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IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,631

THE STATE OF FLORIDA,

Petitioner,

-vs-

PATSY JONES,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, PATSY JONES, was the defendant in the trial court and the Appellant in the Third District Court of Appeal. The Petitioner, the State, was the prosecution in the trial court and the Appellee in the Third District Court of Appeal. The parties will be referred to as they stood before the trial court. The designation "R." will refer to the record on appeal, and the designation "S.R." will refer to the supplemental record on appeal, which consists of the trial transcript and an exhibit.

STATEMENT OF THE CASE AND FACTS

On November 17, 1994, the defendant was found guilty, after trial by jury before Circuit Judge Richard Margolius, of attempted third-degree felony murder of Thomas Walsh (as a lesser offense of Count I); armed burglary of Walsh's vehicle (Count II); armed robbery of Walsh (Count III); carjacking (Count IV), and dealing in property stolen from Walsh (Count V). (S.R. 871-73; R. 161-65.) (Circuit Case No. 93-30742.)

Shortly after midnight on September 7, 1993, Thomas Walsh, a Baxter Healthcare Corporation operations manager, had left the Miami airport and was driving a rental car on the Route 112 ramp northbound onto I-95 to go to a company meeting in Broward, when he was forced off the road and blocked by a yellow Ryder truck. (S.R. 265-68.) As Walsh started to back his vehicle down the ramp, a woman, identified as the defendant Patsy Jones, jumped out of the truck and fired one or two shots from a distance of thirty feet. (S.R. 270-71.) The defendant and a male (subsequently identified as Alvan Hudson) approached, ordered Walsh out of the car, and robbed him, taking personal effects though leaving his wedding ring, and taking the car and possessions inside. (S.R. 273-76.) The car, driven by the defendant and with Hudson inside, and the Ryder truck driven by Recondall Wiggins, then left. (S.R. 276, 599-601.) Later that day, the defendant pawned a computer, which had been taken from Walsh, for $200.00, and, at another pawn shop, pawned a ring for $55.00; these items were recovered by police and returned to Walsh. (S.R. 280-81, 286-87, 323-41, 346-51, 354-60, 636-37.) Travel and other papers belonging to

Walsh were subsequently located in a stairwell near the apartment where the defendant resided, other belongings including Walsh's luggage and personal effects were found in her apartment, and recovered. (S.R. 281-97, 393-97, 590-91, 654-76.) The rental car which had been taken from Walsh was found a few blocks away from the apartment. (S.R. 402-04.) The defendant, after waiver of rights, gave statements to police admitting her involvement. (S.R. 550-57, 589-602, 634-37, 688, 692, 696-98, 919-38.)

The sentencing hearing was held on December 29, 1994. (S.R. 881-912.) A category one scoresheet was utilized, yielding a permitted sentencing range of three to seventeen years imprisonment. (R. 176.) The trial court departed from the guidelines on the basis of victim status, and sentenced the defendant on Count I to five years imprisonment; on Counts II and III to life; on Count IV to thirty years; and on Count V to fifteen years, all sentences to run concurrently, with a three-year firearm mandatory minimum on Counts II, III and IV. (S.R. 905; R. 170-75.)

On direct appeal, the Third District Court of Appeal vacated the conviction for attempted third-degree felony murder as a non-existent offense under *State v. Gray*, 654 So. 2d 552 (Fla. 1995), and certified the same question certified in *Wilson v. State*, 660 So. 2d 1067 (Fla. 3d DCA 1995), *review granted* (Fla. Case No. 86,680, January 31, 1996), i.e.,

> WHEN A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER MUST BE VACATED ON AUTHORITY OF *STATE v. GRAY*, 654 So. 2d 552 (FLA. 1995), DO LESSER INCLUDED OFFENSES REMAINED VIABLE FOR A NEW TRIAL OR

REDUCTION OF THE OFFENSE?

Wilson, id. at 1069; *Jones v. State*, 669 So. 2d 1094, 1095 (Fla. 3d DCA 1996) (App.)

The Third District Court of Appeal further ruled that the departure by the lower court on the basis of the victim's "vulnerability" was unjustified, and reversed and remanded for resentencing within the guidelines. 669 So. 2d at 1097; (App.) The court certified as one of great public importance the question of "whether the particular vulnerability of a person in the victim's position justifies a departure from the guidelines." (*Id.*)

Notice to invoke this Court's discretionary jurisdiction was timely filed by the Petitioner on March 18, 1996.

SUMMARY OF ARGUMENT

I.

A conviction for attempted third-degree felony murder cannot stand under this Court's decision in *State v. Gray*, 654 So. 2d 552 (Fla. 1995), which held such offenses to be non-existent, and the District Court of Appeal properly vacated the conviction outright. Reduction to a lesser was not proper because assuming, arguendo, there could be lessers to such a non-existent offense, there could be no necessarily lesser-included offenses, and reduction to a permissive lesser-included offense (assuming the existence of such) is impermissible under *Taylor v. State*, 608 So. 2d 804 (Fla. 1992).

As to a remand for retrial on the two asserted lessers (attempted manslaughter or aggravated assault), the evidence was insufficient for attempted manslaughter and any aggravated assault in this case was an integral part of the robbery and therefore dual convictions should be held impermissible under authority of *Simmons v. State*, 634 So. 2d 153, 154 (Fla. 1994).

II.

A guidelines departure cannot be based on factors inherent in the offense or scored under the guidelines, or on factors for which convictions have not been obtained. Here the defendant committed a robbery and carjacking of a male business executive driving from the airport on the expressway, heading to Broward County for a company meeting.

The trial court's departure for victim vulnerability on the stated basis the victim was a "tourist" was properly held unsustainable by the District Court of Appeal. The

victim suffered no injury or trauma, and his status as visitor was already factored into the offenses at conviction; the legislature enacted the carjacking statute, a heightened form of robbery statute, to protect residents and visitors alike. The victim was not cognizably more vulnerable than any victim of a robbery, an offense which by its nature is a crime of opportunity. The cause was properly remanded for resentencing within the guidelines permitted range.

ARGUMENT

I.

THE DISTRICT COURT OF APPEAL PROPERLY VACATED OUTRIGHT THE DEFENDANT'S CONVICTION FOR THE NON-EXISTENT OFFENSE OF ATTEMPTED THIRD-DEGREE FELONY MURDER PURSUANT TO *STATE v. GRAY*, 654 So. 2d 552 (Fla. 1995).

