if they were looking for a place to break into, Buffkin replied, "me and Kormondy was at the time" (T 916-917).

They again went back to the house. There was other company at the house. Shane and Valerie Kormondy talked in their bedroom. Buffkin sat in the kitchen and drank whiskey. Kormondy then came in and Buffkin and Kormondy started talking about hitting up a house (T 917-918). Hazen was not present in the kitchen at this time.

As Buffkin, Hazen, and Kormondy were going out the door, Buffkin realized he had left the gun underneath the chair. Buffkin told Kormondy he had left the gun, and Kormondy told Buffkin they had to get it. Hazen was already going towards the car when Buffkin ran into the house, took the gun from underneath the chair, walked outside the door, shoved the gun down his britches and got in the car. After Buffkin got in the car, he took the gun and slid it down up underneath the carseat (T 917-918). Kormondy was driving, Buffkin got in the front passenger seat, and Hazen was in the back behind the driver's seat (T 921-922). It was getting dark and was between eight and nine when they left.

Buffkin testified that they were scoping out places and just riding around. They stopped once at a bar (T 947-948).

Buffkin and Kormondy started talking about hitting a house. Buffkin saw a car in the subdivision and then Kormondy said, That's us". Buffkin then testified, "I knew what time it was already. I knew we were fixing to go ahead and hit a house. I don't know if Hazen heard it or whatever, if he knew, if he even knew what was going on" (T 922-923).

Kormondy pulled the car over and they sat for a bit. Kormondy, Buffkin, and Hazen got out of the car. Buffkin was ahead and when he turned around he saw Kormondy and Hazen putting socks on their hands. Buffkin saw Mr. McAdams walk by the garage

door and then go in the house.

Buffkin walked to the driveway. Kormondy was off to the side from where the door was and was putting a white T-shirt over his head so that only his eyes showed. Buffkin didn't see a T-shirt on Hazen at the time. After they entered the house, Buffkin saw that Hazen had a T-shirt over his head also. Buffkin knocked on the door. He heard someone say "who is it" and Buffkin replied, "me". Mr. McAdams opened the door and Buffkin saw Mr. and Mrs. McAdams standing there. Buffkin testified that he then looked at them, showed them the gun, and said, "put your heads down and don't look up or I'll blow your fucking heads off" (T 928). They looked shocked. Buffkin told them to put their heads down and get down on the floor, do as he said, and no one would get hurt. Buffkin said the McAdams' got down on the floor and did exactly as Buffkin said.

Buffkin said that all along the plan was to just go in there, get money, guns and jewelry and get up out of there (T 923-928).

When asked what plan they had to secure the house once they got in, Buffkin answered, "Well, me and Kormondy had talked about it before and I just basically told him when we entered the house just pull the phone cords and shut the curtains and stuff like that and so that's basically what happened. When he came in he ran towards where like you come in the door here, you have got

the kitchen here, you have got like a little bar thing here. He ran around that way, snatched out the phone and started shutting the blinds. When Hazen came inside the door, he went off towards like where the living room part was and after he got through they started heading down towards the back going back towards the bedroom in the house. I don't know what they were doing back there" (T 929) .

Buffkin heard things being thrown around in the back of the house. Kormondy and Hazen returned to the front. Kormondy had a gun in his hand, and asked Mr. Mc.Adams what he used the gun for, The man first replied "nothing" and then said "target practice".

According to Buffkin, Kormondy then "rubbed the gun up on the woman's ass and told her she had a cute ass and then he stated get up and come with me is basically what he told her" (T 931).

Buffkin said taking the woman in the back bedroom was not part of the original plan (T 931). Mrs. McAdams, Kormondy and Hazen went down the hall. "The woman was stating, please don't do this to her and just take whatever you want, don't hurt us and then the man stated the same thing (T 931). Buffkin stayed in the front room holding a gun on Mr. McAdams.

Five to fifteen minutes later Kormondy and Hazen brought back Mrs. McAdams, who was naked at that time. Buffkin figured that they must have raped her. Mrs. McAdams sat next to Mr.

McAdams and reached over to touch him. Kormondy said, "I didn't tell you to touch him". Mrs. McAdams moved her hand away.

Buffkin got a beer from the icebox, handed it to Mr. McAdams, and told him to drink. Buffkin figured that under the circumstances, the man needed a drink. Buffkin then handed his gun, the .44, to Hazen, and told Hazen to watch the man. Buffkin told the woman to get up and come with him. Buffkin said he was "intending to go ahead and rape the woman. Kormondy wound up behind them also. Buffkin told Mrs. McAdams, "I don't know what the other two did to you, but you're going to like what I'm going to do to you" (T 933).

Buffkin said Kormondy had touched the woman with the gun, and the woman was cooperating. Buffkin told Mrs. McAdams to lie down, Kormondy walked in at the time and Buffkin "had sex with the woman as when Kormondy was getting his penis sucked otherwise". Kormondy told Mrs. McAdams to keep her hands across her eyes. Buffkin had reached up to the shower and grabbed a towel. When the woman dropped it from her mouth, Kormondy told her he was going to blow her head off. Mrs. McAdams was shaking and crying.

When Mrs. McAdams dropped Kormondy's penis out of his mouth, Kormondy told her that if she dropped it out again, he would blow her head off. Kormondy started going out and threw the towel over Mrs. McAdams head. Kormondy went back to the front of the

house, and Hazen walked in. Hazen tried to hand Buffkin the .44 gun. Buffkin told Hazen to keep the gun.

Buffkin went back up front. At the time, the towel was over the woman's head. Buffkin ran into the living room and was at the bar in the kitchen. Buffkin started going through Mrs. McAdams' purse. Buffkin looked over and saw Kormondy telling the man to keep his "fucking head down." Buffkin heard a hammer pulled back and looked at Kormondy and started shaking his head no. Kormondy kept bumping the man on the head. About that time the gun went off. Kormondy ran out the door and then came back in. After that Buffkin heard a second shot in the back and thought the woman had been killed (T 933-937).

Buffkin ran out the door and went to the car. Kormondy and Hazen also went toward the car. Kormondy handed the gun that belonged to Mr. McAdams to Buffkin and said, "I didn't mean to shoot the man", "it happened on accident". Buffkin testified he then told Kormondy, "well, what is done is done, you can't change it now. And I fired me up a cigarette and he fired up the vehicle and we rode off" (T 937).

They then rode around and sold the gun. The buyer of the gun blinked a light and Buffkin struck a lighter. Buffkin explained that this was a signal that he wanted some crack. Kormondy told the buyer of the gun to give him 40 piece of crack cocaine for the gun. Kormondy then handed the gun to Buffkin.

Buffkin asked the buyer to show Buffkin some "40" pieces. Buffkin took some crack after checking it with his lighter because "you got bad crack and you got good crack". Buffkin gave the man the gun and grabbed the "40" and Kormondy drove the car off. Kormondy smoked all the crack because Buffkin and Hazen preferred drinking to smoking crack (T 948-949).

On the way to Kormondy's house, Kormondy drove behind a Winn-Dixie. Buffkin threw out some keys and a wallet.

After getting back to the house, in discussing the sexual batteries, Buffkin asked Kormondy, "did he shoot off in the woman". Kormondy said he did not, or not that he was aware of. Buffkin never asked Kormondy about the gunshot that happened in the bedroom. Buffkin said he never asked if Mrs. McAdams was dead, but he assumed that she was. Buffkin said Hazen was in the back bedroom when the shot went off.

Buffkin saw Hazen with some jewelry after they went back into Kormondy's house. Kormondy, Buffkin, and Hazen went through the jewelry. Buffkin decided he did not want any of the jewelry. After looking at the jewelry, they put it back in the same tan bag. Hazen took the jewelry outside and put it in Kormondy's camaro.

Buffkin had a drink. While they were sitting there talking, Mrs. Kormondy came into the room. The three stopped talking. Mrs. Kormondy then went back to bed.

After getting back to the house, in discussing the sexual batteries, Buffkin asked Kormondy, "did he shoot off in the woman". Kormondy said he did not, or not that he was aware of. Buffkin never asked Kormondy about the gunshot that happened in the bedroom. Buffkin said he never asked if Mrs. McAdams was dead, but he assumed that she was.

Buffkin said Hazen was in the back bedroom when the shot went off.

Buffkin went to bed. Hazen and Kormondy were still sitting in the kitchen. When Buffkin woke up, Hazen was gone (T 939-947).

Concerning an agreement with the state, there was the following colloquy between the prosecutor and Buffkin:

> Q: Now, I understand that you made an agreement with the State that you would testify truthfully, is that correct?
>
> A: Yes, sir.
>
> Q: And for that agreement it was agreed that you would not receive the death penalty, isn't that right?
>
> A: That's correct.
>
> Q: Is it also your understanding the death penalty would not be pursued because it was not thought that you were the one that shot Mr. McAdams?
>
> A: Yes, sir.
>
> Q: Did you shoot Mr. McAdams?
>
> A: No, sir.

Q: Did you see who shot him?

A: Yes, sir.

Q: And who was that?

A: That was Kormondy (T 946-947).

Buffkin agreed that before any agreement was made, he spoke to his attorney, Mr. Beck. Buffkin told Beck who was with Buffkin (T 949-950).

