IN THE FLORIDA SUPREME COURT

EUGENE EDWARDS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,887

RESPONDENT'S BRIEF ON THE MERITS
ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER

PRELIMINARY STATEMENT

The Petitioner, Eugene Edwards, was the defendant in the trial court and the Appellant below; this brief will refer him as the defendant. Appellee, the State of Florida, was the prosecution and appellee below; the brief will refer to the Respondent as the State.

The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of trial court proceedings. "IB" will designate Appellant's Initial Brief. The symbol "A" is used to designate the lower court's opinion attached hereto as an appendix. Each symbol is followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

The instant case comes to this Court based upon express and direct conflict between the lower court's decision and Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988). This Court has jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv).

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's version of the procedural history and facts adduced at trial as being essentially accurate, but only when viewed in light of the following additions and corrections.

The record reflects that the defendant at no time objected to or moved for mistrial regarding the prosecutor's opening statements relative to the term "pack" which was used to describe the defendants as acting in concert. (T. 228-38). The defendant did not move to strike reference to the term, nor did he ask for a curative instruction. (T. 228-38). The sole objection to the use of the term during opening statements was made by counsel for codefendant Charles Bell, an objection not joined by the defendant. (T. 231-32).

With reference to closing arguments, the defendant again failed to object to the prosecutor's use of the term "pack." (T. 803).

The First District Court opinion does not address the defendant's challenge to the prosecutor's use of this term.

Emory Davis, aged fifty, testified that on 10-21-93, he was riding a black and chrome Emory beach cruiser bicycle home when he was jumped, at around 7:30 p.m., by six boys aged

approximately 14-18. (T. 265-56). Davis identified his bicycle and also identified the defendant as the person who put the gun to his neck. (T. 269, 274). He described that individual as having brownish skin, wearing a long sleeved shirt with gold in his mouth. (T. 274). At trial, Davis testified that two of the three boys near him were short. (T. 276). Defense counsel then attempted to impeach Davis regarding his use of the description "other little short one" in deposition. (T. 281). The State objected on the grounds that the defendant was engaged in improper impeachment and the court sustained the objection. (T. 281-82). On redirect examination by the State, Davis testified that he never said anything other than the shortest of the boys was the one who went through his bag, either at deposition or in court. (T. 288). When the defendant moved for mistrial regarding the prosecutor's statements characterizing the witness' testimony as consistent, no request for a curative instruction was made. (T. 292).

Katrina Jones testified that neither she nor the decedent had consumed any alcoholic beverages prior to the shooting. (T. 306). After they arrived at the bar, Tammy reached under her seat to get her gun; she was a corrections officer and also served as a reserve officer. (T. 308). Ms. Jones saw the boys

as she undid her seatbelt and turned to Tammy to ask if she wanted to put the gun in the trunk. (T. 309). Ms. Jones told Tammy she wanted to leave because she was uncomfortable due to the speed with which the boys approached, so Tammy put the key into the ignition. (T. 309). The next thing Ms. Jones noticed was the defendant standing next to the driver's door with a gun pointed at Tammy; he told them to "give it up." (T. 310-11).

On cross-examination, Ms. Jones identified the defendant as the boy at the driver's door, codefendant Thomas Thompson as the boy at the back of the car, and a third boy at the passenger side of the car. (T. 330).

Trent Cunningham ran outside the bar after the shooting and moved a bike laying beside the driver's door to reach Tammy. (T. 335-36). The gun Tammy held in her hand was removed and place in the rear of the car. (T. 336).

Medical Examiner Dr. Floro testified that the wounds sustained by the decedent were consistent with her being turned slightly to the left, with the shooter to her right rear. (T. 367). A bullet hole in the driver's seat indicated the bullet's direction as being from back to front. (T. 379).

Mike McMullen testified that earlier that day he had seen the defendant with a .25 caliber gun at Eric Johnson's house; the

defendant was playing with the gun, showing it off. (T. 420). At the park, the defendant asked the others if they wanted to go robbing. (T. 422). When the group regathered, the defendant had his gun with him. (T. 425).

McMullen also saw Thomas Thompson hold a gun on Emory Davis during the robbery. (T. 428). As the boys approached Ms. Johnson's convertible, Bell tried to give McMullen the gun, but McMullen refused to take it, so Thompson did. (T.433). After the shooting, the defendant abandoned the bicycle he was riding and ended up on the handlebars of McMullen's bike. (T. 436). Thompson took the guns when they split up. (T. 437).

Codefendant McMullen gave a written statement to the police following his arrest. (T. 438). On cross-examination, McMullen admitted having committed several breaking and entering offenses, as well as, several bicycle thefts for which he was not prosecuted. (T. 447-49). He also participated in a robbery of a man and several car thefts with Eric Johnson. (T. 450-51). These other crimes were not part of the deal he made in this case. (T. 524).