The defendant was convicted under Count I of the information of attempted third-degree felony murder, which the District Court of Appeal properly vacated under authority of *State v. Gray*, 654 So. 2d 552 (Fla. 1995), which held that attempted felony murder is a non-existent offense in Florida. Although portions of the Petitioner's lengthy discussion on the subject somewhat confute or obscure the point, the jury's return of this lesser verdict[1] constituted as a matter of state and federal constitutional law an (implied) acquittal of all greater offenses and, of course, no retrial may be had as to those offenses. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1957, 26 L. Ed. 2d 300 (1970); *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957); *Selvester v. United States*, 170 U.S.

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[1] The defendant was charged in Count I of the information with attempted first-degree murder (R. 1), and the jury was instructed on attempted first-degree murder, along with lessers of attempted second-degree murder, attempted third-degree felony murder, attempted voluntary manslaughter, and aggravated assault. (T. 808-818.) Notwithstanding the State's contention that when the defendant got out of the Ryder truck and fired one or two shots, she did so at the victim and with premeditation (S.R. 270-71, 761-63), no shots struck the vehicle (S.R. 272, 762), the defendant's statements to police were that the shots were warning shots only (S.R. 600, 636, 697), and the ensuing sequence of events was that the defendant approached the victim with a companion, and robbed him of personal possessions and the car but allowed him, upon his insistence, to keep his wedding ring. (S.R. 275, 600-01, 698.) The jury's finding (S.R. 871; R. 161) thus negated the thrust of the State's argument.

262, 269, 18 S. Ct. 580, 582-83, 42 L. Ed. 1029 (1898). Accordingly, the only question presented herein is a limited one, i.e., whether an appellate court may "reduce" the conviction of a non-existent offense to another offense, or whether retrial is permitted for any lesser-included offenses. For the reasons which follow, the lower court correctly concluded that neither action may be taken.

First, as to the question of "reduction," even apart from the inherent logical impossibility of "reducing" a non-existent offense, this Court has held that even an (unproven) *existent* offense may only be reduced to a (proven) *necessarily* lesser-included offense. *Taylor v. State*, 608 So. 2d 804 (Fla. 1992). Both as a general logical matter, and with respect to the particulars of this case, there are no "necessarily" included offenses of "attempted third-degree felony murder." *See* Fla. Std. Jury Instr. (Crim.), Schedule of Lesser Included Offenses (listing no category one, that is, no necessarily included offenses, for third-degree felony murder). Thus, if there could be any lessers of the non-existent offense, they could only be category two lessers, reduction to which is flatly impermissible under *Taylor v. State*, *id.* at 804. *See, e.g., Behn v. State*, 621 So. 2d 534, 537-38 (Fla. 1st DCA 1993) (where evidence insufficient to convict defendant of charged offense of manslaughter by culpable negligence, offense could not be reduced to that of vehicular homicide because latter is a permissive lesser-included offense, and outright discharge required).

Second, as to the question of remanding for retrial on "lessers," in the first instance, the State's reliance on certain decisions of this Court misconstrues those decisions. Citing *Jordan v. State*, 438 So. 2d 825 (Fla. 1983); *State v. Sykes*, 434 So. 2d 325 (Fla. 1983);

and *Achin v. State*, 436 So. 2d 30 (Fla. 1982), the State asserts that where a conviction is returned for a non-existent offense retrial could be had even for "an obviously higher level offense" and therefore, under the State's reasoning, *a fortiori* for a lesser offense. (Brief of Pet'r at 12-14.) This Court's decisions hardly state that; each of the relied upon decisions represents the proposition that when the reason for invalidity of the verdict-returned offense is that it is not a separate offense but rather an offense fully contemplated by and co-extensive with the main (charged) offense, a verdict cannot stand but retrial is permissible.

See Jordan v. State, id. at 826 (offense of attempted resisting arrest with violence is non-existent because attempt is already contemplated within resisting arrest statute and returned verdict "includes all the elements of the offense originally charged"); *State v. Sykes, id.* at 326-28 (same as to relation between "attempted" grand theft and grand theft); *Achin v. State, id.* at 32 ("'[A]ttempted extortion' is not a crime because 'extortion' is in itself an attempt. The elements for both are identical. Rather than being a lesser-included of 'extortion,' 'attempted extortion' is 'extortion.'".)[2],[3]

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[2] Indeed, if anything, these cases are more supportive of the Respondent's position as to unavailability of reduction in this case because they recognize that even in light of an explicit finding by a jury of a "non-existent" offense *identical in elements* to an existent offense, the verdict cannot stand and the Court will not presume to reduce to a lesser offense, but rather will remand the case for appropriate redetermination by jury where retrial is, unlike herein, permissible.

[3] The State's reliance on *United States v. Davis*, 873 F. 2d 900 (6th Cir. 1989), also is inapposite. Apart from being a case *sui generis, Davis*, unlike the instant case, involved "trial error" in failure to dismiss what turned out to be a defective indictment; it has long

And, although taking an overly and unconstitutionally narrow view of the scope of double jeopardy, the State does recognize that remand for a new trial on lessers is not permitted where double jeopardy operates as a bar. That jeopardy is a bar, or should be, is the situation here. Notwithstanding the State's argument that the defendant has been given an "unwarranted free ride" (Brief of Pet'r at 9), in fact the defendant has been convicted in this case of armed robbery, armed burglary, and armed carjacking. (R. 162-64, 166.) The shot that was fired in this case was fired from a distance of thirty feet, as a warning shot (S.R. 600, 636, 697), and in the ensuing robbery the victim was unharmed and, while his car and other possessions were taken, he was allowed to keep his wedding ring. (S.R. 275, 600-01, 698.)