On cross-examination, Buffkin stated that when he escaped from the road camp, he broke into a trailer. He took a car and some clothes. He also took some keys. Buffkin stopped by his ex-girlfriend's house and then went to his cousin Larry's trailer. Buffkin checked with Larry to see if Buffkin's escape had been on the news. Buffkin agreed that he and his cousin Larry, whose last name he did not know, had played "together and everything ever since we were little kids. Buffkin then went to a bar and slept in the stolen car behind the bar. The next morning he got some beer and cigarettes and then stayed behind the bar. He returned to his cousin Larry's trailer one time after his first visit (T 952-957).

Buffkin knew he could not stay around his family and decided to go to Kormondy's house. Buffkin stated he and Kormondy had been good friends since meeting in jail in 1.990. At the time he met Kormondy in 1990, Buffkin had already been sentenced to prison and was in jail waiting to testify against a codefendant

in another case.

Buffkin went to Kormondy's house on Thursday, July 8th, told Kormondy that Buffkin had escaped, and showed Kormondy the $30,000 car stolen from the trailer. Kormondy invited Buffkin to stay.

After planning a second burglary of the trailer Buffkin had burglarized, Kormondy and Buffkin went back to the trailer on July 8th and stole a stereo (T 957-962).

On Friday, July 9th, Buffkin, Kormondy and Kormondy's brothers rode around, and went to "titty bars". Also during the day on Friday, Buffkin, Kormondy, and a man named "Joe" rode around the Wedgewood area to buy crack. Kormondy bought some cocaine and Kormondy and Joe smoked it. As they were riding around, they mentioned burglarizing a place a home with no one there. Buffkin said that the conversation about breaking into a home included Buffkin and Kormondy, but that Joe did not know what was going on.

Buffkin said that their driving around included the Thousand Oaks subdivision where the McAdams lived. They stopped at one point and Joe got out of the car to take a 'leak". When Joe got back in the car, Kormondy and Buffkin were "mentioning" breaking in a house in that subdivision. Joe said he didn't want no part of it and asked to be dropped off at his trailer. Kormondy and Buffkin dropped Joe off (T 962-970).

Buffkin maintained that he met Joe for the first time at Kormondy's house when Kormondy went to pick Joe up and brought Joe back. Buffkin said he was at Joe's trailer at the time they dropped him off at his trailer after Joe said he didn't want to be part of breaking in a house and later when they picked him to go out and buy crack (T 981-984).

Buffkin further maintained that he had never left Kormondy's house and came back to the house in a blue truck (T 982).

Buffkin described Joe as about six foot tall and weighing 190 pounds (T 1002). Joey Tarcus was then brought into the courtroom and Buffkin identified him as Joe (T 1003). During the trial, Allen Cotton, an investigator with the State Attorney's Office, testified that Tarcus was six-foot four and one-half inches tall and weighed 260 pounds (T 1028-1029).

After dropping off Joe, Kormondy and Buffkin then broke into James Chaney's home and stole rings, whiskey, stereo equipment, and the .44 Charter Arms Bulldog firearm. They then went back, picked up Joe, sold the stolen stereo equipment, and went to a crack dealer in the Wedgewood area (T 971-972). Kormondy and Joe smoked the "crack" (T 984).

The next morning Shane and Kay Kormondy stated they were going to a family reunion. While they were gone, Buffkin drank some Crown Royal whiskey that he and Kormondy had stolen from the Chaney home. After about two hours Shane and Kay Kormondy

returned with Hazen. Buffkin had never met Hazen before (T 985-986). Buffkin stated he had a fifth earlier that day and a littler more when he got back to the house. Buffkin said he loved to drink, that according to other people he had a drinking problem, but that he could handle his drinking, so that you couldn't tell he had been drinking at the time they left the house (T 918-919). Buffkin characterized the others as having "drank a little bit" and not into drinking as heavy as Buffkin (T 921).

Concerning Kormondy and Buffkin's conversation about breaking into a home, there was the following colloquy between the defense attorney and Buffkin:

> Q: At the time that you had this conversation with Mr. Kormondy about breaking into a house with someone in it, was Mr. Hazen privy to that conversation, was he present?
>
> A: No, sir.
>
> Q: Did you see or hear Mr. Kormondy discuss that idea with Mr. Hazen?
>
> A: Not that I was aware of, no, sir (T 987-988).

Buffkin and Kormondy had a conversation in the kitchen about breaking into a house with someone in it. Concerning Hazen's access to this conversation, Buffkin responded as follows to defense counsel's questions:

> Q: Okay, a the time that you had the conversation with Shane in the kitchen was James Hazen privy to that conversation? Was

he in the kitchen?

A: No sir, he was in the living room sitting on the couch or in that chair.

Q: Were you and Shane talking loud enough for him to have overheard you in the living room?

A: No sir. There was no way he could have heard it because the TV was on and they were in there talking (T 991).

As to whether or not Hazen could see the gun Buffkin took out to the car, Buffkin testified:

Q: When you shoved it [the gun] in your britches, was Mr. Hazen in a position to see you do that?

A: Never did, sir.

Q: When you took it out in the car, could he have seen it at that point?

A: No, sir, he couldn't have. There was no way he could have (T 992).

Buffkin further testified:

Q [defense attorney]: Now, you indicated that -- when you all are riding around looking for or headed to Thousand Oaks Subdivision, did you or Mr. Kormondy mention to Mr. Hazen that you were going to break into a house?

A: Never did, no, sir (T 998).

...

Q [prosecutor]: Now, after you got in the car with Kormondy and Hazen, you had the gun when you were driving around you said later that after driving around quite awhile you went to the subdivision of Thousand Oaks?

A: Yes, sir.

Q: During this time did you talk when you were seated in the front of the car in the passenger's seat and Kormondy was driving and Hazen was in the back seat, did you talk about what you and Kormondy were going to do?

A: Yes, sir, we did.

Q: And what did you talk about?

A: About burglarizing the house with someone in it.

Q: Did you talk about who was going to go in with the gun?

A: Well, I had basically already had told them that I'll go in with the gun. I don't know if Hazen heard this or whatever because when we were sitting in the car the radio was playing too (T 1008).

While Buffkin said he was not exactly the person who planned the crime, "We had just, we mentioned it, both of us, me and Kormondy did about hitting a house with someone in it" (T 999).

Buffkin further stated he was told that the reason the death penalty was not pursued against him was that he didn't actually shoot Mr. McAdams (T 1000). Buffkin agreed that he had six to eight prior convictions for felonies or crimes of dishonesty (T 1001). These convictions were for burglary of an auto and petty theft in 1993, two grand thefts and a burglary in 1990, and two grand thefts and a burglary in 1988 and 1989 (T 1012).

Kevin Beck, Curtis Buffkin's attorney, testified that he had negotiated a plea agreement with the state on behalf of Buffkin. The agreement was that the state would not pursue the death penalty if Buffkin would testify truthfully. Beck said that it

was his understanding that one of the facts that led to the agreement was the state's determination that Buffkin was not the triggerman. Beck testified that Buffkin was told he was facing the death penalty, that his status as a nontriggerman would affect the State's ability to impose the death penalty, and that he was given an opportunity to enter a plea in return for truthful testimony in part because he was not the triggerman (T 1017).

Prior to this agreement, Buffkin told Beck that Shane Kormondy and James Hazen were with Buffkin when the crime was committed (T 1016).

Ms. McAdams was recalled as a witness for the State (T 1030). When asked to describe the physical build, height, and approximate weight of the men who assaulted her and her husband, Mrs. McAdams replied, "Okay, Mr. Buffkin was approximately, I'd say, five eight, five nine, a little bit heavier build than the other two; I would say medium build. The other two were -- Mr. Kormondy was slightly taller than Mr. Hazen, but they were both very slim built" (T 1030).

Appellant immediately moved for a mistrial, stating, "Your Honor, at this time I move for a mistrial. This lady has basically said that she could not identify Mr. Hazen as the person who assaulted her. Now she's coming into court and describing Mr. Hazen as the person that assaulted her. I move

for a mistrial" (T 1031). The motion was denied (T 1031). Appellant then asked for a curative instruction (T 1032). Appellant asked the trial judge to "tell them [the jury] to disregard the statement that Mr. Hazen was one of the men that assaulted her (T 1032-1033). After further questioning by the state, the trial judge advised the jury, "All right. Ladies and gentlemen, Mrs. McAdams has previously testified that she could not identify Mr. Hazen, from her prior testimony. Today she has described an individual and made reference to Mr. Hazen, and I want you to clearly understand that you're not to take the description that she gave of Mr. Hazen today, describing him today, as being any indication that she was in a position to identify him at the time that these events occurred, and you're not to take her testimony as being an identification of Mr. Hazen at the time that these events occurred. Her testimony was only to describe what she believed to be the physical appearance of those who she alleges assaulted her at the time that the events occurred. Do all of you clearly understand that?" (T 1035-1036).

Appellant then renewed his motion for mistrial which was denied (T 1036).

The state rested (T 1040).

Appellant's motion for a judgment of acquittal on the grounds that the state failed to establish a prima facie case of guilt as to each count was denied (T 1041).

Appellant James Hazen testified in his behalf that he was not present when the crimes against the McAdams' were committed.

Hazen was visiting the area from Pancho City, Oklahoma with his foster parents, Mr. and Mrs. Mike and Sam Karl. They were staying on a houseboat in Daphne, Alabama.

Kormondy was Sam Karl's nephew. Hazen had known Kormondy since Hazen was seven years old, and considered Kormondy a close friend and family member. Shane Kormondy was at the houseboat almost every day visiting, and sometimes brought his wife Kay (T 1043-1046).

Hazen said he was a part of a Kormondy family reunion in Cantonment held in July. After the reunion, Hazen went with Kormondy back to Kormondy's house in Pensacola. They were driven by Shane's mother, Lane. Shane Kormondy's car was at Kormondy's house.