Detective Baxter had contact with the defendant and codefendant Bell the same day. (T. 544). The defendant was sixteen years old. (T. 545). The defendant indicated his

understanding of his constitutional rights and executed a waiver form in the presence of Detective O'Steen. (T. 550). The defendant described the bicycle that he took from Davis which he was riding at the time of the shooting, as black with silver fins. (T. 552-53). Detective Baxter wrote out the statement relating to the shooting as the defendant orally made it. (T. 544). The defendant told them that he, Thompson, Johnson, McMullen, and Bell were riding bikes across the Winn-Dixie parking lot when they saw two women in a convertible pull up to the bar. (T. 556). Thompson said "let's go get them," meaning let's rob them. (T. 556). The defendant went to the driver's side of the car while Johnson was behind Thompson by the street; he did not know where Bell or McMullen were. (T. 556). The defendant was armed with a .25 caliber chrome pistol, Thompson had a .38, and Bell had either a .32 or .38 black pistol. (T. 556). As the defendant approached the car and told the women to "give it up," the decedent pulled a .357. (T. 557). Thompson told her 'don't do it' as he held a gun on her head. (T. 557). The driver shot once, hitting the defendant in the right thumb; Thompson shot her firing three times. (T. 557). The defendant admitted 'trying' to fire his weapon, but claimed he was not sure if it went off. (T. 557). He abandoned the bike he was riding

and ran to the next street where he got onto the handlebars of McMullen's bike. (T. 557). Thompson stated that he "shot a whore." (T. 557). The defendant went to the hospital for treatment of his hand the following day, telling the hospital personnel that he cut himself. (T. 557-58). He pointed out the injury to the Officers. (T. 558). The defendant was not promised anything in return for his statements. (T. 560).

When the State attempted to introduce McMullen's statement to police during Detective O'Steen's testimony, Bell conceded that there had already been testimony regarding the statements, but objected on the grounds of relevance. (T. 596). The State pointed out the fact that the evidence was offered to rebut the claim of recent fabrication already made by the defense. (T. 596-98). McMullen's statement was read to the jury in its entirety. (T. 606-09).

McMullen told the police that the defendant told them that he was going to get Davis' bike; the defendant held a .25 to Davis. (T. 607). When they rode up to the bar, the defendant indicated to them that he was "fixing to rob the girls." (T. 607). The defendant and Thompson approached the girls with guns pointed at them. (T. 608). After the shooting, the defendant said he should have shot the girl in the head because she tried to kill

him. (T. 608). O'Steen added grammatical things to McMullen's statement which was otherwise in the speaker's words. (T. 610).

Detective Nelson testified that there was a distance of not more than two miles between the Davis robbery and the Bell residence and a distance of about five miles from that residence to the scene of the shooting. (T. 625-26). He interviewed the defendant regarding his involvement in the Davis robbery while he was held at the detective's bureau; the defendant waived his constitutional rights. (T. 628, 630-31).

Detective Nelson told the defendant that he was there to talk about the Davis robbery and to see if he was willing to talk about the homicide; he described the defendant's demeanor during their conversation as joyful and laughing. (T. 631-32). The defendant told Nelson that they were riding around when they spotted Davis on a rather new bike. (T. 633). The defendant and another boy held guns on Davis, taking his bike, about two dollars, and some cigarettes. (T. 633).

Detective Roberts testified that he searched the defendant's bedroom after the defendant's mother executed a consent to search form. (T. 667-68). He found a partially disassembled .25 caliber semiautomatic handgun in a first aid box in the defendant's dresser. (T. 668).

SUMMARY OF ARGUMENT

ISSUE I.

Conflict jurisdiction does not lie given the fact that the lower court made assumptions as to the holding in Quiles which is not supported by that opinion. It also does not lie because the cases are easily distinguishable.

Admission of the testimony below was appropriate to rebut the implication that McMullen had an improper motive to lie or recently fabricate his testimony to obtain a favorable plea from the State. The motive to lie or fabricate, the plea, did not exist at the time the statments were made to police following his arrest.

ISSUE II.

The trial court did not ause its discretion in permitting the prosecutor to use the term "pack" in argument when the defendant failed to object and the term was used to describe the defendants as a group who acted in concert.

ISSUE III.

The trial court did not abuse its discretion in denying the defendant's motion for mistrial, and the defendant was not

deprived of a fundamentally fair trial, when the prosecutor stated, in essence, that a witness' testimony at trial was consistent with that in a deposition in response to an improper attempt at impeachment by the defense.

ARGUMENT

ISSUE I

WHETHER THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THAT OF THE SECOND DISTRICT COURT OF APPEALS IN QUILES V. STATE, 523 So. 2D 1261 (FLA. 2D DCA 1988)? (Restated)

The defendant contends, and the First District found, that conflict exists between its decision below and that of the Second District Court of Appeal in Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988). Before a discussion of the merits, it is necessary to first determine whether conflict does, in fact, exist.

This Court has the authority to resolve legal conflicts which are created by the District Courts of Appeal. Article V, Section 3(b)(3) of the Florida Constitution enables the Supreme Court to review decisions of the District Courts which expressly and directly conflict with decisions of another District Court or with the Florida Supreme Court on the same question of law. See also: Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court has held that it, "in the broadest sense has subject-matter jurisdiction under Article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addressees a

question of law within the four corners of the opinion itself." The Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988). Thus, for conflict to exist, it must be expressly and directly set forth on the face of the opinions at issue.