Thus, in context, the assaultive behavior represented by the shot appears both patently insufficient for attempted manslaughter and, moreover, was an integral part of the force through which the robbery was effected, and therefore, multiple convictions should be barred. *See Simmons v. State*, 634 So. 2d 153, 154 (Fla. 1994) (convictions for both robbery and grand theft are impermissible because "[t]he degree factors of force and use of a weapon aggravate the underlying theft offense to a first-degree felony robbery"); *Cleveland v. State*, 587 So. 2d 1145, 1146 (Fla. 1991) ("[W]hen a robbery conviction is enhanced because of the use of a firearm in committing the robbery, the single act involving the use of the same firearm in the commission of the same robbery cannot form the basis of a separate conviction and sentence for the use of a firearm while committing

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been the double jeopardy rule that a reversal for trial error, as distinct from insufficiency or certain other types of invalidity, does not constitute a double jeopardy bar. *Id.* at 904-06.

a felony under section 790.07(2).").[4]

Therefore, the lower court properly adjudicated this issue, and the certified question (which should be rephrased to recognize the verdict herein was for attempted third-degree rather than attempted first-degree felony murder) should, under the facts of this case, be answered in the negative, and the decision of the lower court approved.

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[4] Some courts have paradoxically relied upon this Court's decision in *Taylor* for the proposition that multiple convictions for both robbery, and aggravated assault used to effectuate the robbery, are permissible. *See, e.g., Owens v. State*, 626 So. 2d 240, 242 (Fla. 2d DCA 1993), *review denied*, 634 So. 2d 626 (Fla. 1994); *Stone v. State*, 616 So. 2d 643 (Fla. 4th DCA 1993). Compare *Sanders v. State*, 621 So. 2d 723 (Fla. 5th DCA) (in implicit disagreement with logic of foregoing cases, recognizing that although in some instances aggravated assault may be a permissive lesser-included offense of robbery and apparently double jeopardy would therefore bar double conviction, evidence in instant trial showed acts "took place in a rather lengthy criminal episode" and "were not factually a 'single act' involving use of the same firearm."), *review denied*, 629 So. 2d 135 (Fla. 1993). *Stone* and *Owens*, unlike *Sanders*, take no apparent account of the extant case of *Cleveland,* and in any event precede *Simmons*. There is no self-evident reason why this Court's holding that aggravated assault is a permissive rather than a necessary lesser-included offense of robbery suggests, much less mandates, the conclusion that convictions for both are permissible. To the contrary, such would typically seem impermissible under *Cleveland* and *Simmons*, and, it would appear in any event that the *Sanders* analysis is on the more correct track than *Owens* or *Stone*.

II.

BECAUSE A GUIDELINES DEPARTURE CANNOT BE BASED ON FACTORS INHERENT IN THE OFFENSE OR SCORED UNDER THE GUIDELINES, OR ON FACTORS FOR WHICH CONVICTIONS HAVE NOT BEEN OBTAINED, THE LOWER COURT PROPERLY HELD THAT DEPARTURE FOR VICTIM VULNERABILITY STATUS, WHERE THE VICTIM (A MIDDLE-AGED BUSINESSMAN) WAS UNINJURED AND WAS NO MORE VULNERABLE THAN MOST OR MANY VICTIMS OF ROBBERY, WAS UNJUSTIFIED.

The lower court properly found that there was no allowable factor to meaningfully differentiate this case from most robberies and that, accordingly, the trial court's departure sentence was unjustified. At sentencing on December 29, 1994, the trial court stated as its basis for guidelines departure: "I am relying solely on the tourist aspect. . . . I think certainly based on the facts of this case, this particular tourist was particularly vulnerable, yes, but I think as a general theory of law, yes." (S.R. 906, 908.) The trial court expressly disclaimed reliance upon, and rejected, the reasons suggested by the State pertaining to high degree of sophistication. (S.R. 906.) On the guidelines scoresheet, the trial court notated: "Ct. finds that the victim as a tourist was especially vulnerable to be a victim(,)" and indicated, as it stated at sentencing, that a detailed written order, to be prepared by the State, was to follow. (R. 176; S.R. 911.) The trial court expressly acknowledged that if the appellate court "says that tourists are not especially vulnerable, then I would have to vacate the sentence and impose a sentence pursuant to the guidelines, clearly." (S.R. 908.)

On the day following sentencing, the trial court rendered the following, State-

prepared, order:

> 2. The Court's sentence departs from the guidelines because the evidence clearly establishes that the defendant ~~and her codefendants~~ chose the victim in this case because they correctly surmised that he was a tourist. The defendant's confession establishes that when she and the codefendants decided to commit a robbery they drove a considerable distance to the area of Miami International Airport. Specifically, they drove to the expressway on the south side of the airport, which was closest to the rental companies where an out-of-town tourist would most likely go to rent an automobile. They forcibly stopped the victim's rental car on the expressway and committed the crimes for which the defendant was convicted.
>
> 3. The victim's status as a tourist made him particularly vulnerable to defendant's crimes since his lack of familiarity with the area made his escape highly unlikely. Moreover, because he was a tourist it was a great hardship for him to return to Miami to appear for deposition and trial. The defendant and her codefendants specifically selected the victim in this case because they hoped that his vulnerability as a tourist would make the crime easier to commit and less likely to be successfully prosecuted.
>
> 4. The particular vulnerability of a victim can be a valid reason for departing from the sentencing guidelines. *Carter v. State*, 550 So. 2d 1130 (Fla. 3d DCA 1989); *Orange v. State*, 535 So. 2d 691 (Fla. 3d DCA 1988); *Berry v. State*, 511 So. 2d 1075 (Fla. 1st DCA 1987). Particularly, when as in this case, the victim's vulnerability is the actual reason why he was selected as a victim, a departure from the guidelines is warranted.

[R. 178-79.]

On January 5, 1995, the cause came on before the trial court for hearing on the

defense's objections to the order. (S.R. 913-16.) When defense counsel stated that the only reason the court had given at sentencing for departure was that a tourist qualifies as a vulnerable victim, and that the remainder of the order was surplusage, the trial court acknowledged:

> THE COURT: Well, that's true. I think what you have described as surplusage in paragraph two is simply a statement of fact leading up to that conclusion. That's all.
>
> I just think -- I want the Appellate Court -- you're right; this is one legal reason. The victim was a tourist and I found that he was -- that status of tourist made him vulnerable. The wording was "specially vulnerable", and the language in the rest of two is a statement of fact. The same as three. Paragraph number three is a discussion of fact. That's all.
>
> MR. ADELSTEIN: I want the record clear that we objected to those portions. And I apologize for being late.
>
> THE COURT: Noted.
>
> MR. ADELSTEIN: For whatever Appellate purpose --
>
> THE COURT: Your objection is preserved and note for the record.

[S.R. 915-16.]