At that time, which was early afternoon, Hazen met Darrell Buffkin at Kormondy's house. Darrell was introduced to Hazen as "Curtis". Kormondy did not tell Hazen at the time that Buffkin was an escapee from a road camp. Hazen said Kay Kormondy didn't tell him, and that he and Kay Kormondy didn't speak that much because they didn't get along. He attributed this to the fact that Kay's family had disapproved of Kay's marriage to Shane, and that Hazen was part of Shane's family (T 1047-1049).

Hazen and Buffkin sat around for an hour or hour and one-

half getting to know each other (T 1049). Hazen and Buffkin dumped out a bag of pennies to get some money to buy medicine for Kay Kormondy. Hazen, Buffkin, and Kormondy went in Kormondy's chamber and got the medicine. They were gone for about twenty minutes.

After they got back, they sat around, drank mixed drinks, and talked. They discussed different penitentiaries they had been in and the different things they had seen in them (T 1050).

They then left the house again, and rode around for about an hour and a half. During this time, Kormondy bought some "crack" and smoked it. Hazen and Buffkin did not smoke any (T 1050-1051).

They arrived back at the house about six in the afternoon. They ate, drank, and watched television. During this time, a man and his girlfriend stopped by and were visiting (T 1051-1052).

Kormondy came into the living room where Hazen was watching television, talking to the visitors and Kay, when Kormondy told Hazen to come on, they were going. Hazen went out to the car and was surprised to find that nobody was behind him, so he sat in the car and waited for Kormondy and Buffkin to come out (T 1053).

Kormondy and Buffkin got into the car. They left the Kormondy house, drove several miles, and went to a trailer and picked up someone that Hazen did not know. This person was waiting at the gate.

Kormondy was driving, Buffkin was in the front passenger seat, Hazen was seated in the middle of the rear seat because there was a child's car seat to his left, and the person they picked up was sitting to Hazen's right. The person said, "Let's go buy some stuff". They then drove to a neighborhood where Kormondy and this other person bought crack. They went to a little field where Shane and this other person smoked the crack. During this time, Buffkin and Hazen drank beer and mixed drinks (T 1053-1057).

Hazen testified that it was apparent that Buffkin and Kormondy knew this person from before. They were talking about people Hazen did not know, and for some time the conversation really did not involve Hazen. As Hazen testified, "it was an A, B, and C conversation and I was Z. I was no -- nothing to do with that conversation at all (T 1054-1055).

Hazen said after the crack was smoked, they would ask Hazen whether he wanted to do something exciting, just mellow out, what did he want to do? Hazen said he just wanted to have a little fun and relax. After listening to the three others for awhile, talking about someone they knew and whether they should go visit that person, Hazen was getting drunk and tired and asked if they would take him home. Hazen estimated it to be about twelve or twelve-thirty at that time. After being asked what happened after Hazen asked to be dropped off, Hazen replied, "This other

gentleman said well, run me by my house real quick and drop me off, and y'all can come back later. And so we went and took him to his trailer, and they run home, dropped me off" (T 1057-1058). The prosecutor's objection to the hearsay and motion to strike the statement "of this anonymous person" was sustained (T 1058).

Kormondy dropped Hazen off at Kormondy's house. "They just said well, whatever. Have it your way. You know, if you don't want to -- if you're scared to play, you know, stay home" (T 1058-1059). Kormondy and Buffkin left the way they had come.

Hazen went to go in the house but the door was locked. Hazen decided not to wake up Kay Kormondy and their child because Kay had been sick earlier in the day and he didn't want to bother her. It was a nice night, a little warm. Hazen played with a hot plate attached to a barbecue grill and also dozed off a little.

Hazen estimated it was an hour or more before Buffkin and Kormondy returned. (T 1059-1061). Buffkin came around he parked car first and said, "well, if I didn't do it like that, I was going to have to shoot him anyhow. Kormondy appeared scared and Buffkin "was emotional like he was just freaked out" (T 1062).

Hazen went into the living room of the house and lay down on the couch. Kormondy and Buffkin milled around. One of the two, Hazen believed it was Buffkin, said, "well, it's done. There's nothing that can be done about it" (T 1063).

Hazen was curious about what happened and figured it had something to do with the rough black neighborhood where "crack" was sold that they had been frequenting earlier.

After they had been in the house about ten minutes, Kay Kormondy got up briefly, looked in the living room, and turned around and went right back to bed. At the time, Hazen was lying on the couch, about to go to sleep; Buffkin was shying away from Kay and trying not to look at her, and Kormondy just looked at her and continued his conversation (T 1063-1064).

That morning Kay Kormondy woke Hazen up at about seven-thirty in the morning to get a phone call. Hazen talked to Shane Kormondy's mother, Lane Barrett, on the phone. Hazen agreed to go out on a boat with her, his mom (stepmother Sam Karl), and some other people.

Hazen got in the car with Kay to go to a store to meet Lane Barrett. Hazen stated that Kay did not show him any jewelry that morning. Kay did ask Hazen what they had done last night, and Hazen told her they had ridden around and picked up some guy, and that Shane and the guy had some smoke. Other than that, Kay talked about how she was going to kick Shane Kormondy out that day (T 1065-1067). Kay asked Hazen if he had been with them and robbed anybody, Hazen told her no, that he was not with them, that if they did go rob somebody, it was when they dropped him off. Hazen also told her that he'd had enough to drink that

night, but he was not drunk (T

Concerning Ms. McAdams earlier testimony that she had seen Hazen staring at her at a court appearance, Hazen stated that he had not been staring at her, that he may have looked in that direction, that he didn't know her, and didn't look directly at her. Hazen also said the courtroom was crowded and there were not may seats available. Hazen stated that the day Ms. McAdams got on the stand and testified at the trial was the first day that he knew who she was or what she looked like (T 1068-1069).

Hazen further testified that during the jury selection process in the case, he had been concerned about a Ms. McAdams who was listed on the jury venire. Hazen stated, "I thought it was the victim in this case. I thought -- I thought maybe the State had put her there to try to get an ID or something of me. I didn't know what -- what the woman was doing there" (T 1069; T 1071).

Hazen testified he had been convicted of a crime involving dishonesty or a felony twice (T 1072).

The state began it's cross-examination by asking, "Mr. Hazen, you're a convicted felon?" (T 1073). The state then brought out that Kormondy and Buffkin were also convicted felons and that Kormondy and Hazen were close friends. In asking about Buffkin, the prosecutor asked, "And Mr. Buffkin is a convicted felon?" to which Hazen answered, "I know that now". When the

prosecutor then said, "Well, I thought you said y'all sat around and we talked about the penitentiary?, Hazen answered, "Well, I knew it then but, I mean, I didn't -- right when I first met him, I did not know that. It was probably several hours later". The prosecutor then asked Hazen, "Well, what are you trying to say" (T 1072). The trial judge overruled appellant's objection to the form of the question and that Hazen had already said what he meant to say. (T 1073). The prosecutor then again asked "What are you trying--?," at which point Hazen interjected, "It was several hours later. If you're trying to say did I know it right at first, no. I didn't know it for several hours -- several hours". The prosecutor then argued, 'I didn't ask you when you knew it. I just said do you know it?, at which point Hazen answered "yes" (T 1073-1074). In point of fact, the prosecutor's exact original question concerning Buffkin was, "And Mr. Buffkin is a convicted felon? (T 1073).

Hazen testified he was sitting in his backyard in Pancho City, Oklahoma on July 19, 1993 when he was arrested. He was shocked when he was arrested. Hazen was not as shocked to find out they were arresting Kormondy and Buffkin. He already knew Kormondy had been arrested because a police officer told him, "they already got one of y'all" (T 1074). Hazen said Kormondy did not call him from the jail nor did anybody else call to tell him to watch out because the police were coming. Hazen said his

address in Pancho City was 3701 Larkspur and that there were two phone numbers at the residence, (405) 765-3701 and (405) 765-3700 (T 1075).

Hazen said that when he appeared in Courtroom 401 for the previously referenced court appearance that he did not see Ms. McAdams. Hazen said he sat in the jury box, but not in the spot that Ms. McAdams had said he was seated. Hazen said when he first went in the courtroom, he had to pay attention to where he was going so he wouldn't run into the jury box. He then sat down and started looking around to see where his family was at. It did not take him long to find Shane's family, Sam Karl, and Hazen's girlfriend in the courtroom -- they were sitting directly behind him.

Hazen agreed that if Ms. McAdams was seated in the courtroom where she said, that if Hazen looked in his family's direction, he would not have been looking in the direction in which Ms. McAdams was seated (T 1076-1079).

There was then the following colloquy between the prosecutor and Hazen:

> Q: So when Mrs. McAdams said that you looked at her and recognized her, your testimony is that you were not looking at her or in her direction and looking at someone else; you just don't recall it at all?
>
> A: If I looked at her, I didn't recognize her. I didn't know she was sitting there. I was just looking for my family.
>
> Q: You never looked at her, locked eyes and looked

away?

A: Just like I look at that gentleman there every once in a while, I don't lock, you know, and just stare. I would just -- you know.

Q: You didn't do that over and over again?

A: No, I did not.

Q: You didn't look at her and recognize her because you'd been in her home?

A: No, I did not (T 1079-1080).