In this case, the lower court's opinion specifically notes that the defendant, during cross-examination, implied that the witness was falsely testifying because he had negotiated a favorable plea bargain and would therefore do anything to avoid going to prison. Based upon this implied charge of an improper motive or recent fabrication, the court found that the testimony was admissible pursuant to F.S. 90.801(2)(b). The court stated:

> Appellant correctly points out that the prior consistent statement must have been made before the defendant had a motive to falsify. He claims, however, that because the witness made the statement to the police after he had been arrested and charged with first-degree murder, he therefore had a motive to falsify at that time; thus the statement must be deemed inadmissible, citing Keller v. State, 586 So. 1258 (Fla. 5th DCA 1991); Bianchi v. State, 528 So. 2d 1311 (Fla. 2d DCA 1988); Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988).
>
> In Quiles, the Second District **appears** to hold that a statement given to the police by a witness who was directly involved in the crime -- there a victim -- is per se inadmissible, because a police investigation of the crime implicitly gives rise to a motive to falsify. Although Keller and Bianchi cite this holding from Quiles with approval, the language in both cases is dicta, because in each the appellate court determined from a reading of the record that the defendant during cross-examination had not made a charge of recent

> fabrication; therefore, the prior consistent statements were improperly admitted to bolster the credibility of the witness. We find no such distinguishing fact in Quiles, however, and certify our conflict with this case.
>
> In the cases cited earlier in this opinion from the supreme court and this court, Anderson, Stewart, *et al.*, prior consistent statements made to the police were admissible pursuant to section 90.801(2)(b), notwithstanding the witnesses gave such statements while under arrest or under investigation for the crime at issue or other crimes. The mere fact that police are conducting an investigation into the crime does not, in our judgment, automatically establish a motive to falsify on the part of the witness.

In Quiles, the defendant's hearsay objection was overruled resulting in the admission of testimony of a police officer regarding the victim's account of an aggravated assault with a firearm. The court held that the testimony constituted inadmissible hearsay because the statements by the victim were made after the assault to police who arrived in response to the victim's call of complaint and the victim had time to reflect on the events.

Significant to the analysis of whether conflict exists is the lower court's lack of certainty as to the holding in Quiles. The court, in effect, attempts to read a fact into that case which is not there to create conflict. Nowhere in the Quiles opinion does the Second District Court state that during the witness' testimony Quiles either implied or expressly stated that the

witness had a motive to lie or that the witness had recently fabricated his testimony. Instead, the lower court reads this challenge into the case to establish conflict exists.

The Quiles Court specifically relied upon two other Second District cases for its result. In Preston v. State, 470 So. 2d 836 (Fla. 2d DCA 1985), the testimony of a police officer and the rape victim's boyfriend were admitted over defense objection as either hearsay exceptions under F.S. 90.801(1) and (2) or as "first complaint." The facts of the case showed that after failing to meet up with her boyfriend at a bar, the complainant accepted a ride with Preston, stopping on the way for additional drinks. During the ride to the victim's home, she contended that Preston had forced sexual relations with her. The Second District noted that to qualify under the statute as a hearsay exception, the statements must have been made prior to the existence of the fact which is said to indicate bias, interest, corruption, or other motive to testify, but that in that case, the victim's statements were made after a motive to falsify existed, i.e., the victim engaged in merrymaking with another man, arriving home at 3:00 a.m. in a disheveled condition. The court also stated, in dicta, that "the statements to the officer were made during a police investigation." 470 So. 2d at 837.

The basis for the holding in Preston was the fact that the witness' motive to lie was to excuse her behavior, a motive which existed upon her arrival home, an event which preceded her conversations with either the officer or her boyfriend. The reference to the police investigation constitutes pure dicta.

In the other case cited by the Quiles Court, Lamb v. State, 357 So. 2d 437 (Fla. 2d DCA 1978), the trial court overruled a defense objection to the admission of testimony by a police officer as to the witness/complainant's account of the crime made in response to her call and after she had time to reflect. In Lamb, like Quiles and Preston, there is nothing in the opinion which establishes that the defendant implied that the witness had a motive to lie or had recently fabricated her account of the events. Thus all three cases stand for the proposition that prior consistent statements are appropriately admitted to rebut implied motives to lie or fabricate only when such a challenge to the witness is made.

The facts of this case are readily distinguishable and the cases do not conflict on the same facts addressing the same principle of law. The record reflects that the defendant, in cross-examination of McMullen, repeatedly implied that McMullen had lied in the course of his statement to the police to obtain a

favorable plea. This fact establishes that conflict jurisdiction does not exist. It is inappropriate to read matters into a case, to obtain jurisdiction.

Furthermore, although the defendant in this case, 'objected,' he did not, however, make appropriate objection to the police officer's testimony in this case whereas in Quiles an appropriate hearsay objection was made. Here, the codefendant Bell objected to the admission of the statement during Officer O'Steen's testimony on the grounds of relevance. (T. 596). Bell's counsel, in an aside, added that the statement was inadmissible as a form of improper impeachment. (T. 606). The latter statement, of course, does not rise to the level of a cognizable objection. The defendant joined in Bell's objections, stating "same motion." (T. 606). Thus, the defendant's objection is limited to the sole cognizable ground raised by Bell, i.e., relevancy. State v. Barber, 301 So. 2d 7 (Fla. 1974). This fact again distinguishes the instant case from Quiles and the Court should decline to accept the case based upon asserted conflict jurisdiction.