The District Court of Appeal properly found the foregoing to be an inadequate basis for departure. To the extent that the written order varies from the oral pronouncement, i.e., to the extent that it suggests planning or premeditation as a basis for departure, this was specifically rejected by the court at sentencing. (S.R. 906.)

Moreover, premeditation or planning is common to any robbery, and therefore cannot be a basis for departure. *Hansbrough v. State*, 509 So. 2d 1081, 1087-88 (Fla. 1987) (reason that "armed robbery planned in advance by the defendant" is invalid ground for departure); *Williams v. State*, 544 So. 2d 1125, 1126 (Fla. 3d DCA 1989) (that robbery committed in a "calculated, premeditated manner" invalid ground for departure).

See also Hernandez v. State, 575 So. 2d 640, 642 (Fla. 1991) ("We believe there is little distinction between planning and premeditation and the professional manner in which a crime is committed. As we have stated, the facts relied upon in this case and in many of the district court cases cited above reveal planning on the part of each defendant, not skillfulness. This type of planning is common to most crimes and thus cannot constitute a valid reason for departure.").

Additionally, with regard to the reference in paragraph 3 of the trial court's order (R. 179) that the victim's "lack of familiarity with the area made his escape highly unlikely(,)" while the victim had some (but not a great deal of) familiarity with the area (S.R. 267), the relative familiarity or lack thereof had nothing to do with the offense; what precluded escape was not lack of familiarity, but that the path of the car was blocked. (S.R. 270.) The additional observation of the court about the hope of a lesser likelihood of successful prosecution (R. 179 ¶ 3) is also immaterial. Most people who commit criminal offenses do so in the hope they will not be detected, or if detected, will not be successfully prosecuted. *See, e.g., Johnson v. State*, 510 So. 2d 658, 660 (Fla. 2d DCA 1987) ("The trial court's second reason given for departure

was that 'The Defendant knew he had a vulnerable victim, one not likely to report the crime.' Whether or not the victim was likely to report the offense is irrelevant since he did report it.").

Similarly, to the extent the written order referred to a forcible stop, that was an integral part of the robbery and as such, a circumstance inherent in the offenses at conviction and already factored in the guidelines.

The, as acknowledged by the trial court, sole basis for its departure was that the victim as a tourist was vulnerable. This is an unsupportable basis for departure. Virtually every victim of a robbery is vulnerable, and every robbery a crime of opportunity. In *Wemett v. State*, 567 So. 2d 882 (Fla. 1990), the court comprehensively discussed the applicable law:

> As its sole written justification for departure, the trial court stated the following, quoted below in its entirety:
>
> 1. The age and vulnerability of the victim—The victim in this case was an eighty-four year old female living alone. The Court finds that the age and extreme vulnerability of this particular victim which was known to the defendant made it possible for the defendant to terrorize the victim, not once, but twice within a twenty-four hour period. It was clear from the victim's demeanor and presence at trial, and the testimony presented by the State, that the defendant picked this victim strictly because of her helplessness.
>
> (Citations omitted.)
>
> The general rule in sentencing is to sentence within the guidelines; departure from the guidelines is the exception to the rule. *See, e.g., Williams v. State*,

492 So. 2d 1308, 1309 (Fla. 1986). The exception of upward departure is intended to apply when extraordinary circumstances exist to "reasonably justify aggravating . . . the sentence." Fla.R.Crim.P. 3.701(d)(11). *See, e.g., State v. McCall*, 524 So. 2d 663, 665 (Fla. 1988); *Hall v. State*, 517 So. 2d 692, 694-95 (Fla. 1988); *Vanover v. State*, 498 So. 2d 899, 900-01 (Fla. 1986). It necessarily follows that a departure cannot be based on factors common to nearly all victims of similar crimes. Otherwise, the exception would swallow the rule. Previous decisions rendered by this Court, in a context similar to that presented here, support this position.

For example, in *Williams*, the defendant was convicted of aggravated battery with a deadly weapon. We rejected as a ground for departure the fact that the "the defendant stabbed the victim while she was sleeping and therefore more vulnerable," holding that vulnerability of the victim "alone is not a clear and convincing reason to depart." 492 So. 2d at 1309. We resolved analogous situations in similar fashion in *Mathis v. State*, 515 So. 2d 214 (Fla. 1987), and *Lerma v. State*, 497 So. 2d 736 (Fla. 1986), *receded from on other grounds*, *State v. Rousseau*, 509 So. 2d 281, 284 (Fla. 1987). In *Mathis*, we rejected a departure predicated on the fact that the victims of an armed robbery were female and working alone at night. We reasoned that "victims' defenselessness is common to nearly any armed robbery," and "gender of the victim, in and of itself, [is not] an appropriate reason for departure." *Mathis*, 515 So. 2d at 216. Likewise, in *Lerma*, the trial court departed from the guidelines in a sexual battery case on the grounds that "[t]he victim was an especially susceptible female," being a "slight female, weighing approximately 108 lbs., while the defendant is a stocky, muscular male." *Lerma*, 497 So. 2d at 738. We rejected that as a reason for departure, holding the helplessness of a sexual battery victim cannot be a valid reason to depart because "unfortunately, the vast majority of victims of sexual battery are virtually helpless." *Id.* At 739.

> Some of the same concerns we had in *Williams, Lerma,* and *Mathis* also are present here. Just as almost any female armed-robbery victim could be considered defenseless to a bigger, stronger male or almost every female sexual-battery victim can be considered helpless when attacked, almost every elderly person could be considered helpless and vulnerable to a younger, stronger assailant such as Wemett. Vulnerability is not a clear and convincing reason to depart from the guidelines when the victim's helplessness is common to nearly all similar crimes. Were we to allow the departure here based solely on age-related vulnerability, virtually every defendant who assaults an elderly person or a child would qualify for a departure sentence regardless of the nature or severity of the offense. These crimes are reprehensible, but such a rule would defeat the purpose and spirit of the guidelines.

[*Id.* at 886-87.]