Hazen agreed that he told his counsel that he saw a woman during jury selection named Mrs. McAdams and he wondered if that was Cecilia McAdams. The prosecutor then inquired of appellant as to what documents he had seen concerning the case. Hazen stated he had seen Buffkin's deposition about a week before, Officer Allen Cotton's deposition and another officer's deposition. Hazen stated he had not seen the deposition of Mrs. McAdams or the police reports. The prosecutor then pursued the matter as follows:

Q: (Prosecutor): From reading those depositions, sir, it should have been very clear to you, shouldn't it, that Cecilia McAdams was not a middle-aged woman with glasses, as the woman appeared in the jury pool?

A (Hazen): If I recall, there wasn't nothing directly said about what she looked like or nothing in there.

Q: You didn't know if she was eligible to be your mother or your grandmother; is that what you're trying to say?

A: I've never seen this woman. I don't know how old she was. I ain't never seen her. I don't know how tall, how wide, how nothing. I do not know the woman. I've never seen the woman until yesterday.

Q: Are you saying you had no idea of her age at all?

A: No.

Q: Whether she was young, middle-aged, or old?

A: I knew they were thirty-something, but I didn't know anything more than that?

Q: So you did know she was in her 30s, probably?

A: Yeah, late 30s or early 30s. I had heard something on TV.

Q: Are you trying to tell this jury that that Mrs. McAdams that was seated, I think, about on the fourth row back here towards the end, with the glasses, that middle-aged woman was in her 30s? Are you just saying this, sir, because you want to throw the jury off, thinking that you really didn't recognize Mrs. McAdams, and so you fabricated this?

A: No, I did not fabricate this, and I am not trying to throw these people off.

Q: Can you explain, sir, how if you thought from reading the depositions that Mrs. McAdams was in her 30s, that you thought that that was the woman, that middle-aged woman, Mrs. McAdams, seated back here? Tell us. Convince us, if you will, that you weren't trying to throw this jury off.

A: I heard the name McAdams. I don't know nothing more than that.

Q: Oh, now you're saying you didn't see her?

A: I heard the name McAdams and I started wondering. I started looking for this lady to see if I could find her. Something come up. She stood up or she -- somebody moved or something happened. Anyhow, she said her name, and I asked my attorney is that the woman that's the victim in this case? And he --

Q: So you did see her?

A: I seen her after she stood up, yes.

Q: All right. So you're trying to convince this jury that you really thought that middle-aged woman might have been the 30-year-old woman who is the victim in this case?

Mr. Albritton (Defense Attorney): Your Honor, he's asked that question three or four times. It's being argumentative now.

The Court: Overruled.

Q: (prosecutor): That's your testimony, your sworn testimony?

A: I don't know how old that woman was.

Q: Sir?

A: I'm not an age expert here.

Q: No, you've not been qualified as an expert, sir (T 1082-1084)

Hazen agreed that the last time he went riding with Kormondy and Buffkin that Hazen was concerned that Kormondy and Buffkin were going to commit a crime but nothing happened. As Kormondy and Buffkin "started talking a little deeper", Hazen asked them to take him home.

Hazen agreed with the prosecutor that at that point they

hadn't committed any crimes and so Hazen wasn't that worried about it. The prosecutor then turned his question around and suggested that Hazen did not consider smoking crack a crime. Hazen said he did consider smoking crack a crime, but that they were grown men and he couldn't stop them. Hazen said while he did not distance himself from them when they were doing crack, he kept to his own self drinking beer and mixed drinks (T 1085-1087).

Hazen testified he never saw a gun, he didn't hear any talk about the robbery, and he didn't hear any talk about going to pick a house out (T 1092).

In response to a question from the prosecutor about picking up two men, Hazen said he did not know about two men. He did know that they picked up one person at his trailer. Hazen explained that he could not retrace the route from Kormondy's house to the trailer because of his unfamiliarity with the Pensacola area (T 1092-1093; T 1105-1106). Hazen believed that after they dropped Hazen off at Kormondy's house, Kormondy and Buffkin may have gone to pick up the person at the trailer. This was based on hearing Kormondy or Buffkin telling the person they would be back later (T 1094-1095). Hazen did not remember the name of the person although he thought it might have been used once or twice in conversation (T 1093-1094). Hazen described the person as a little bigger than Hazen with light brown shoulder-

length hair (T 1094).

When the prosecutor questioned Hazen about why he didn't go back to Kormondy to get the key to the house after Hazen found out it was locked, Hazen replied, "I figured I'd be able to get in the house when they dropped me off. I turned around -- when the door was locked, I turned around to ask Shane [Kormondy] for the keys, and he was already gone too far away that I could not get his attention to get him to come back" (T 1101).

Hazen stated that when Kormondy and Buffkin returned to the house he did not ask them about what had happened. He had already been to the neighborhood where they bought "crack' and was skeptical of it. Hazen said if they had gone back to the neighborhood and somebody tried to rob them or shoot them, Hazen did not want to know anything about it (T 1099-1101). Hazen, when asked by the prosecutor if Hazen would care if they [Kormondy and Buffkin] had killed anybody, responded, "Yes, I would, very much so" (T 1102).

Hazen said he did not tell Kay Kormondy that they [Kormondy and Buffkin] robbed someone, and that he told her that he didn't know what they did. Hazen believed that his words to Kay Kormondy were, "yeah, I guess they robbed somebody". Hazen said he volunteered to Kay Kormondy he had been drinking and Kay knew he had been drinking. Hazen further said that Kay said that she was going to throw Shane Kormondy out of the house. She told him

this in the car and she also stated the evening before in front of her Hazen, her friend and his wife that she would never consider Kormondy her husband (T 1087-1091).

When confronted with Buffkin's testimony that Hazen was involved in the commission for he crime against he McAdams, Hazen stated that Buffkin's testimony was not true (T 1102).

The prosecutor then began questioning of Hazen, intimating a prosecution theory that Hazen had been pulled into something Hazen had never planned or intended, and eliciting ambiguous testimony from Hazen concerning hypothetical situations:

> Q (prosecutor): Sir, is it just a matter that you got pulled into something, you're from out of town, got in the car with them, didn't really know what they had in mind, pulled up to a neighborhood, they want to go in a house and break in , and you just sort of went along not really knowing what was going to happen? Really, wasn't it a case of that?
>
> A (Hazen): No, it was not.
>
> Q: Isn't it really a case, sir, of approaching the house and getting in and finding out that there's more that they had in mind, that they wanted to rob somebody, and then you got scared, and you didn't really want to be involved in it?
>
> A: No.
>
> Q (prosecutor): Isn't it a case, sir, of once being in the house, that they began to rape a woman, and you didn't want to have any part of that, and you were scared, and you just don't want to tell us that you were there?
>
> A (Hazen): If I was gonna have something to do with that situation, it would have been

done a lot different and --

Q: You'd have killed Mrs. McAdams, for one thing.

A: If somebody --

Q: Is that right?

A: Yeah, if I --

Q: Is that right? Is that right?

A: If I would have been there, that's what would have happened, yes.

Q: You would have made sure she was dead?

A: If that's what -- if I was gonna do that, that's what would have to have happened, yes.

Q: Did it ever cross your mind, sir, that if you'd been there, sir, the whole point of this is, you don't kill somebody, that you turn around and walk out or you tell the others to stop? Did it ever cross your mind that's the right answer, sir?

A: If I was there, that's what I would have done.

Q: You just said if you were there, you would have killed her?

A: If I could have stopped it, I would have (T 1103-1104).

Joseph Tarcus testified for the defense. Mr. Tarcus stated he had known Shane Kormondy his entire life and had been with Mr. Buffkin for about five hours. Tarcus stated that when he first met Buffkin, it was when Kormondy and Buffkin came to Tarcus' home in Kormondy's chamber. It was in July, before the crime against the McAdams. Tarcus declined their invitation to go

riding around because he was working on his car. Tarcus stated that he would be over to the Kormondy house later (T 1106-1109). The following afternoon Tarcus went to the Kormondy house. Buffkin was not at the Kormondy house when Tarcus arrived. Buffkin came to the Kormondy house about an hour later. Buffkin arrived in a large, blue pick-up truck driven by a male. The male sat in the truck for about five minutes and then drove away (T 1109-1111).

Kormondy, Buffkin, and Tarcus then went out to the Wedgewood area and bought some crack (T 1111). During this time, Buffkin said that he wanted a handgun because he was not going back to jail. When asked if Buffkin said how a handgun was going to keep him out of jail, Tarcus replied, "Yeah. He'd [Buffkin] shoot him in the head. That's his [Buffkin's] exact words." (T 1112).

Tarcus said they did not drive out near the Thousand Oaks subdivision; that they were in Wedgewood and behind Pine Forest High School (T 1112).

When asked if he ever got out in front of an apartment complex and urinated, Tarcus said, "Probably. I know there was one on Highway 29. It was not an apartment complex. It's a truck stop. It's a lounge and -- let me think of the name of it. It's right across the street from Groovin Noovin's". Tarcus then agreed that it was not at an apartment complex (T 1113).

Tarcus said he was with Kormondy and Buffkin until about

9:30 or 10:00 in the evening at the latest. After Buffkin said he was an escaped convict, Tarcus had them drop him off at his house (T 1113).

Tarcus did not see Kormondy and Buffkin again, nor did he go out with them again to buy and smoke crack (T 1113-1114).

Tarcus testified on cross-examination that he did not participate in the crimes against the McAdams (T 1114).