Even if conflict jurisdiction existed, however, it is clear that the lower court in this case reached the correct decision. F.S. 90.801(2)(b) specifically provides that a statement is not

hearsay if the declarant testifies at trial and is subject to cross-examination regarding the statement and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication.

In this case, McMullen testified at trial and was subject to both direct and cross-examination regarding his statement to the police. The statement was consistent with his trial testimony and was offered for the sole purpose of rebutting the defendant's express contention that McMullen had lied to get a favorable plea agreement. It clearly fits into the class of statements contemplated by the rule.

Contrary to the defendant's assertion, this case, as recognized by the lower court, is on par with this Court's decision in Anderson v. State, 574 So. 2d 87 (Fla. 1991), cert. denied, 116 L. Ed. 2d 83 (1991). In Anderson, following the arrest of codefendant Beasley on July 1, 1987, Beasley made statements regarding the crimes to investigating agent Velboom; she again made statements to Velboom on August 20. When Beasley testified before the grand jury on July 15, she gave one version of the events and then, on July 24, negotiated a favorable plea.

At that time, she gave a different account of the crime and told that same version at trial.

At trial, Anderson alleged that Beasley had fabricated her trial testimony after negotiating a favorable plea. The clear implication is that to obtain the plea, Beasley lied. The defendant ignores the fact that Beasley was under investigation as a codefendant at the time of her July 1 statement to police. Nevertheless, this statement was deemed admissible by this Court since that statement was made **prior** to the time her alleged motive to falsify, i.e., the negotiated plea, existed. The Court held that the August 20th statement was improperly admitted since it was made "*after* the plea agreement, when the alleged motive to falsify arose." 574 So. 2d at 92-93. Curiously enough, in reaching this decision, the defendant fails to recognize that this Court cited to Quiles, clearly interpreting that case to mean that the motive to falsify was based upon the existence of a favorable plea, not the mere existence of a police investigation at the time of the statement.

Similarly, this Court, in Rodriguez v. State, 609 So. 2d 493 (Fla. 1992), addressed a challenge to the trial court's admission of testimony by police officers concerning prior consistent statements of Rodriguez's accomplices. The Court held:

> The prior statements of Fernandez and Valdez were properly admitted under section 90.801(2)(b), Florida Statutes (1989), which excludes from the definition of hearsay the prior consistent statement of a witness who testified at trial and is subject to cross-examination concerning that statement when the statement is offered to "rebut an express or implied charge ... of improper influence, motive, or recent fabrication." Defense counsel's references to plea agreements with the state during cross-examination of both of these witnesses were sufficient to create an inference of improper motive to fabricate. *See Stewart v. State*, 558 So. 2d 416, 419 (Fla. 1990); *Kelly v. State*, 486 So. 2d 578, 583 (Fla.), *cert. denied*, 479 U.S. 871, 107 S. Ct. 244, 93 L. Ed. 2d 169 (1986); *Dufour v. State*, 495 So. 2d 154, 160 (Fla. 1986), *cert. denied*, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987). Accordingly, because the statements in question were given prior to the existence of both witnesses' motive to fabricate they were properly admitted. *Dufour v. State*, 495 So. 2d at 160; *Wilson v. State*, 434 So. 2d 59 (Fla. 1st DCA 1983). 609 So. 2d at 500.

The Court again recognized that the statements to police made prior to the time a favorable plea was negotiated was admissible, since the motive to fabricate did not arise until the time of the plea.

In another case which is on point, Jackson v. State, 599 So. 2d 103 (Fla. 1992), this Court addressed a claim that a taped statement by a codefendant was improperly admitted at trial in corroboration of the codefendant's trial testimony. Recognizing that the statement was admitted by the State to rebut the inference that the codefendant had fabricated his story in light

of his agreement with the State to testify against Jackson in return for a life sentence, the court held the statement was properly admitted pursuant to F.S. 90.801(2)(b).

In another case, Stewart v. State, 558 So. 2d 416 (Fla. 1990),a defendant argued the trial court had wrongly permitted a Detective to testify regarding statements made by Stewart's roommate, Smith, as to what Stewart had told him regarding the crimes. Stewart objected on the grounds that the testimony was hearsay and the state countered that it was being offered to rebut Stewart's claim that the witness had recently fabricated his testimony in return for favorable treatment by the state. On appeal, Stewart contended that Smith's statements should be discounted since the statement was not made before the reason to falsify came into existence. The Court stated:

> We disagree. During cross-examination of Smith, defense counsel indicated that Smith was not to be believed because he was attempting to obtain favorable treatment at sentencing on convictions that had been obtained on other charges. This was a recent situation; when Smith spoke to Marsicano, no convictions had been obtained and no sentences were pending. Marsicano's testimony was properly offered to combat Stewart's charge of recent fabrication. *See Dufour v. State*, 495 So. 2d 154 (Fla. 1986), *cert. denied*, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987); § 90.801(2)(b), Fla. Stat. (1983). 558 So. 2d at 419.

