IN THE SUPREME COURT OF FLORIDA

BERRY KESSLER,

Appellant,

vs. **CASE NO. 90,035**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

SUMMARY OF THE ARGUMENT

Appellant's first claim is that the trial court erred in denying his motion to excuse juror Mengel for cause because he had some knowledge of the case from that morning's newspaper. Kessler concedes, however, that Mr. Mengel said he could set the information aside and reach a verdict based only on the law and the evidence. This Court has consistently held that the mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness and that it is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court. Based on these facts, appellant is not entitled to relief.

Appellant next contends that the trial court erred when it denied his motion to suppress statements and violated his Fifth Amendment rights against self-incrimination and to due process of law by admitting his statements to FBI informant Barkett. Appellant's contention that noncustodial statements made to an informant in furtherance of a separate plan to commit murder for profit should be suppressed as involuntary is unsupported by the facts or the law.

Appellant next contends that the trial court erred in allowing the state to introduce evidence: 1) that he planned with the informants Barkett and Walcutt to employ Bo Yankee in Walcutt's video store, to obtain key man life insurance, then murder Yankee

to collect the insurance proceeds and 2) that after his arrest Kessler attempted to have Vessey kill Barkett and Walcutt and to influence the testimony of Cheryl Hamilton. Contrary to appellant's argument that this evidence was inadmissible Williams rule evidence, it is the state's position that this evidence was properly admitted as inextricably intertwined evidence. With regard to the evidence concerning Kessler's attempts to murder or otherwise tamper with the prosecution witnesses against him, this Court has repeatedly held that evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any ex post facto indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions. The admission of this evidence was within the trial court's discretion and no abuse of discretion as been shown.

Kessler next contends that the trial court erred by admitting evidence of his federal tax offense convictions. It is the state's position that this evidence was properly admitted during the state's redirect examination of Detective Lawless *after* defense counsel questioned Lawless about Kessler's admission to him that he had been charged and indicted for tax evasion for the handling of his client's books.

Appellant next argues that it was error for the prosecutor to inquire of Detective Lawless, Insurance Agent Douglas Stammler and

Kessler's girlfriend, Cheryl Hamilton Trotter as to whether Kessler had expressed any sorrow or sympathy about the death of Mr. Deroo. It is the state's position that, in the instant case, this evidence was relevant and admissible.

Appellant's last claim is that the trial court should have granted the motion for mistrial when references to his federal trial were made before the jury. This Court has declined to find error in similar cases, noting that it is not uncommon that jurors become aware that the case before them may have been previously tried as a result of references to prior testimony. As the references to the prior trial, in the instant case, were generally inadvertent and, in large part, were a result of questioning by defense counsel, not the state, no error has been shown.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO TRIAL BY AN IMPARTIAL JURY BY DENYING HIS CAUSE CHALLENGE TO JUROR MENGEL.

Appellant's first claim is that the trial court erred in denying his motion to excuse juror Mengel for cause because he had some knowledge of the case from that morning's newspaper. Kessler concedes, however, that Mr. Mengel said he could set the information aside and reach a verdict based only on the law and the evidence. (XIII, T 488-90, 531) Based on these facts, appellant is not entitled to relief.

This Court has consistently held that "the mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness and that it is sufficient if the juror can lay aside his opinion or impression and render a verdict based on the evidence presented in court. Castro v. State, 644 So.2d 987, 990 (Fla. 1994); Bundy v. State, 471 So.2d 9, 19 (Fla. 1985), cert. denied, 479 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). Moreover, to be qualified, jurors need not be totally ignorant of the facts of the case nor do they need to be free from any preconceived notion at all:

> To hold that the mere existence of any preconceived notion as to the guilt of the accused, without more, is sufficient to rebut the presumption of a prospective juror's

> impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.
>
> Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961).

In the instant case, the record shows the following with regard to Mr. Mengel's responses during voir dire:

> THE COURT: Thank you. Now, then, are any of the prospective jurors familiar with the defendant set forth in the charging document, the Indictment or have you read or heard anything concerning this charge against Mr. Kessler, and that would include both firsthand information as well as secondhand information, such as newspaper, radio and television, anything of that sort?
>
> And I'd like to proceed by the first row. Does anybody have any knowledge of this document or this charge? And if you would raise your hand if you do.
>
> THE COURT: Okay. Mr. Mengel.
>
> PROSPECTIVE JUROR MENGEL: Yes, sir.
>
> THE COURT: And Mr. -- is it Urgo? Mr. Mengel, do you feel that you can put aside anything that you may have read or heard about this case and serve with an open mind and reach a verdict based only on the law and the evidence presented during the course of the trial?
>
> PROSPECTIVE JUROR MENGEL: Yes, sir.
>
> THE COURT: All right. Mr. Urgo, let me ask you this question: Is your knowledge based upon secondhand information as opposed to firsthand?
>
> PROSPECTIVE JUROR URGO: Like a newspaper.
>
> THE COURT: All right. Let me pose the same question to you. I'm sure you understand -- and if you don't, let me be very direct about it -- that the role of a juror, regardless of what knowledge they may have of an allegation or of a witness in a criminal

case, is to listen to the evidence adduced, brought forward at trial, whether it be testamentary evidence, that is, somebody testifying, or tangible evidence, that is, something that can be picked up, documentary evidence, whatever the evidence happens to be.