Mr. Bobby Lee Prince testified as a defense witness. Prince lived at 651 Childers Street, Apartment 10. Prince stated that the Thousand Oaks Subdivision was approximately a half a mile north of his apartment complex (T 1115-1117). Prince elaborated that from his apartment complex you would take of a right onto Chemstrand and the first road on your left would be the Thousand Oaks Subdivision (T 1129). Prince marked the locations on Defense Exhibits 1-A and 1-B (T 1128-1129).

Prince testified that on the Friday before July 11, 1993 he heard a suspicious car pull up about 9:30 in the evening. Prince was very particular in his description of the car, noting that it was a gray 2-28 two-door with mags, a muscle man and woman in the back window, a black spoiler on the front of the car, and a Z-28 on the emblem in the center front of the car. Prince identified State's Exhibits 18 and 20 [previously identified as Kormondy's car] as the car that he saw pull up. Prince was paying particular attention because they had been broken into about a

month before that, and the car sounded unusual to him for the neighborhood (T 1118-1120).

After about five minutes, the dome light of the car came on for about one minute. Prince observed three males get out of the car. They exited the car and one of the males urinated in the bushes. The driver had long, blondish hair, was skinny compared to the other two, and was wearing a ball cap. The front seat passenger and the back seat passenger had blackish-brownish short hair. The back passenger was a little shorter but bigger then the front passenger (T 1120-1121). They left the car and headed in the direction of the Thousand Oaks Subdivision. About forty-five minutes later Prince saw the three males return. The three males at first walked past their car until another car that had pulled into the apartment complex parked and the occupant went into her apartment. At that point, the three males got in their car and took off. During the time the males were gone, Prince wrote down the tag number of the car. However, by Monday when he realized its possible relevance, he had thrown it away (T 1121-1123; T 1125).

On Saturday, while cooking out with his wife and son, Prince thought he saw the car drive by again; however he could not be sure it was the same car (T 1126-1127).

The Prince's were away from their apartment most of Sunday. On Monday, they saw law enforcement personnel and canines walking

all around. They learned from a neighbor there had been a murder in the area. Mr. Prince advised a detective on Monday about the car he had seen and specifically told her that he first saw the car outside his apartment complex on Friday night (T 1125) .

On cross-examination, Prince looked at State's Exhibits 15 [a picture of Kormondy], 16 [a picture of Buffkin], and State's Exhibit 17 [a picture of Hazen]. Prince testified that size-wise Kormondy's picture would match up with the driver; size-wise and because of the short hair Buffkin's picture would match up with the back-seat passenger; and body-wise and from what his hair looked like Hazen's picture would match the person in the front passenger seat (T 1130). Prince agreed he could not identify the individuals by their faces but was testifying to the similarity in build (T 1132).

Prince stated that none of the males he saw weighed 260 pounds and were six-foot five inches.

The state suggested to Prince that it was possible he saw the three men on Saturday night. Mr. Prince at first responded by saying that "I'm more sure probably that it was Friday night but it could have been Saturday night" (T 1131). Prince stated that his wife had suggested to him it was Saturday night but that Prince was convinced it was Friday (T 1131).

On re-direct, Prince stated that he had told the police the first saw the car on Friday night, that in a previous

conversation with defense counsel and at a deposition Prince had stated it was Friday night, that he had always maintained that it was Friday night, and that he had testified a few minutes before that it was Friday night. Prince stated that at all these times he was convinced it was Friday when he observed Kormondy's car in his apartment complex parking lot (T 1132-1133).

The defense rested (T 1134).

Susan Lewis, an employee of Southern Bell Telephone Company, testified that on July 19, 1993 at 6:17 p.m., a phone call was made from the residence of Vernon Holderfield, 581 Neal Road, Cantonment to 405-765-3700 in Ponce City, Oklahoma. The prosecutor represented to defense counsel that Kormondy's brother lived at 581 Neal Road (T 1136-1139).

Barbara White, a lieutenant with the Pancho City, Oklahoma Police Department, executed an arrest warrant against Hazen at about 8:45 p.m. at 3701 Larkspur Drive in Pancho City. Neither White, or anyone in her presence, told Hazen that anyone else had been arrested (T 1140-1141).

On cross-examination White stated that there were other officers there when the warrant was served, that Lieutenant Helms actually executed the arrest warrant, and that she was present. White stated that Hazen was transported to the jail by Patrolman Jim Sharon (T 1141-1142).

The state rested. Appellant made a motion for a judgment of

acquittal which was denied (T1146-1147).

The jury returned a verdict finding appellant guilty as charged on all counts (T 1320).

During the penalty phase the state presented evidence that appellant had been convicted of the crimes against the McAdams (T 1378-1380).

The state presented Arlene Fragale, a victim-witness coordinator employed with the State Attorney's Office. Over appellant's objection Fragale testified that in a conversation with the prosecutor Mrs. Kormondy related the following: that in a conversation with her husband Mr. Kormondy, before the McAdams' crimes, that Mr. Kormondy said Buffkin and Hazen were going with him (T 1380-1381). During cross-examination there was the following colloquy:

> Q(Defense Attorney): Ms. Kormondy did not tell you whether or not Mr. Hazen knew anything about their going to the house, did she?
>
> A (Fragale) : She didn't say.
>
> Q: She simply said that her husband told her that?
>
> A: Her husband said that those three men **were** going to leave that night (T 1381).

Officer Allen Cotton testified for the state that the reason he applied for a warrant against Hazen was due to statements made by Kormondy. Kormondy confessed to the crime. In Kormondy's initial statement of June 19, 1993 Kormondy named Hazen as being

the third participant. Kormondy originally said that Buffkin killed Mr. McAdams and that Hazen was the first to rape Mrs. McAdams. On cross-examination, Cotton stated that Kormondy said Hazen was in another room when Mr. McAdams was shot. There was also the following colloquy:

> Q (defense attorney): From Mr. Kormondy's statement or from Mr. Buffkin's statement there is no evidence that Mr. Hazen planned this robbery or planned to be involved in a murder, is there? . . . Mr. Buffkin's or Mr. Kormondy's.
>
> A (Cotton) : He [Hazen] was involved in part of the planning of the robbery. So far as the murder itself, no sir.
>
> Q: Mr. Buffkin or Mr. Kormondy's.
>
> A: He was involved in part of the planning of the robbery. So far as the murder itself, no, sir.
>
> Q: In what statement was this?
>
> A: That is in the statement of Mr. Buffkin where he states that the defendant had on gloves and a mask -- I say gloves, it was socks and a mask when they left the vehicle.
>
> Q: When they left the vehicle, I understand that.
>
> A: Correct.
>
> Q: Other than that?
>
> A: Other than that, no, sir.
>
> Q: That he was involved at the house, there's no evidence that he was involved at the house with Kormondy and Buffkin in planning the robbery?

A: Where are you referring at, Mr. Allbritton, so far as the planning goes at the scene or at the --

Q: I'm talking prior now at Mr. Kormondy's house.

A: No, sir (T 1388-1389)

Sam Karl, who had taken appellant in as a child and who appellant considered his mother, testified. Karl said she first saw Hazen when he was eight or nine and lived in the same neighborhood that she did with his adoptive parents, the McKissics. Hazen and his brother were taken away from his biological parents and put up for adoption because his mother was unfit. Apparently the McKissics adopted Hazen and his brother Bobby at a time they thought they could not be biological parents. But they later had four children of their own, and became abusive to Hazen and his brother Bobby. Karl often fed Hazen because he was no allowed to go home to the McKissicks unless he had earned some money that day to eat (T 1390-1392).

Karl said the McKissics natural children and Hazen and Bobby were treated very differently. The McKissics would pay for the four children to go to the local pool; Hazen and Bobby had to walk ten miles to the free pool if they wanted to swim. Hazen didn't have much at all in the way of food or clothing. Hazen started mowing lawns in the neighborhood when he was eight or nine, and then took the money to the McKissicks so they would feed and clothe him. Bobby, Hazen's younger brother, withdrew

into a shell and was placed in a home. Karl would take Hazen there on Christmas so he could visit Bobby (T 1393-1394).

Karl was Shane Kormondy's aunt. Because of this, Hazen and Kormondy grew up playing together and considered each other family. Hazen began calling Karl mom when Hazen was about ten years old (T 1394-1395).

At seventeen Hazen was arrested for a burglary. He and two others broke into a business and stole two cases of beer. Hazen was in the car during the burglary. Hazen was placed on probation for the incident. Until that time, Hazen had no prior arrests or any type of record (T 1395-1396). From nine until seventeen Karl's impression was that Hazen was a very respectful, loving child (T 1396).

Karl related an incident where she had called Hazen at the McKissick's home to see if Hazen could go to Whitewater with her and some children. Hazen was handing the phone to Mrs. McKissick and Karl overheard McKissick saying to Hazen that he was, "an illegitimate little bastard and you're no good and you're a liar and don't ask me for a damn thing because you're not going to get it." At that point Karl said something on the phone, and Mrs. McKissick apologized to Karl saying she didn't mean for Karl to hear that(T 1396-1398.)

Hazen was then readopted by an unmarried gay man named Jerry Hazen. The McKissics had told appellant that he either go with

this man, or go behind bars until Hazen was eighteen. Three weeks after the adoption Jerry Hazen made sexual advances toward Hazen. It was after that Hazen got into his first trouble -- the earlier referenced burglary. After a subsequent sexual advance, Hazen hit Jerry Hazen in the nose. Hazen was arrested for violation of the burglary probation and sentenced to prison. Hazen subsequently escaped and was re-arrested and sentenced on the escape. Hazen was released in 1992 or 1993. He had obtained his GED while in prison. When he was released, he began working two jobs to pay of the fines and restitution. He lived with Karl. Hazen was putting most of his earnings to paying off the fines; in fact one county was paid off and another was almost paid (T 1398-1403).