Indeed, on the facts of this case, the stated basis for departure is expressly forbidden. A factor already inherent in the scored offense may not be utilized as a basis for departure. *State v. Mischler*, 488 So. 2d 523 (Fla. 1986); *Hendrix v. State*, 475 So. 2d 1218, 1220 (Fla. 1985). The defendant in this case was convicted of carjacking, which is a parallel, heightened-penalty robbery statute, the precise legislative intent of which was to provide heightened protection to presumed more vulnerable Florida residents and visitors in vehicles. The very preamble to the statute specifically recites the following findings:

> [The Florida Legislature is determined to protect Florida's residents and visitors from harm, and punish those who would injure or abuse any resident or visitor, and
>
> [The incidence of armed motor vehicle theft is a

> threat to human life and to the well-being of all of the citizens of the State of Florida and to the visitors we welcome, and . . .
>
> [C]arjacking is also a threat to the physical, emotional and economic well-being of the citizens and visitors of this state[.]

Ch. 93-212, Laws of Fla.

Therefore, the defendant has already been convicted of an offense which relates to the presumed vulnerable status of a victim in an automobile, the legislative intent of which was identical as to resident or visitor status.

On the facts of the case, there is nothing to manifest any particular vulnerability on the part of the victim, nor was he injured.[5] The victim was a corporate executive on his way to Broward County for a company meeting. (S.R. 265-66.) There was no testimony of either injury or trauma, and, while, unfortunately, his vehicle and possessions were taken (for which convictions were obtained and which are factored into the guidelines), the defendant honored the request not to take a wedding ring. (S.R. 275, 600-01.) The victim here was certainly no more vulnerable than, in all of which instances vulnerability was found an impermissible reason for departure, the fact that the female victim while sleeping was stabbed by the male defendant, *Williams v. State*, 492 So. 2d 1308 (Fla. 1986), *see also Grant v. State*, 547 So. 2d 952 (Fla. 3d

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The three cases relied upon by the trial court (R. 179 ¶ 4), all of which were, incidentally, pre-*Wemett*, are of no bearing in the case. *Carter v. State*, 550 So. 2d 1130 (Fla. 3d DCA 1989) and *Orange v. State*, 535 So. 2d 691 (Fla. 3d DCA 1988) both involved extraordinary injuries to the victim; *Berry v. State*, 511 So. 2d 1075 (Fla. 1st DCA 1987) involved a victim found unusually vulnerable because pregnant.

DCA 1989); the victim was of advanced age, under the influence of alcohol, and was murdered in a particularly brutal way, *Johnson v. State*, 517 So. 2d 792 (Fla. 3d DCA 1988); the victim worked in, and was attacked in, a business establishment open all night, *Williams v. State*, 531 So. 2d 212, 218 (Fla. 1st DCA 1988), *see also Mathis v. State*, 515 So. 2d 214, 216 (Fla. 1987); the victim was an elderly female with disabilities, at home alone and in bed, when the defendant shot into her residence, *Grant v. State*, 586 So. 2d 438 (Fla. 1st DCA 1991); or that the (robbery) offense "was extremely heinous in that the victim . . . was an eighty-six year old frail, blind person." *Byrd v. State*, 516 So. 2d 107, 108 (Fla. 4th DCA 1987).

The single ascribed reason of victim as vulnerable "tourist" was neither factually-based nor a proper basis for departure and, accordingly, the departure sentences on Counts II, III and IV were properly vacated by the District Court and the cause properly remanded for resentencing within the guidelines. The lower court fully and correctly discussed the applicable law; its decision should be affirmed, and the certified question answered in the negative.

CONCLUSION

Based on the foregoing, the District Court of Appeal properly vacated the defendant's conviction under Count I for attempted third-degree felony murder as a non-existent offense, and it properly rejected the State's argument for reduction to, or retrial for, lesser offenses. Moreover, the lower court properly found that the trial court's departure sentence was unsustainable on the facts of this case, and accordingly, its decision should be affirmed in its entirety and both certified questions answered in the negative.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Consuelo Maingot, Assistant Attorney General, Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 19th day of June, 1996.

BRUCE A. ROSENTHAL
Assistant Public Defender

IN THE SUPEME COURT OF FLORIDA

CASE NO. 87,631

THE STATE OF FLORIDA,

Petitioner,

vs.

PATSY JONES,

Respondent.

_____/

APPENDIX TO BRIEF OF RESPONDENT ON THE MERITS

PAGE

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1996

PATSY JONES, **

Appellant, **

vs. ** CASE NO. 95-389

THE STATE OF FLORIDA, ** LOWER TRIBUNAL NO. 93-30742

Appellee. **

Opinion filed March 13, 1996.

An Appeal from the Circuit Court for Dade County, Richard V. Margolius, Judge.

Bennett H. Brummer, Public Defender and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Consuelo Maingot, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and JORGENSON and GREEN, JJ.

SCHWARTZ, Chief Judge.

The appellant Jones and two co-perpetrators followed an Illinois businessman named Thomas Walsh, who had just arrived at Miami International Airport on his way to a meeting in Broward County, from a rental car agency at the airport onto an expressway where they stopped his car at gunpoint, shot at him and robbed him of money and jewelry. She was convicted of attempted third degree

felony murder, as a lesser offense of attempted first degree murder, and of armed burglary, armed robbery, carjacking with a firearm, and dealing in stolen property. On this appeal, she challenges only the first conviction and an upward departure sentence which was based on the victim's heightened vulnerability.[1] We find merit in both positions.

I.

The attempted third degree felony murder conviction must be reversed under State v. Gray, 654 So. 2d 552 (Fla. 1995). Moreover, as in Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995), review granted (Fla. Case no. 86,680, January 31, 1996), and several similar cases,[2] we reject the state's claim that this conviction may properly be reduced to a lesser included offense. We again certify to the Supreme Court the question of great public importance stated in Wilson. 660 So. 2d at 1069.

II.

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[1] The maximum permitted under the guidelines was seventeen years imprisonment. The court departed to impose concurrent sentences of life for armed burglary and for armed robbery, thirty years for carjacking with a firearm--all with a concurrent three-year firearm mandatory minimum--five years for attempted third degree murder, and fifteen years for dealing in stolen property.

[2] See Gibson v. State, ___ So. 2d ___ (Fla. 1st DCA Case no. 94-3311, opinion filed, February 6, 1996)[21 FLW D358]; Pratt v. State, ___ So. 2d ___ (Fla. 1st DCA Case no. 94-1432, opinion filed, January 31, 1996)[21 FLW D311]; Lee v, State, 664 So. 2d 330 (Fla. 3d DCA 1995); Alfonso v. State, 661 So. 2d 308 (Fla. 3d DCA 1995), cause dismissed, 665 So. 2d 220 (Fla. 1995), review granted (Fla. Case no. 86,739, January 30, 1996).