Listen to all of the evidence, listen to the law that must be applied, to arrive at a fair and impartial verdict based exclusively upon the evidence and the law, and to set aside anything, any secondhand knowledge or information they may have received about a defendant or a charge before coming into the courtroom. Do you feel you can do that?

PROSPECTIVE JUROR URGO: I don't know.

THE COURT: All right. Thank you, sir. Mr. Mengel, is your knowledge concerning this charge based upon firsthand knowledge, that is, something you actually saw or heard, or upon secondhand knowledge?

PROSPECTIVE JUROR MENGEL: Newspaper this morning.

THE COURT: All right. Do you feel you could set aside -- I believe we have already discussed that you feel you could set aside that and render your verdict based upon the evidence and the law in this case.

PROSPECTIVE JUROR MENGEL: Yes.

(XIII, T 488-490)

* * *

MR. MENSH: Same thing here. Nothing different. The judge is going to tell you you've got an obligation to determine where the truth lies. That's what verdict means. It comes from the Latin verdict, to speak the truth.

And you do that by behind me in this witness chair, that's the only place you get your evidence from, only place you get your testimony from, only thing you can consider any facts from.

Then he tells you what the law is that applies to this case. Of course, you're obligated to follow that, because if you didn't, we'd have a system, a government of

anarchy instead of an orderly process of fair trials in the jury system; right?

So if you have read or heard something on the outside, whether it was in the morning or yesterday or before, you can assure Judge Webb that you will put that out of your mind and only consider the facts and testimony from the witness stand, coupled with the law that Judge Webb tells you that applies to them. Will you do that?

PROSPECTIVE JUROR MENGEL: Yes.

MR. MENSH: Mr. Mengel, you indicated that you read something maybe this morning. Without going into it, would you be able to do that, put that aside?

PROSPECTIVE JUROR MENGEL: Yes, sir.

MR. MENSH: Thanks, Mr. Mengel. Mrs. Korrow, am I pronouncing that correctly, ma'am?

(XIII, T 530-531)

* * *

MR. EBLE: Thank you, Mrs. Freudenstein. Mr. Mengel, you also read the newspaper, so I'm going to ask you the same questions. Was it today's St. Pete Times?

PROSPECTIVE JUROR MENGEL: Pasco Times.

MR. EBLE: And without telling me what the opinion was, if you formed one, but did you read the article all the way through?

PROSPECTIVE JUROR MENGEL: Yes.

MR. EBLE: When you read the article, did you form an opinion as to the guilt or innocence of Mr. Kessler? Without telling me what, did you form an opinion at the time you read the article?

PROSPECTIVE JUROR MENGEL: I didn't form an opinion me personally, but I assumed that somebody else had formed an opinion and found him guilty. I'm sorry.

MR. EBLE: But --

PROSPECTIVE JUROR MENGEL: But I didn't form an opinion.

MR. EBLE: Have you not formed an opinion as you sit here today?

PROSPECTIVE JUROR MENGEL: No.

MR. EBLE: Do you presume Mr. Kessler innocent of the charges against him?

PROSPECTIVE JUROR MENGEL: Yes.

MR. EBLE: You can assure Mr. Kessler and myself, if you are selected, that you presume him innocent as we sit here?

PROSPECTIVE JUROR MENGEL: Yes.

MR. EBLE: Thank you, Mr. Mengel. I thought that was everybody who had read something, but if I missed somebody, Mrs. Winterberger, had you also read something about the case or no?

(XIV, T 594-595)

* * *

PROSPECTIVE JUROR KORROW: Definitely. Yes.

MR. EBLE: Mr. Mengel, I don't mean to pick on you at all, sir, and I recognize that where you're sitting is a very difficult place to hear.

The jury box is a little bit better. This is just a bad room for the voices carrying, and I'll use this microphone, if that's what it's going to take. Have you any trouble hearing me, as long as I use this microphone?

PROSPECTIVE JUROR MENGEL: Not at all.

MR. EBLE: Okay, sir. And you will raise your hand if you missed a question, because sometimes I wander from the podium, I'm bad at that, I pace. And if I wander and you can't hear my question, will you let the Court know that you need us to repeat it?

PROSPECTIVE JUROR MENGEL: Yes, sir.

MR. EBLE: Mr. Mengel, I have the same question of you, sir. Mr. Kessler's entered a plea of not guilty to the charges in this Indictment that he effected the death of John DeRoo from a premeditated design. Will you hold the State to that burden if selected as a juror? Will you give him a fair trial, sir?

PROSPECTIVE JUROR MENGEL: Yes, sir.