Hazen was in Escambia County in July 93 on vacation with Mr. and Mrs. Karl. They were staying on their houseboat in Alabama (T 1403-1404).

During cross-examination, the prosecutor noted that except for summers Karl worked full-time (T 1405-1407). The prosecutor then inquired how she could work full-time and spend so much time with Hazen (T 1407). The prosecutor questioned Karl about the McKissicks giving up Hazen after all those years of abuse, questioning Karl as to why the Oklahoma authorities didn't intervene (T 1407-1409). The prosecutor compared the McKissicks taking Hazen's money with earlier testimony that Hazen gave his

money to Karl. Karl clarified that she handled Hazen's money because she bought the money orders to pay Hazen's fines (T 1409). The prosecutor then accused Karl of lying in his office about her previous knowledge of a prior burglary (the burglary where the beer was taken) committed by Hazen. Karl responded that she had told the prosecutor not only about the burglary, but had given the prosecutor the name of the place where it occurred. The prosecutor further accused the witness of denying knowledge about Hazen's escape. The prosecutor then asked the witness if the reason Hazen was at her house so much was because in actuality Karl had no discipline whatsoever, that she enticed him down there, and that she profited financially by his presence. The prosecutor asked Karl if she received state aid for taking care of Hazen; insinuating that she did. When Karl indicated that she took care of a lot a abused children as a foster parent, that she did get aid for some, and that she did not recall specifically if she ever got aid for Hazen. The prosecutor replied, "I guess that's something you would forget perhaps whether you got state aid" (T 1413). The prosecutor asked the witness if she cared so much for Hazen, why didn't she adopt them. Karl responded that the state law in Oklahoma would not allow you to adopt foster children (T 1415).

The prosecutor then asked Ms. Karl if it didn't have something to do with her background, and hadn't she had some

problem with contributing to delinquency problems? (T 1415).

After objection, at the bench, the prosecutor stated he knew the witness was convicted of contributing to delinquency with some juvenile (T 1417). The prosecutor apparently had no written verification of this nor did he reveal his source. Further, prior to Karl taking the stand, the prosecutor had advised the defense attorney that the prosecutor had no evidence of any felonies or crimes of dishonesty concerning Ms. Karl. After the trial judge ruled that the line of questioning would be admissible, the prosecutor stated he would just abandon it (T 1416-1418).

At a later point, after continuing to question the witness about details of the escape that appellant had been previously convicted for, the prosecutor then asked if Karl had gone to Kormondy's house and bought some stereo equipment or a VCR and taken it back to her home in Oklahoma (T 1421-1422).

The case was submitted to the jury.

During its deliberation, the jury returned a question.

> THE COURT: Okay. We're back on the record again. The defendant is present represented by counsel. The State is present through counsel. The jury has a question which they have propounded to the Court in writing. The question says, "sir, may a juror abstain from voting? Example: Six favor death, five are opposed, one abstains. Do we then have a simple majority?" Signed by the foreman.
> Counsel, do you agree with the Court that the answer to this question should simply be

that a juror may not abstain from voting, period?

MR. ALLBRITTON: Judge, I don't know whether or not that is a correct statement of the law. I've never run across it. I don'-t know of any case law to support one position one way or the other, and I'm kind of reluctant to agree to anything. I'm going to leave it to the judgment of the Court.

THE COURT: Well, the judgment of the Court is that you have what is tantamount to a hung jury if you have a juror abstain. They are required by their oath and by their instructions by the Court that they are to return a recommendation that is in some form either by a majority or otherwise. If they were not in a position to vote, then that should have been made known at jury selection. They were given ample opportunity to make that known if they were not in a position to vote on this issue. Since the inception they were told that this was a potential death penalty case.

MR. ALLBRITTON: Of course, you see what my concern is, Judge. If the example is that six have voted for death and five have not, that even though the other one did not vote, that six does not constitute a majority.

THE COURT: Right.

MR. ALLBRITTON: And, therefore, death would not be an option.

THE COURT: Their vote does not say that this is what we have come to so far. It says example. Now, whether that example coincides with where they are in their deliberations, I have no way of knowing,and I don't think it would be proper for the Court to inquire.

'''

THE COURT: . . . I'm simply going to answer the question that it is not permissible for a

juror to abstain from voting, period (T 1461-1463).

The trial judge then instructed the jury that:... "I have read the question and the answer to the question is that it is not legally permissible for a juror to abstain from voting. Does that answer the question? JUROR: Yes, sir, it does (T 1463).

The jury subsequently returned an advisory verdict of death by a seven to five vote.

The trial judge followed the recommendation and sentenced appellant to death on the murder conviction. Appellant was sentenced to life on the remaining five contemporaneous convictions (R 228-241).

The sentencing order outlining the trial court's reasoning for sentencing appellant to death is contained in the record (R 242-253). The aggravating circumstances found by the trial judge all relate to the crime committed against the McAdams. One, the Defendant has been previously convicted of a felony involving the use or threat of violence to a person. This was based on the acts which occurred that evening, including the sexual battery of Mrs. McAdams. Two, the capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit a burglary. This was based on the burglary of the McAdams home. And thirdly, that the capital felony was committed for pecuniary gain (R 243-246).

While the judge says that no other factors were considered in aggravation, it is noteworthy that the trial judge's belief that "witness elimination" was another intent of the perpetrator's (R 243). The judge mentioned this in his order finding the appellant had previously been convicted of a felony involving the use of threat or violence, and further stated in his rejection of one mitigating circumstance stating, "The firing of the second shot could have been for no purpose other than to create the appearance (for the benefit of his codefendants) that Hazen had,in fact,completed his part in what the evidence establishes to have been a prearranged plan for the elimination of both Mr. and Mrs. McAdams (T 246-247).

This appeal follows.

SUMMARY OF ARGUMENT

In Issue I appellant submits that the trial erred in determining that the evidence did not support the mitigating circumstance that appellant had "no crimes of violence prior to July 19, 1993" and that "a co-defendant with greater involvement was sentenced to life.

Under Campbell v. State, 571 So.2d 415 (Fla. 1990) the law is clear that a trial judge is required to expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether the evidence supports it and

whether any proposed statutory mitigation is truly mitigating.

In this case, the trial court rejected that appellant had no prior crimes of violence because of an equivocal and ambiguous statement made on the stand which had no relevance to the proposed mitigator.

Further, in rejecting as a mitigating circumstance that an equally or more culpable co-defendant received life, the trial court not only ignored the evidence, but the telling statement made by the prosecutor at the sentencing hearing that all three perpetrators "equally deserve the death penalty because none of the mitigating circumstances, when added together for each of these defendants, could possibly outweigh the aggravating circumstances in this case" (S 103). The result was to violate the rule of Slater v State, 316 So.2d 539 (Fla 1975).

In Issue II appellant submits that the death sentence in this case is disproportional as a matter of law to the sentence received by a co-perpetrator who was of equal or greater culpability in the commission of the murder. The relative culpability of the defendant who received a life sentence is contrasted to the relative culpability of appellant. The resulting inescapable conclusion is that the facts as presented at trial establish without any serious question that Buffkin's relative culpability in this crime was greater than Hazen's. It is indisputable that the relative culpability was at a minimum an

equal culpability. Under no scenario of the facts as presented at trial, can appellant be considered more culpable than Buffkin. Hazen's death sentence should be vacated and his a life sentence imposed.

In Issue III appellant submits that the trial court erred in instructing the jury that it was not legally permissible for a juror to abstain from voting in the penalty phase. An accused has an inviolate right under the statutory sentencing scheme in Florida to an advisory recommendation made by a jury. Section 921.141, Fla. Stat.(1995). Unless a majority of the jury recommends death, the accused is entitled to a life recommendation. Implicit in this right to an advisory recommendation is a right to a fair and impartial jury. This right is nullified when a juror is ordered and advised by the trial judge that the law requires that juror to vote and posits that no intervening circumstances have rendered that juror unfair and partial.

In Issue IV appellant submits that the "reverse identification" made by Mrs. McAdams in a previous encounter with appellant in a courtroom, i.e., that while she did not recognize appellant he recognized her, constituted reversible error and deprived appellant of his right to a fair trial and due process of law in contravention of Article I, Sections 9 and 16 of the Florida Constitution and Amendments V and XIV of the United

States Constitution. Any probative value that this testimony may have had was outweighed by the prejudicial effect on appellant's right to a fair trial. This is due both to the circumstances under which Mrs. McAdams viewed appellant -- at an arraignment with his co-defendants and to the manner in which it was used by the state as "proof" that appellant was at the scene of the crime.

In Issue V appellant submits he was deprived of a fair trial and due process of law due to the prosecutor's unveiled and unsubstantiated attack on appellant's only mitigation witness. The testimony was completely out of ethical bounds and deprived appellant of fundamental fairness in the presentation of evidence at his penalty phase.

ARGUMENT

ISSUE I

THE TRIAL JUDGE ERRED IN DETERMINING THAT THE EVIDENCE DID NOT SUPPORT PROPOSED MITIGATING CIRCUMSTANCES AND WHETHER OR NOT THE PROPOSED NONSTATUTORY MITIGATING CIRCUMSTANCES WERE TRULY MITIGATING

Out of the proposed mitigating circumstances, the trial judge rejected and gave no weight to the proposed mitigators of "No crimes of violence committed prior to July 19, 1993" and "a co-defendant with greater involvement sentenced to life imprisonment" (T 250-251). The full argument on the court's rejection of the latter mitigating circumstance, that "a co-

defendant with greater involvement sentence to life imprisonment" is contained in Issue II.