Here, as in Stewart, the defendant charged that McMullen lied to obtain favorable treatment in the form of the plea. Neither the plea nor negotiations therefore were in existence at the time McMullen made the statements to police. The record also fails to support the defendant's claim below that he received favorable treatment with regard to other crimes he admitted involvement in since it does not establish an agreement to grant McMullen immunity or other favorable treatment in return for his testimony in this case. In fact, the record does not show that the authorities were even aware of these other crimes at the time the statements were made.

Dufour v. State, 495 So. 2d 154 (Fla. 1986), a case cited by this Court as authority in Anderson, Rodriguez, Jackson, and Stewart, as well as by the lower court in this case, presented a challenge to the admission of testimony of a police officer regarding statements made by a codefendant as a prior consistent statement made to rebut implications of improper motive or recent fabrication. The Court held that:

> [w]hile noting that a witness' testimony may not ordinarily be bolstered with corroboration with his own prior consistent statements, *Van Gallon v. State*, 50 So. 2d 882 (Fla. 1951); *McElveen v. State*, 415 So. 2d 746 (Fla. 1st DCA 1982), we find that the statements in this case fall within the rule's narrowly drafted terms and were properly admitted. First, through its

> references in cross-examination to Taylor's negotiations with the state attorney's office involving armed robbery charges, the defense adequately impeached the witnesses' credibility, raising the specter of both improper motive and recent fabrication. Because, too, the statement in question was made at the time of Taylor's arrest in October 1982, prior to the robbery plea negotiations, *Wilson v. State*, 434 So. 2d 59 (Fla. 1st DCA 1983), and the actual filing of the Georgia murder charge, the trial court could properly have found that the statement was made prior to the existence of Taylor's motive to fabricate. 495 So. 2d at 160.

Thus, this Court explicitly found in Dufour that prior consistent statements to police at the time of arrest, but before the commencement of plea negotiations, were properly admissible to rebut the inference of improper motive or recent fabrication when the speaker testified at trial and was subject to cross-examination.

In Kelly v. State, 486 So. 2d 578 (Fla. 1986), the defendant challenged admission of the testimony of a private detective originally hired by defense counsel for one of Kelly's codefendants regarding statements of the codefendant which were introduced following rigorous cross-examination as to the codefendant's grant of immunity for his testimony. In rejecting the defendant's challenge, the Court noted that

> questions concerning the admissibility of extrajudicial statements for the purpose of rehabilitating witnesses impeached by the inference of a recent motive to

> fabricate are largely addressed to the sound discretion of the trial court, and are not to be reversed in the absence of a prejudicial abuse of discretion. 486 So. 2d at 583.

In this case, the defendant fails to establish that the trial court abused its discretion in admitting the testimony, particularly in view of the lack of proper objection to it posed by the defendant. This lack of preservation also supports the lower court's failure to find the issue meritorious.

Finally, the defendant does not address the fact that this Court, in numerous cases, including Jackson and Anderson, has held that even if prior consistent statements are improperly admitted, such error may be purely harmless, rather than per se reversible error. Here, even if one were to assume that the statements were improperly admitted in this case, any error would be harmless in view of the fact that McMullen previously testified regarding his statements to the police, as well as, because of other independent and overwhelming evidence of guilt which includes the surviving witness' identification of the defendant and the defendant's own confession. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

The defendant cites to no cases, other than Quiles in support of his contention that he should be entitled to reversal. As the

foregoing argument shows, he is unable to establish that conflict jurisdiction lies and cannot establish that properly analyzed case law supports his position. The ruling of the lower court should be affirmed and this Court should dismiss the instant appeal.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO REFER TO THE DEFENDANT AND HIS CODEFENDANTS AS A "PACK" WHEN THE ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW AND THE TERM WAS DESCRIPTIVE OF THE BOYS ACTING IN CONCERT? (Restated)

The defendant contends that the trial court erred in permitting the prosecutor to define the defendant and his codefendants as a pack. This issue was raised by him in his appeal to the First District Court of Appeal and was decided against him without written opinion as to that issue. The sole issue discussed by the lower court is that set forth in issue one in which the court acknowledged that conflict existed with the Second District in Quiles. Despite the fact the lower court failed to address this issue, the defendant includes it in his brief. Although the State acknowledges that this Court, in accepting jurisdiction over conflict cases, has jurisdiction to hear the entire case, it is clear that there is no independent basis aside from the conflict issue on which to base review of either this claim or that set forth in issue three of the defendant's brief. The Court on numerous occasions in the past has declined to go outside the certified question presented as to do so invites a wholesale review of whatever issues a claimant

seeks to present regardless of whether they are meritorious. The State respectfully urges the Court to decline to hear and consider those issue presented which are not certified as in conflict.

While the defendant presents this issue to the Court in nearly the identical form presented below, he omits to inform the Court that in his brief in the First District Court, he contended that an objection and motion for mistrial were made as to the prosecutor's comments. He now makes no contention whatsoever that an objection was made and mistrial was sought, instead ignoring the need for preservation of the issue.