The trial court departed upward from the sentencing guidelines on the following basis:

> 2. The Court's sentence departs from the guidelines because the evidence clearly establishes that the defendants chose the victim in this case because they correctly surmised that he was a tourist. The defendant's confession establishes that when she and the codefendants decided to commit a robbery they drove a considerable distance to the area of Miami International Airport. Specifically, they drove to the expressway on the south side of the airport, which was closest to the rental companies where an out-of-town tourist would most likely go to rent an automobile. They forcibly stopped the victim's rental car on the expressway and committed the crimes for which the defendant was convicted.
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> 3. The victim's status as a tourist made him particularly vulnerable to defendant's crimes since his lack of familiarity with the area made his escape highly unlikely. Moreover, because he was a tourist it was a great hardship for him to return to Miami to appear for deposition and trial. The defendant and her codefendant specifically selected the victim in this case because they hoped that his vulnerability as a tourist would make the crime easier to commit and less likely to be successfully prosecuted.
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> 4. The particular vulnerability of a victim can be a valid reason for departing from the sentencing guidelines. Carter v. State, 550 So. 2d 1130 (Fla. 3d DCA 1989); Orange v. State, 535 So. 2d 691 (Fla. 3d DCA 1988); Berry v. State, 511 So. 2d 1075 (Fla. 1st DCA 1987). Particularly, when as in this case, the victim's vulnerability is the actual reason why he was selected as a victim, a departure from the guidelines is warranted.

Whatever our own view may be, the guidelines departure imposed because of Walsh's "particular vulnerability" in these circumstances does not pass muster under controlling decisions of the supreme court. E.g., Wemett v. State, 567 So. 2d 882 (Fla. 1990); Mathis v. State, 515 So. 2d 214 (Fla. 1987); Lerma v. State, 497 So. 2d 736 (Fla. 1986). This is essentially because Walsh's

situation as an out-of-towner driving a rental car at night on a Miami expressway was simply not significantly more (indeed, was probably less) dangerous than that of any other victim of an armed robbery, or, even more obviously, any other victim of a carjacking. As the Supreme Court said in Wemett:

> [A] departure cannot be based on factors common to nearly all victims of similar crimes. Otherwise, the exception would swallow the rule. Previous decisions rendered by this Court, in a context similar to that presented here, support this position.
>
> For example, in Williams, the defendant was convicted of aggravated battery with a deadly weapon. We rejected as a ground for departure the fact that the "the defendant stabbed the victim while she was sleeping and therefore more vulnerable," holding that vulnerability of the victim "alone is not a clear and convincing reason to depart." 492 So.2d at 1309. We resolved analogous situations in similar fashion in Mathis v. State, 515 So.2d 214 (Fla. 1987), and Lerma v. State, 497 So.2d 736 (Fla. 1986), receded from on other grounds, State v. Rousseau, 509 So.2d 281, 284 (Fla. 1987). In Mathis, we rejected a departure predicated on the fact that the victims of an armed robbery were female and working alone at night. We reasoned that "victims' defenselessness is common to nearly any armed robbery," and "gender of the victim, in and of itself, [is not] an appropriate reason for departure." Mathis, 515 So.2d at 216. Likewise, in Lerma, the trial court departed from the guidelines in a sexual battery case on the grounds that "[t]he victim was an especially susceptible female," being a "slight female, weighing approximately 108 lbs., while the defendant is a stocky, muscular male." Lerma, 497 So.2d at 738. We rejected that as a reason for departure, holding that helplessness of a sexual battery victim cannot be a valid reason to depart because "unfortunately, the vast majority of victims of sexual battery are virtually helpless." Id. at 739.
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> Some of the same concerns we had in Williams, Lerma, and Mathis also are present here. Just as almost any female armed-robbery victim could be considered defenseless to a bigger, stronger male, or almost every female sexual-battery victim can be considered helpless

> when attacked, almost every elderly person could be considered helpless and vulnerable to a younger, stronger assailant such as Wemett. Vulnerability is not a clear and convincing reason to depart from the guidelines when the victim's helplessness is common to nearly all similar crimes. Were we to allow the departure here based solely on age-related vulnerability, virtually every defendant who assaults an elderly person or a child would qualify for a departure sentence regardless of the nature or severity of the offense. These crimes are reprehensible, but such a rule would defeat the purpose and spirit of the guidelines.

Wemett, 567 So. 2d at 886-87.

The trial judge's entirely correct conclusion that the victim was targeted because of the belief that an attack upon him would be especially easy to commit and to get away with similarly does not justify a departure. Presumably all robbers, burglars, and carjackers--indeed all criminals--choose their victims on the basis of whether their crimes are more, rather than less, likely to be successful. Thus, one walking alone on a dark street or working alone at a convenience store after midnight is obviously more likely to be singled out than a member of a crowd at the Orange Bowl. But our courts have consistently held that these considerations are not enough to support a departure. E.g., Mathis, 515 So. 2d at 214 (females working alone at night not "particularly vulnerable"). The facts of Williams v. State, 531 So. 2d 212 (Fla. 1st DCA 1988) are particularly close to ours. There the court rejected a vulnerability departure based on the fact that the victim was the sole employee of an all-night store. The court stated:

> However, victim vulnerability is not a valid reason to depart when the victim's helplessness is based on factors common to nearly all victims of armed robbery. Mathis v. State, 515 So.2d 214, 215 (Fla. 1987); Burney v. State, 523 So.2d 795, 795 (Fla. 1st DCA 1988). In this case, as in Burney and Mathis, the victim's vulnerability was due to the circumstances of his employment. We conclude that the victim's vulnerability in this regard was a factor common to nearly all armed robbery victims employed by business establishments that remain open all night, and therefore does not constitute a valid departure reason in this case.

Williams, 531 So. 2d at 218-19.