Under Campbell v. State, 571 So.2d 415 (Fla. 1990) the law is clear that a trial judge is required to expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether the evidence supports it and whether any proposed statutory mitigation is truly mitigating.

A) In rejecting the proposed mitigating circumstance of "No crimes of violence committed prior to July 19, 1993 the trial judge wrote:

> "The evidence establishes that (prior to the instant criminal episode) Hazen had no involvement in crimes of violence. His prior criminal record consists of a burglary for which he was initially placed on probation. His supervision was, however, terminated for failure to pay court costs and fines. As a result of that violation he was sentenced to state prison. While in state prison he escaped and was apprehended in New Mexico where he was returned to prison and sentenced to additional time for the escape.
>
> Although, on its face, Hazen's lack of record for violent crimes appears to be a viable mitigating factor the Court considers Hazen's own testimony to be the more accurate barometer of his propensity for violence. Although he denied participating in the events of that evening he, nonetheless, testified that if he had been present neither Mr. or Mrs. McAdams would have been left alive. This testimony clearly belies any inference which might otherwise be drawn from a lack of documented prior violent behavior.
>
> The Court therefore finds that this non-statutory mitigating factor has not been reasonably established and gives it no weight." (T 250-251).

The record support for the court's annulment of the proposed mitigating factor does not, in fact, address whether or not Mr. Hazen had "no prior record of violent crimes prior to July 19, 1993". Instead, the trial judge treats the mitigating factor as if it were proposed that Mr. Hazen had no propensity for violence. Not only does this not address the actual mitigating factor proposed, the only record support for the trial judge's conclusion that defendant has a propensity for violence is based on a cross-examination of Hazen, which contained several interruptions by the prosecutor, was based on hypothetical proposed by the prosecutor, and was ultimately ambiguous as to its meaning.

> Q (prosecutor): Isn't it a case, sir, of once being in the house, that they began to rape a woman, and you didn't want to have any part of that, and you were scared, and you just don't want to tell us that you were there?
>
> A (Hazen): If I was gonna have something to do with that situation, it would have been done a lot different and --
>
> Q: You'd have killed Mrs. McAdams, for one thing.
>
> A: If somebody --
>
> Q: Is that right?
>
> A: Yeah, if I --
>
> Q: Is that right? Is that right?
>
> A: If I would have been there, that's what would have happened, yes.

Q: You would have made sure she was dead?

A: If that's what -- if I was gonna do that, that's what would have to have happened, yes.

Q: Did it ever cross your mind, sir, that if you'd been there, sir, the whole point of this is, you don't kill somebody, that you turn around and walk out or you tell the others to stop? Did it ever cross your mind that's the right answer, sir?

A: If I was there, that's what I would have done.

Q: You just said if you were there, you would have killed her?

A: If I could have stopped it, I would have (T 1103-1104).

The ambiguity is further clarified in the defendant's favor in light of the fact that the trial judge believed the defendant was in fact at the scene, and that the defendant had in fact not killed Mrs. McAdams despite an apparent ability to do so.

Thus the trial judge erred in taking a statement based on a hypothetical during a cross-examination in which appellant was repeatedly interrupted by the prosecutor, and giving it more weight then what actually played out at the scene. A statement replete with "ifs" must fall before the actual facts which transpired at the scene -- that is that Hazen did not kill or attempt to kill Mrs. McAdams.

The trial judge candidly stated in his order that "the evidence establishes that (prior to the instant criminal episode) Hazen had no involvement in crimes of violence".

B) The trial judge erred in rejecting as a mitigating circumstance that "a co-defendant with greater involvement [was] sentenced to life imprisonment" (T 250-251). The full argument as to why the court erred in rejecting this mitigating circumstance is contained in Issue II.

Thus the trial judge erred in not finding the aforementioned mitigating circumstances and denied appellant his right to proportionality review and due process of law in contravention of Article I, Sections 2, 9, and 16 of the Florida Constitution and Amendments V, VIII, and XIV of the United States Constitution.

ISSUE II

APPELLANTS SENTENCE WAS DISPROPORTIONAL TO THE SENTENCE RECEIVED BY A CO-PERPETRATOR WHO WAS OF EQUAL OR GREATER CULPABILITY IN THE COMMISSION OF THE CRIMES

Florida law is well-settled that death is not a proper penalty when a co-perpetrator of equal or greater culpability has received less than death. This holds whether the co-perpetrator's death sentence becomes final while the defendant's case is at the trial level, on direct appeal, or pending decision on a motion seeking post conviction relief. Scott v. Dugger, 604 So.2d 465 (Fla. 1992) (post -conviction relief); Witt v. State, (direct appeal) 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935, 54 L.Ed. 2d 294, 98 S.Ct. 422 (1977); Slater v State, 316 So.2d 539 (Fla 1975) (trial level).

In Slater, Slater, Larry Gore, and Charlie Ware were arrested for a robbery that resulted in a murder. Gore was the driver of the get-away car and never entered the establishment. The uncontroverted evidence established that Slater and Ware entered the motel, and that during the robbery, the clerk of the motel was shot and killed by Ware. Slater then assisted Ware in removing the money from the motel and fled the scene. Ware plead guilty to first degree murder and received a life sentence.

Slater was tried by a jury, received a life recommendation, and was sentenced to death.

In ordering that Slater's sentence be reduced to life

imprisonment, this Court stated:

> In this robbery-murder incident, the court that tried the appellant also permitted the "triggerman", Ware, to enter a plea of nolo contendere to the charge of first degree murder, for which he was sentenced to life imprisonment. The record clearly reflects that the defendant-appellant, Slater, was an accomplice and did not have the murder weapon in his hand. Eleven members of the jury recognized the circumstances surrounding this offense and recommended life imprisonment. We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same. The imposition of this sentence is not equal justice before the law. [Emphasis added].

Slater, 316 So.2d at 251.

More recently, in Scott, this Court considered Scott's claim brought on a motion for post-conviction relief that "the death sentence is disproportionate, disparate, and invalid based upon the newly discovered evidence that Scott's codefendant Amos Robinson received a life sentence" Id. at 467. Prior to the motion for post-conviction relief, Scott's death sentence had been recommended by the jury, imposed by the trial judge, and affirmed by this Court. This Court accepted review stating that regardless of the timing of the respective sentences of the defendants for a crime, "it is proper for this Court to consider the propriety of the disparate sentences in order to determine whether a death sentence is appropriate given the conduct of all

participants in committing the crime" Id. at 468. This Court found that factually,

> 'As to the crime itself, they [Scott and Robinson] were both involved in all aspects of it. They both participated in the robbery of the victim, his kidnaping, his beatings and, although Scott eventually ran the man down with the automobile, it was only after Robinson concocted this method of killing the victim, and, in fact, was the first to try, but failed. It is clear that this is not a case where Scott was the "triggerman" and Robinson a mere unwitting accomplice along for the ride. In fact, "there is little to separate out the joint conduct of the codefendants which culminated in the death of the decedent" (citation omitted)"

Id. at 468.

After concluding its review of the law and the facts, this Court vacated Scott's death sentence and remanded for imposition of a life sentence without eligibility for parole for twenty-five years.

In the case at bar, the facts as presented at trial establish without any serious question that Buffkin's relative culpability in this crime was greater than Hazen's. It is indisputable that the relative culpability was at a minimum an equal culpability. Under no scenario of the facts as presented at trial, can appellant be considered more culpable than Buffkin.

During Buffkin's trial, Buffkin plead guilty to the murder of Mr. McAdams, as well as burglary, robbery, and three counts of sexual battery (T 911).

Buffkin began his crime spree, culminating in the murder of Mr. McAdams, by escaping from a county prison on July 6, 1993. During the four days before Buffkin went to Kormondy's house, Buffkin committed several crimes. After leaving the road camp, Buffkin broke into a trailer home and stole a $30,000 car, clothes, and some keys. After spending some time with his girlfriend and cousin "Larry" (whose last name Buffkin was never able to remember), Buffkin decided to go to Kormondy's house. Buffkin and Kormondy had been good friends since meeting in jail in 1990 while Buffkin was awaiting transport to prison.

Kormondy welcomed Buffkin, and the two went back to the trailer home Buffkin had previously burglarized and stole some stereo equipment.

The next evening, Friday July 9th, Buffkin, Kormondy, Kormondy's brothers, and Joe went to "titty bars" and bought crack which Kormondy and Joe smoked. During this time, Buffkin and Kormondy talked about burglarizing a home.

Buffkin and Kormondy took Joe back to his home. Buffkin and Kormondy then broke into James Chaney's house where they stole rings, whiskey, stereo equipment and a .44 Charter Arms Bulldog firearm. They went back and picked up Joe, sold the stereo equipment and purchased crack. Kormondy and Joe smoked the crack. When Buffkin was subsequently arrested in North Carolina he had in his possession Chaney's Charter Arms Bulldog firearm;

at the same time a wedding ring stolen from Chaney was recovered from Buffkin's sister.

Kormondy and Buffkin began a discussion about breaking into a house with someone in it. This was apparently because they believed they were more likely to obtain cash rather then items that might be difficult to fence. Buffkin said that all along the plan was to just go in there, get money, guns and jewelry and get up out of there (T 923-928).

It was after these burglaries committed by Kormondy and Buffkin that appellant arrived at the Kormondy home -- invited there after a family reunion which Hazen had attended.