The record below reflects that the sole objection made below to the comments complained of was one objection and motion for mistrial made by codefendant Bell during the prosecutor's opening argument. (T. 232). The record is completely devoid of any objection on the part of the defendant in either opening or closing argument. The issue is not preserved for review, since the defendant failed to either object or join the objection and motion of his codefendant. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

It is undisputed that the control of counsel's comments to the jury is a matter which is within the sound discretion of the

trial court. Absent an abuse of that discretion, an appellate court may not reverse. Breedlove v. State, 413 So. 2d 1 (Fla. 1982); Gallon v. State, 455 So. 2d 473 (Fla. 5th DCA 1984). As a general rule, a considerable degree of latitude is allowed prosecutors in their remarks to the jury and they may draw all reasonable inferences from evidence adduced at trial. Frierson v. State, 339 So. 2d 312 (Fla. 3d DCA 1976); State v. Thomas, 326 So. 2d 413 (Fla. 1975). Each instance in which a defendant contends that a prosecutor engaged in an abusive or inflammatory remarks must be considered on its own merits and must be judged within the context of circumstances existing at the time the comment was made. Darden v. State, 329 So. 2d 287 (Fla. 1976).

To constitute cognizable reversible error, the defendant must object to the improper comments, request that the court give a curative instruction to the jury to remove any taint from the remarks, and then, only if the curative instruction was insufficient to cure the harm, move for mistrial. Clark v. State, 363 So. 2d 311 (Fla. 1978); State v. Cumbie, 380 So. 2d 1031 (Fla. 1980). The failure to comply with this procedure bars consideration of the issue on appeal. Cabrera v. State, 490 So. 2d 200 (Fla. 3d DCA 1986); Clark v. State, supra.; State v. Cumbie, supra.

Only in those rare instances in which a remark rises to the level of fundamental error is a defendant's failure to follow the appropriate procedure excused. Fundamental error, of course, is that error which goes to the foundation of the case or merits of the cause of action. The rare case in which fundamental error has been found as the result of prosecutorial comment has been described as:

> [w]hen the prosecutorial argument taken as a whole is of such a character that neither rebuke nor retraction may entirely destroy their sinister influence. Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984).

Only where it is reasonably evident that the statements complained of were so inflammatory and abusive as to have influenced the jury to return a more severe verdict than it ordinarily would have, thus depriving the defendant of a fundamentally fair trial, is reversal warranted. James v. State, 334 So. 2d 84 (Fla. 3d DCA 1976). In other words, to rise to the level of fundamental error, the remark must be so prejudicial as to vitiate the entire trial. Cobb v. State, 376 So. 2d 230 (Fla. 1979).

To prevail, then, in view of his failure to preserve the issue, the defendant must establish that the comments constituted fundamental error. The defendant's discussion, however, ignores

the fact that in making the comments complained of, the prosecutor referred to the codefendants by name, number, or as a group in conjunction with referring to them as a pack. These references are as follows:

> The defendants, number one, Thomas Thompson, number two, Eugene Edwards, number three, Charles Bell, number four, Eric Johnson, number five, Thomas McMullen, also known as Mike, were in their own world also. They were in a pack. (T. 228-29); ... all five of them remained together as a pack, in a group. (T. 231); They all remained together as a group, in a pack. (T. 232); When she was going to take off her seatbelt, she looked back and she saw she had a pack, that pack that included Edwards and Bell, that pack that was involved in this. She saw that pack of bicycles, boys on the bicycles... (T. 234); They all took off, that is all five of them took off riding their bicycles, together, as a pack. They then ran into Mr. Davis and robbed him of his bicycle, cigarettes, which they all shared, and money, a dollar and 50 in change. They then ran into the man with the groceries, who we don't know his name because the police happened to pull up so they didn't go forward with that. They then went to where Katrina Jones and Tammy Jo Johnson were in their convertible and then the attempted robbery, all five of them, and, in fact, were involved in the shooting and then they all fled together as a pack, they fled the scene. So that day of October 21st, 1993, they altogether, all five of them, acting as a pack, working jointly, committed the crimes... (T. 237).

In closing argument, the following comment was made without defense objection:

> ...maybe Ms. Johnson, Ms. Jones could have gotten away from the scene, but, unfortunately, the defendant was not alone because he was part of a pack. He was part

of number one, two, three, four, and five, a group... (T. 800, 802).

The defendant provides this Court with a dictionary definition of "pack," defining the term as "a company or set of persons." While his definition goes on to state that the term "generally" implies low character or association for some purpose, he latches onto the first portion of the definition and insists that the term was used to impugn his character, totally ignoring the alternative definition provided. His contention that the term was used in an unsavory sense is refuted by the record as set forth above. The defendant fails to address, in any fashion, the context in which the remarks were made as required in evaluating claims of alleged improper prosecutorial comment. As the above portions of the record establish, each time the term was used, it was used to illustrate the fact that the five individuals involved operated as a group and acted in concert. The term was simply not used in the sense claimed by the defendant.