Surely neither the present victim nor those in his general class was or are more vulnerable than the sleeping victim in Williams v. State, 492 So. 2d 1308 (Fla. 1986), the elderly, alcohol-impaired victim in Johnson v. State, 517 So. 2d 792 (Fla. 3d DCA 1988), the elderly, disabled lady in Grant v. State, 586 So. 2d 438 (Fla. 1st DCA 1991), who was at home late at night in bed when the defendant shot into her house, or the 86 year-old frail, blind victim in Byrd v. State, 516 So. 2d 107, 108 (Fla. 4th DCA 1987). In all of these cases, however, departures based on victim vulnerability[3] were reversed. We must do the same. We certify that this case also involves a question of great public importance as to whether the particular vulnerability of a person in the

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[3] Because the trial judge did not base the departures on the status of the victim as a visitor, but rather because of his purported "vulnerability" under the circumstances, we do not directly consider whether a departure could be sustained on that ground. See generally State v. Baker, 483 So. 2d 423 (Fla. 1986); Steiner v. State, 469 So. 2d 179, 182 n.10 (Fla. 3d DCA 1985), review denied, 479 So. 2d 118 (Fla. 1985).

victim's position justifies a departure from the guidelines.

III.

The appellant's convictions for armed robbery, armed burglary, carjacking with a firearm, and dealing in stolen property are affirmed, the attempted third degree felony murder conviction is vacated, and the cause is remanded for resentencing within the guidelines.

Affirmed in part, reversed in part, questions certified.

were taken post arrest as well. The evidence of other arrests in this setting was thus clearly impermissible. *Hardie*, 513 So.2d at 793–94; *see also Nordelo v. State*, 603 So.2d 36, 38 (Fla. 3d DCA 1992) (holding error the admission of officer's testimony about subsequent unrelated car chase, but also finding the mistake harmless under the circumstances); *Jackson v. State*, 598 So.2d 303 (Fla. 3d DCA 1992) (reversing conviction where police officer revealed that defendant had "an arrest record and was recently released from prison"); *cf. Walker v. State*, 642 So.2d 605 (Fla. 1st DCA 1994) (reversing where prosecutor asked defendant, over objection, if he had ever had any problems with law enforcement, defendant said no, and prosecution brought in evidence of such an incident).

II. IMPROPER PROSECUTORIAL ARGUMENT

[4–6] We further find the prosecutor's attack on the credibility of an alibi witness on the basis that the witness was not immediately listed on the defense's witness list to be improper as well. The purpose of closing argument is solely to afford the attorneys one final opportunity to argue the facts in evidence and/or reasonable inferences to be drawn therefrom. *E.g., Jones v. State*, 612 So.2d 1370 (Fla.1992), *cert. denied*, —— U.S. ——, 114 S.Ct. 112, 126 L.Ed.2d 78 (1993); *Robinson v. State*, 610 So.2d 1288 (Fla.1992); *cert. denied*, —— U.S. ——, 114 S.Ct. 1205, 127 L.Ed.2d 553 (1994); *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985). Moreover, Willis correctly points out that the decision of whether or when to list a particular witness on a pretrial witness list is beyond the control of the witness. Therefore, the credibility of a witness cannot properly be assailed at any stage of a proceeding on the basis of a delayed listing of the witness.

[7] The State having been the beneficiary of the foregoing error, has the burden of demonstrating beyond a reasonable doubt that the cumulative effect of this error did not contribute to the guilty verdict. *DiGuilio*, 491 So.2d at 1139. We conclude that the State cannot sustain its burden here. The State's evidence in this case was anything but overwhelming. Its entire case rested solely upon the credibility of the victim and her description of her assailant. Since we can only properly characterize this case as "close," we cannot find the errors complained of to be harmless. Therefore, we must reverse the robbery conviction and remand for a new trial.

Reversed and remanded.

Patsy JONES, Appellant,

v.

The STATE of Florida, Appellee.

No. 95–389.

District Court of Appeal of Florida, Third District.

March 13, 1996.

Defendant was convicted in the Circuit Court, Dade County, Richard V. Margolius, J., of attempted third-degree felony murder, armed burglary, armed robbery, carjacking with firearm, and dealing in stolen property. Defendant appealed. The District Court of Appeal, Schwartz, C.J., held that: (1) there is no crime of attempted third-degree felony murder; (2) attempted third-degree felony-murder conviction could not be reduced to lesser-included offense; and (3) defendant was not subject to sentence enhancement based upon "particular vulnerability" of victim, a tourist.

Affirmed in part, reversed in part, questions certified.

1. Homicide ⇐25

There is no crime of attempted felony murder.

2. Homicide ⇐347

Conviction for nonexistent offense of third-degree felony murder could not be reduced to lesser-included offense.

3. Criminal Law ⇐1283

Defendant convicted of, inter alia, armed robbery and car jacking, was not subject to sentence enhancement on basis of victim's heightened vulnerability, despite defendant's admission that she and her coperpetrators chose victim, who was tourist, based on their belief that attack on him would be especially easy to commit and to get away with; presumably all criminals choose their victims on basis of whether their crimes are more, rather than less, likely to be successful.

An Appeal from the Circuit Court for Dade County; Richard V. Margolius, Judge. No. 93-30742.

Bennett H. Brummer, Public Defender and Bruce A. Rosenthal, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Consuelo Maingot, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and JORGENSON and GREEN, JJ.

SCHWARTZ, Chief Judge.

The appellant Jones and two co-perpetrators followed an Illinois businessman named Thomas Walsh, who had just arrived at Miami International Airport for a meeting in Broward County the next day, from a rental car agency at the airport onto an expressway where they stopped his car at gunpoint, shot at him and robbed him of money and jewelry. She was convicted of attempted third degree felony murder, as a lesser offense of attempted first degree murder, and of armed burglary, armed robbery, carjacking with a firearm, and dealing in stolen property. On this appeal, she challenges only the first conviction and an upward departure sentence which was based on the victim's heightened vulnerability.[1] We find merit in both positions.

I.

[1, 2] The attempted third degree felony murder conviction must be reversed under *State v. Gray*, 654 So.2d 552 (Fla.1995). Moreover, as in *Wilson v. State*, 660 So.2d 1067 (Fla. 3d DCA 1995), review granted, 668 So.2d 604 (Fla.1996), and several similar cases,[2] we reject the state's claim that this conviction may properly be reduced to a lesser included offense. We again certify to the Supreme Court the question of great public importance stated in *Wilson*, 660 So.2d at 1069.

II.

[3] The trial court departed upward from the sentencing guidelines on the following basis:

> 2. The Court's sentence departs from the guidelines because the evidence clearly establishes that the defendants chose the victim in this case because they correctly surmised that he was a tourist. The defendant's confession establishes that when she and the codefendants decided to commit a robbery they drove a considerable distance to the area of Miami International Airport. Specifically, they drove to the expressway on the south side of the airport, which was closest to the rental companies where an out-of-town tourist would most likely go to rent an automobile. They forcibly stopped the victim's rental car on the expressway and committed the crimes for which the defendant was convicted.