Buffkin unequivocally testified that while at the Kormondy home, Hazen was not involved nor could he hear the conversations which took place between Hazen and Kormondy about breaking into an occupied home (T 987-988; T 991). When Buffkin took the previously stolen .44 Charter Arms Bulldog firearm out of the house, Buffkin shoved the gun into his pants concealing it from Hazen's view. In fact, Buffkin had at first forgot the gun he had hid under the couch, and went back inside to get it while Hazen was outside by the car (T 992).

Buffkin said he and Kormondy did discuss burglarizing the home in the car, that the radio was playing in the back seat, and that he did not know what, if anything, Hazen heard (T 1008).

During the commission of the crime, short of pulling the

trigger, Buffkin had the most active role. It was Buffkin who knocked on the front door of the McAdams home, disarmed them by saying it was "me", and then said to the McAdams, "put your heads down and don't look up or I'll blow your fucking heads off" (T 928). Buffkin repeated to them to get down on the floor and do as he said and no one would get hurt.

Buffkin took credit for the plan to secure the house, stating that when he and Kormondy had talked before about how to secure the house, "I [Buffkin] just basically told him when we entered the house just pull the phone cords and shut the curtains and stuff like that and so that's basically what happened."

Kormondy re-emerged from the back bedroom to the kitchen where Buffkin was holding the McAdams at gunpoint. Kormondy had a gun in his hand which belonged to Mr. McAdams.

Kormondy ran the gun along the woman and told her to come with him. Buffkin said taking the woman in the back bedroom was not part of the original plan. Kormondy and Hazen went in the back room. When they returned and she was naked, Buffkin gave a beer to Mr. McAdams to drink. Buffkin then handed the .44 to Hazen and went back to rape Mrs. McAdams. Buffkin told her, "I don't know what the other two did to you, but you're going to like what I'm going to do to you" (T 933). Kormondy followed and Buffkin and Kormondy proceeded to rape Mrs. McAdams.

Kormondy threw a towel over Mrs. McAdams head and went to

the front of the house. When Hazen walked in the bedroom Hazen tried to hand the .44 firearm to Buffkin but Buffkin told Hazen to keep the gun.

Buffkin then went back to the front of the house and began rifling through Mrs. McAdams purse. At that point, Kormondy shot Mr. McAdams. Buffkin heard a shot in the back bedroom and Buffkin, Kormondy, and Hazen left the house.

The record also supports that Buffkin had a criminal record -- burglary of an auto and petty theft in 1993, two grand thefts and a burglary in 1990, and two grand thefts and a burglary in 1988 and 1989 (T 1012). This record does not include Buffkin's self-admitted escape from the county road camp, two burglaries of a trailer after his escape, auto theft, and the burglary of the Chaney home in which the gun and jewelry were stolen.

Hazen's culpability is that at some point after the crime was planned he became a participant; that time could have been as late as when they exited the car to commit the burglary. Hazen did not participate in the Chaney burglary which supplied the gun. Hazen assisted in disabling phones and rummaging through the McAdams bedroom. Hazen committed a rape on Mrs. McAdams. At one point,Hazen guarded Mr. McAdams with a gun (not shooting him), and subsequently tried to give the gun back to Buffkin. After hearing a shot in the front room where Mr. McAdams was killed, and being alone in the back room with Mrs. McAdams, Hazen

fired a shot which under no theory was intended to kill Mrs. McAdams.

Under the facts of this case, Buffkin's culpability, as compared to Hazen's, was not considered by the trial judge and in fact Buffkin's life sentence was rejected as a possible mitigating circumstance.

Under the facts of this case, Hazen was given a sentence which was disproportionate, disparate, invalid, and not equal under the law to that given his perpetrator.

This conclusion is shared by the prosecutor in this case who stated at Hazen's sentencing hearing: "All three [Hazen, Buffkin, and Kormondy] deserve the death penalty because none of the mitigating circumstances, when added together for each of these defendants, could possibly outweigh the aggravating circumstances in this case" (S 103).

Based on the foregoing, imposition of the death penalty in this case violated appellant's constitutional right to equal protection of the law, due process of law, and freedom from cruel or unusual punishment in contravention of Article I, Sections 2, 9 and 17 of the Florida Constitution and Amendments V, VIII, and XIV of the United States Constitution.

ISSUE III

THE TRIAL JUDGE REVERSIBLE ERRED IN ADVISING THE JURY THAT IT WAS NOT LEGALLY PERMISSIBLE FOR A JUROR TO ABSTAIN FROM VOTING IN THE PENALTY PHASE

Appellant submits that the trial court erred in instructing the jury that it was not legally permissible for a juror to abstain from voting in the penalty phase. An accused has an inviolate right under the statutory sentencing scheme in Florida to an advisory recommendation made by a jury. Section 921.141, Fla. Stat.(1995). The constitutionality of Florida's death penalty scheme, which includes the advisory sentence process, as well as a wealth of case law which gives an almost irrebuttable presumption to a life recommendation, is contingent on this scheme. Proffit v. Florida, 428 U.S. 242 (1976); Caldwell v. Mississippi, 472 U.S. 320 (1988); Tedder v. State, 322 So.2d 908 (Fla. 1975); Wainwright v. Witt, 469 U.S. 412 (1985).

Unless seven or more jurors recommend death, the accused is entitled to a life recommendation. Implicit in this right to an advisory recommendation by a penalty phase jury is a due process right that the jury be fair and impartial jury. Article I, Sections 16 and 22, Fla. Constitution; Amendments VI and XIV, United States Constitution; Wainwriaht v. Witt, 469 U.S. 412 (1985).

The trial judge committed reversible error when he advised the jurors that the law required that they vote without going

into the circumstances behind the jurors' question. Implicit in the trial judge's instruction to the jury was that no intervening event or change of heart had occurred which made that particular juror feel they could not render an impartial and fair verdict. Without any inquiry, this was an assumption without basis in fact. Thus, the jury's subsequent recommendation of death was a nullity.

MRS. MCADAMS TESTIMONY THAT APPELLANT RECOGNIZED HER AT A PREVIOUS ENCOUNTER IN A COURTROOM SUBSEQUENT TO THE CRIME DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A FAIR TRIAL IN CONTRAVENTION OF ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION AND AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION

Ms. McAdams was present at a court appearance held subsequent to the crime but before trial where all three defendants were brought for arraignment. Ms. McAdams recognized two of her assailants. She was aware that the individuals suspected of committing the crimes against her and her husband were to be in court that day.

Under these circumstances, Ms. McAdams concluded that appellant kept staring at her, and in fact this testimony was used by the state at Hazen's trial as a form of "reverse identification." That is, while Ms. McAdams could not recognize the third perpetrator, that third perpetrator had to be appellant because of the way he kept looking at her in court.

If this had been a situation where Ms. McAdams had been asked to go to court and see if she could recognize anyone involved in the crime, with full knowledge that the suspect was there, certainly a full panoply of the appellant's rights concerning due process, accuracy of any identification, and state and federal constitutional rights to counsel would have undoubtedly been transparently implicated, See Edwards v. State, 538 So.2d 440 (Fla. 1989) and cases cited therein.

The "reverse identification" made by Mrs. McAdams in a

previous encounter with appellant in a courtroom, i.e., that while she did not recognize appellant he recognized her, calls into question those very same rights.

Most important to this analysis is that the probative value was minimal. The prejudice to appellant, as it was used at trial, was overwhelming. This is due both to the circumstances under which Mrs. McAdams viewed appellant -- at an arraignment with his co-defendants, and to the manner in which it was used by the state as "proof" that appellant was at the scene of the crime. Even if it had never been directly referred to as a form of eyewitness proof that appellant was at the scene of the crime -- the facts of this case reveal that this could have been the state's only motive for introducing this testimony.

The admission of the testimony constituted reversible error and deprived appellant of his right to a fair trial, assistance of counsel, and due process of law in contravention of Article I, Sections 9 and 16 of the Florida Constitution and Amendments V, VI,and XIV of the United States Constitution.

Appellant's conviction should be reversed and the case remanded for a new trial.

ISSUE V

APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW AND A FAIR TRIAL IN CONTRAVENTION OF ARTICLE I, SECTIONS 9 AND 16 AND AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION

During the cross-examination of appellant's only mitigation witness, the prosecutor accused her of stealing Hazen's money, being too busy working to take care of her children, helping Hazen only because of a state aid check which he could not prove Kasl ever received, stating she had been convicted of contributing to the delinquency of a child, without producing any proof of same, and repeatedly accused her of lying to him in his office. This undocumented attack on the appellant's mitigation witness crossed all bounds of fairness and due process of law. It deprived appellant of the most rudimentary due process, i.e., fundamental fairness and an opportunity to be heard. While the prosecutor's most fanciful comment took place at the bench, i.e., that Ms. Kasl was actually running a kind of Pleasure Island, it's effects could be seen in the cross-examination before the jury. This theory of prosecution was never shown to be based in fact, and the manner in which it played out in front of the jury unfairly destroyed the credibility of appellant's one mitigation witness.

CONCLUSION

Appellant should be granted a new trial. If this relief is denied, appellant's sentence should be reduced to life. If this relief is denied, appellant's case should be reversed and remanded for a new penalty proceeding.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing was delivered by United States Mail to Mr. Richard Martel, Assistant Attorney General, Office of the Attorney General, The Capitol, Suite 2 14, Tallahassee, Florida 32399-1050 this 19th day January, 1996.

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