Even if one were to assume for the sake of argument that it were, his failure to object bars review and the description is accurate in view of the facts adduced at trial. Finally, if error, it is clear that the comments were not fundamental error since they could not vitiate the fundamental fairness of the

trial. Ample independent evidence of guilt, including, but not limited to, eye witness identification and the defendant's confession were sufficient to support the verdict. The jury was also repeatedly instructed that it must base its case solely upon evidence adduced at trial and that argument of counsel did not constitute evidence. Thus, any alleged error could only be harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE III

WHETHER THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR OBJECTED TO THE CODEFENDANT'S IMPROPER ATTEMPT TO IMPEACH A WITNESS BY STATING THAT THE WITNESS HAD NOT TESTIFIED UNTRUTHFULLY? (Restated)

The defendant contends that he was deprived of a fair trial as a result of a comment of the prosecutor which he asserts constituted improper bolstering of the witness. This issue was raised by him in his appeal to the First District Court of Appeal and was decided against him without written opinion as to that issue. The sole issue discussed by the lower court is that set forth in issue one in which the court acknowledged that conflict existed with the Second District in Quiles. Despite the fact the lower court failed to address this issue, the defendant includes it in his brief. Although the State acknowledges that this Court, in accepting jurisdiction over conflict cases, has jurisdiction to hear the entire case, it is clear that there is no independent basis aside from the conflict issue on which to base review of either this claim or that set forth in issue three of the defendant's brief. The Court on numerous occasions in the past has declined to go outside the certified question presented as to do so invites a wholesale review of whatever issues a claimant seeks to present regardless of whether they are

meritorious. The State respectfully urges the Court to decline to hear and consider those issue presented which are not certified as in conflict.

In presenting this claim, he again fails to set forth a complete account of the surrounding circumstances, an omission which impacts greatly upon the issue.

While most instances of alleged prosecutorial comment take place in the context of opening and closing argument to the jury, the same principles apply to those which take place during the evidentiary portion of the trial. The control of the comments of counsel is within the sound discretion of the trial court and that discretion will not be disturbed absent a showing of abuse. Breedlove v. State, supra.

The record below reflects that counsel for codefendant Bell was engaging in repeated improper attempts to impeach Emory Davis during cross-examination. The prosecutor therefore objected to this procedure. (T. 278). Additional attempts to impeach Davis followed, along with further objections by the prosecutor. (T. 278-87). On redirect examination, the prosecutor asked Davis if he had ever said anything differently with regard to the fact that the shortest boy went through his bag. (T. 288). On recross examination, the following exchange took place:

A: But other than the others, you don't know who -- the one that went in my pocket, he was the shortest of all of them.

MR. BISHOP: Again, Your Honor, I'm going to object and ask to strike all of this. The witness has answered truthfully then and answered truthfully now.

THE COURT: That's not any different than what he testified earlier, Mr. Williams, as I recall his testimony, so I don't know for what purpose that's offered.

MR. WILLIAMS: Your Honor, its for purposes of recross, based upon him asking if he had ever at any time int he past made a statement contrary to what he just said.

THE COURT: Well, I'm going to sustain the objection. I think it's consistent with what he said.

After Davis' testimony was concluded, the witness was excused, and the jury had left the courtroom, the following took place:

MR. MORROW: Your Honor, technically a motion on the last exchange. I didn't want to interrupt the flow of it too much, but Mr. Bishop just stated to the Court and jury that Mr. Davis, the witness, has answered truthfully then and truthfully now, was the statement that he made. We object to that comment. (T. 291).

The trial court overruled the objection, finding the comment was not overly prejudicial. (T. 292). The defendant then moved for mistrial, without first requesting a curative instruction; the motion was denied. (T. 292-93).

Given the defendant's conceded desire not to 'interrupt the flow' he did not make a timely objection and follow the requisite

procedure by requesting a curative instruction prior to moving for mistrial. Instead, the defendant waited until the witness' testimony was concluded, the witness was excused, and the jury had departed from the courtroom. The objection and subsequent motion was therefore untimely and the issue is not preserved for the appellate review of this Court. Mancebo v. State, 350 So. 2d 1098 (Fla. 3d DCA 1977). Even if the objection is deemed sufficiently timely by this Court, it should still deny relief as a result of the defendant's failure to first object, request a curative instruction, and only then, if the instruction is insufficient to cure any harm, move for mistrial. Frierson v. State, supra; Mabery v. State, 303 So. 2d 369 (Fla. 3d DCA 1974).

Additionally, the trial transcript fails to establish that the remark was, in fact, made in the jury's hearing, regardless of counsel's remark to the contrary. It is equally feasible that the prosecutor's remark was made sidebar and the jury did not hear it. This is particularly true in view of the court's stated ruling that all speaking motions by counsel be made sidebar. (T. 725).

Regardless, it is clear from the context in which it was made that the comment, while perhaps inartful, was intended to establish the witness had testified consistently with his prior

statement. This is how the trial judge, the individual in the best position to view what occurred, understood the comment. Interestingly enough, the defendant did not challenge the trial court's interpretation of the comment at trial, but instead merely stated that he objected quoting the comment. At no time did he contend that the prosecutor was vouching for the credibility of the witness, that the jury had taken the remark as such, or that he was prejudiced thereby. Since the objection at trial is not on the same as grounds as alleged in either of his appeals, the issue is not preserved. Steinhorst v. State, supra. The remark was clearly not a statement as to the truthfulness of the witness so much as a statement that the testimony was consistent and thus not a proper subject of impeachment.