1. The maximum permitted under the guidelines was seventeen years imprisonment. The court departed to impose concurrent sentences of life for armed burglary and for armed robbery, thirty years for carjacking with a firearm—all with a concurrent three-year firearm mandatory minimum—five years for attempted third degree murder, and fifteen years for dealing in stolen property.

2. See *Gibson v. State*, 667 So.2d 884 (Fla. 1st DCA 1996); *Pratt v. State*, 668 So.2d 1007 (Fla. 1st DCA 1996); *Lee v. State*, 664 So.2d 330 (Fla. 3d DCA 1995); *Alfonso v. State*, 661 So.2d 308 (Fla. 3d DCA 1995), cause dismissed, 665 So.2d 220 (Fla.1995), review granted, 668 So.2d 603 (Fla.1996).

3. The victim's status as a tourist made him particularly vulnerable to defendant's crimes since his lack of familiarity with the area made his escape highly unlikely. Moreover, because he was a tourist it was a great hardship for him to return to Miami to appear for deposition and trial. The defendant and her codefendant specifically selected the victim in this case because they hoped that his vulnerability as a tourist would make the crime easier to commit and less likely to be successfully prosecuted.

4. The particular vulnerability of a victim can be a valid reason for departing from the sentencing guidelines. *Carter v. State*, 550 So.2d 1130 (Fla. 3d DCA 1989); *Orange v. State*, 535 So.2d 691 (Fla. 3d DCA 1988); *Berry v. State*, 511 So.2d 1075 (Fla. 1st DCA 1987). Particularly, when as in this case, the victim's vulnerability is the actual reason why he was selected as a victim, a departure from the guidelines is warranted.

Whatever our own view may be, the guidelines departure imposed because of Walsh's "particular vulnerability" in these circumstances does not pass muster under controlling decisions of the supreme court. E.g., *Wemett v. State*, 567 So.2d 882 (Fla.1990); *Mathis v. State*, 515 So.2d 214 (Fla.1987); *Lerma v. State*, 497 So.2d 736 (Fla.1986). This is essentially because Walsh's situation as an out-of-towner driving a rental car at night on a Miami expressway was simply not significantly more (indeed, was probably less) dangerous than that of any other victim of an armed robbery, or, even more obviously, any other victim of a carjacking. As the Supreme Court said in *Wemett:*

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> For example, in *Williams* [*v. State*], the defendant was convicted of aggravated battery with a deadly weapon. We rejected as a ground for departure the fact that the "the defendant stabbed the victim while she was sleeping and therefore more vulnerable," holding that vulnerability of the victim "alone is not a clear and convincing reason to depart." 492 So.2d [1308] at 1309. We resolved analogous situations in similar fashion in *Mathis v. State*, 515 So.2d 214 (Fla.1987), and *Lerma v. State*, 497 So.2d 736 (Fla.1986), receded from on other grounds, *State v. Rousseau*, 509 So.2d 281, 284 (Fla.1987). In *Mathis*, we rejected a departure predicated on the fact that the victims of an armed robbery were female and working alone at night. We reasoned that "victims' defenselessness is common to nearly any armed robbery," and "gender of the victim, in and of itself, [is not] an appropriate reason for departure." *Mathis*, 515 So.2d at 216. Likewise, in Lerma, the trial court departed from the guidelines in a sexual battery case on the grounds that "[t]he victim was an especially susceptible female," being a "slight female, weighing approximately 108 lbs., while the defendant is a stocky, muscular male." *Lerma*, 497 So.2d at 738. We rejected that as a reason for departure, holding that helplessness of a sexual battery victim cannot be a valid reason to depart because "unfortunately, the vast majority of victims of sexual battery are virtually helpless." Id. at 739.
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> Some of the same concerns we had in *Williams*, *Lerma*, and *Mathis* also are present here. Just as almost any female armed-robbery victim could be considered defenseless to a bigger, stronger male, or almost every female sexual-battery victim can be considered helpless when attacked, almost every elderly person could be considered helpless and vulnerable to a younger, stronger assailant such as Wemett. Vulnerability is not a clear and convincing reason to depart from the guidelines when the victim's helplessness is common to nearly all similar crimes. Were we to allow the departure here based solely on age-related vulnerability, virtually every defendant who assaults an elderly person or a child would qualify for a departure sentence regardless of the nature or severity of the offense. These crimes are reprehensible, but such a rule would defeat the purpose and spirit of the guidelines.

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> However, victim vulnerability is not a valid reason to depart when the victim's helplessness is based on factors common to nearly all victims of armed robbery. *Mathis v. State*, 515 So.2d 214, 215 (Fla. 1987); *Burney v. State*, 523 So.2d 795, 795 (Fla. 1st DCA 1988). In this case, as in Burney and Mathis, the victim's vulnerability was due to the circumstances of his employment. We conclude that the victim's vulnerability in this regard was a factor common to nearly all armed robbery victims employed by business establishments that remain open all night, and therefore does not constitute a valid departure reason in this case.

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III.

The appellant's convictions for armed robbery, armed burglary, carjacking with a firearm, and dealing in stolen property are affirmed, the attempted third degree felony murder conviction is vacated, and the cause is remanded for resentencing within the guidelines.

Affirmed in part, reversed in part, questions certified.

RINKER MATERIALS CORPORATION, a Florida corporation, Appellant,

v.

Michael L. EDELMAN, Roger Edelman, Kenneth Edelman, and Lara Edelman, Appellees.

No. 95–918.

District Court of Appeal of Florida, Third District.

March 13, 1996.

An Appeal from the Circuit Court for Dade County; Philip Bloom, Judge.

Cooney Ward Lesher & Damon and Dale A. Konigsburg, for appellant.

3. Because the trial judge did not base the departures on the *status* of the victim as a visitor, but rather because of his purported "vulnerability" under the circumstances, we do not directly consider whether a departure could be sustained on that ground. See generally *State v. Baker*, 483 So.2d 423 (Fla.1986); *Steiner v. State*, 469 So.2d 179, 182 n. 10 (Fla. 3d DCA 1985), review denied, 479 So.2d 118 (Fla.1985).