The defendant misconstrues the nature of testimony which vouches for the credibility of a witness. The critical inquiry is whether a prosecutor's comment might reasonably lead a jury to believe that there is additional information, which is not before the jury, that convinced counsel of the defendant's guilt. United States v. Granville, 716 F. 2d 819 (11th Cir. 1983); Cummings v. State, 412 So. 2d 436 (Fla. 4th DCA 1983). In this case, the comment complained of cannot be reasonably said to imply that the prosecutor had information other than that

contained in the record on which he based an opinion as to the defendant's guilt. To the contrary, the entire context in which the remark was made illustrates that it related solely to the attempt by Bell's counsel to impeach Davis with portions of his deposition which were read into the record. Since the remark related to matters in evidence, it cannot be deemed to constitute improper vouching.

In this case, the error complained of is not error, let alone reversible error. Even if the defendant were correct in his characterization of the remark, he should not be permitted to prevail. If error, the comment was not severe as it did not relate to the question of guilt or innocence as to the crimes for which he was being tried. It instead related to a collateral issue which was presented solely to establish the circumstances surrounding the crimes at issue. Additionally, as previously stated, the defendant failed to request a curative instruction as to the remark which would certainly have corrected any potential misimpression which resulted. The likelihood that the defendant would have been convicted despite the comment is overwhelming given the existence of the defendant's confession, McMullen's confession, and other independent evidence of guilt which includes eyewitness identification. State v. DiGuilio, supra.

Courts will seldom order a new trial where the evidence of a defendant's guilt is overwhelming. Breedlove v. State, supra. This case does not fall within the purview of the limited types of situation where improper prosecutorial comments require a new trial, such as those in which the evidence of guilt is an extremely close issue, the prosecutor refers to matters not in evidence, or there are unsupported personal attacks on the defendant or counsel. See: Russo v. State, 505 So. 2d 611, 614 (Fla. 3d DCA 1987). Thus, if any error occurred, it was, at most merely harmless and did not contribute to the verdicts.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court to dismiss the instant appeal or, in the alternative to affirm Appellant's conviction, judgment, and sentence entered in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to James Miller, Esq., Corse, Bell, & Miller, P.A., 233 E. Bay Street, Suite 920, Jacksonville, Florida, 32202, this 3d day of January, 1996.

Giselle Lylen Rivera

Giselle Lylen Rivera
Assistant Attorney General

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IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

EUGENE EDWARDS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-3176

Opinion filed November 3, 1995.

An appeal from the Circuit Court for Duval County.
John D. Southwood, Judge.

James T. Miller of Corse, Bell & Miller, P.A., Jacksonville, for Appellant.

Robert A. Butterworth, Attorney General, Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

ERVIN, J.

Eugene Edwards appeals his convictions for first degree murder, attempted armed robbery and attempted first degree murder, raising six issues, only one of which merits discussion. We affirm.

Edwards claims the trial court erred in admitting the statement given by a witness, who was also an accomplice, to the police upon his arrest. We conclude the statement was properly admitted pursuant to Florida Rule of Evidence 90.801(2)(b), which

permits prior consistent statements offered to rebut a charge of improper influence, motive or recent fabrication. During cross-examination of the witness, defense counsel implied that the witness was falsely testifying because he had negotiated a favorable plea bargain and, consequently, would do anything to avoid going to prison. As such, his prior consistent statement to the police was admissible to rebut the implied charge of improper motive or recent fabrication. Anderson v. State, 574 So. 2d 87 (Fla.), cert. denied, 502 U.S. 834, 112 S. Ct. 114, 116 L. Ed. 2d 83 (1991); Stewart v. State, 558 So. 2d 416 (Fla. 1990); Dufour v. State, 495 So. 2d 154 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1332, 94 L. Ed. 2d 183 (1987); McElveen v. State, 415 So. 2d 746 (Fla. 1st DCA 1982).

Appellant correctly points out that the prior consistent statement must have been made before the defendant had a motive to falsify. He claims, however, that because the witness made the statement to the police after he had been arrested and charged with first-degree murder, he therefore had a motive to falsify at that time; thus the statement must be deemed inadmissible, citing Keller v. State, 586 So. 2d 1258 (Fla. 5th DCA 1991); Bianchi v. State, 528 So. 2d 1311 (Fla. 2d DCA 1988); and Quiles v. State, 523 So. 2d 1261 (Fla. 2d DCA 1988).

In Quiles, the Second District appears to hold that a statement given to the police by a witness who was directly involved in the crime--there a victim--is per se inadmissible, because a police investigation of the crime implicitly gives rise

to a motive to falsify. Although Keller and Bianchi cite this holding from Quiles with approval, the language in both cases is dicta, because in each the appellate court determined from a reading of the record that the defendant during cross-examination had not made a charge of recent fabrication; therefore, the prior consistent statements were improperly admitted to bolster the credibility of the witness. We find no such distinguishing fact in Quiles, however, and certify our conflict with this case.

In the cases cited earlier in this opinion from the supreme court and this court, Anderson, Stewart, *et al.*, prior consistent statements made to the police were admissible pursuant to section 90.801(2)(b), notwithstanding the witnesses gave such statements while under arrest or under investigation for the crime at issue or other crimes. The mere fact that police are conducting an investigation into the crime does not, in our judgment, automatically establish a motive to falsify on the part of the witness.

AFFIRMED.

LAWRENCE and VAN NORTWICK, JJ., CONCUR.