(XIV, T 613)

If prospective jurors, as juror Mengel in the instant case did, can assure the court during voir dire that they are impartial despite their extrinsic knowledge, they are qualified to serve on the jury. Davis v. State, 461 So.2d 67, 69 (Fla. 1984), cert. denied, 473 U.S. 913, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). Although such assurances are not dispositive, they support the presumption of a jury's impartiality. Rolling v. State, 695 So.2d 278, 285 (Fla. 1997), cert. denied, 118 S.Ct. 448 (1997); Copeland v. State, 457 So.2d 1012, 1017 (Fla. 1984); Davis, 461 So.2d at 69. Because the trial court has the opportunity to observe and evaluate the prospective juror’s demeanor and credibility, this Court has recognized that the dismissal of a juror is subject to an abuse of discretion review. Lambrix v. State, 494 So.2d 1143, 1146 (Fla. 1986); Castro v. State, 644 So.2d 987, 990 (Fla. 1994). Since appellant has failed to establish that the challenged juror should have been dismissed for cause or that he was not qualified to serve as a juror, no abuse of discretion has been shown.

Nevertheless, relying upon Reilly v. State, 557 So.2d 1365 (Fla. 1990) and Hamilton v. State, 547 So.2d 630, 632-33 (Fla. 1989), appellant urges reversible error. In Reilly, this Court reversed a trial court’s denial of a challenge to a juror who knew that Reilly had given a confession to law enforcement. This Court found prejudice resulted because the juror was aware of a fact that

was inadmissible and far more damaging to Reilly than anything which was actually introduced into evidence.

In, Hamilton this Court held that the denial of defendant's challenge for cause to juror who repeatedly indicated that she had formed a preconceived notion of defendant's guilt constituted reversible error, was error. This Court found that although the juror ultimately indicated that she could base her verdict on evidence and on law as instructed by court, her repeated statements indicated that she had a preconceived opinion of Hamilton's guilt and that it would take evidence put forth by Hamilton to convince her he was not guilty.

By contrast, in the instant case, juror Mengel did not exhibit any preconceived notions of Kessler's guilt or indicate any belief that Kessler bore any responsibility to disprove the state's case. Moreover, the evidence contained in the article was not of such a prejudicial nature that it would be impossible for juror Mengel to set it aside. Accordingly, as no juror who indicated that they had formed an opinion from the pretrial publicity sat on the jury, no error has been shown and this claim should be denied.. Compare, Lambrix v. State, 494 So.2d 1143, 1146 (Fla. 1986)

Additionally, the state asserts that section 924.051, Florida Statutes (Supp. 1996), which was created by the Criminal Appeal Reform Act of 1996 (ch. 96-248, §4, at 954, Laws of Fla.) applies.

Section 924.051 became effective on July 1, 1996. Appellant was not tried until December 20, 1996 and was not sentenced until February 19, 1997. The statute provides that the *party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court and precludes review unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.* Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996) (on reh'g). Given that juror Mengel, in the instant case, was examined by the court, prosecutor and defense counsel on the issue, and yet no evidence that the challenged juror should have been excused for cause or that any unfit juror actually sat or that any prejudice resulted, appellant has failed to carry his burden show harmful error. §924.051 Fla. Stat. (1996). Accordingly, this claim should be denied.

ISSUE II

WHETHER THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS AGAINST SELF-INCRIMINATION AND TO DUE PROCESS OF LAW BY ADMITTING HIS STATEMENTS TO FBI INFORMANT BARKETT.

Appellant next contends that the trial court erred when it denied his motion to suppress statements. He claims that the court violated his Fifth Amendment rights against self-incrimination and to due process of law by admitting his statements to FBI informants. It is the state's position that the trial court properly denied the motion to suppress.

The principle is well settled that a trial court's order denying a defendant's motion to suppress comes to the appellate court clothed with a presumption of correctness. Henry v. State, 586 So.2d 1033 (Fla. 1991); DeConingh v. State, 433 So.2d 501, 504 (Fla. 1983), cert. denied, 465 U.S. 1005 (1984); Stone v. State, 378 So.2d 765, 769 (Fla. 1979), cert. denied, 449 U.S. 986 (1980); McNamara v. State, 357 So.2d 410 (Fla. 1978). At the trial court level the state bears the burden of establishing by only a preponderance of evidence that the confession was freely and voluntarily given. Once a trial court has ruled in favor of the state, a reviewing court must interpret the evidence in the light most favorable to sustaining the trial court's ruling. State v. Riehl, 504 So.2d 798 (Fla. 2nd DCA), review denied, 513 So.2d 1063 (1987); Williams v. State, 441 So.2d 653 (Fla. 3d DCA 1983). The trial court's ruling on this issue cannot be reversed unless it is

clearly erroneous. The trial court, in the instant case, properly denied the motion to suppress.

To support his claim of error, Kessler relies on Bram v. United States, 168 U.S. 532 (1897) and its progeny for the proposition that under the Fifth Amendment right against compulsory self-incrimination, a confession must be voluntary to be admissible. The standard announced in Bram, however, has evolved through the years to a "totality of circumstances" analysis. Withrow v. Williams, 113 S.Ct. 1745, 507 U.S. 680 (1993). The Court explained that although in Bram the Court held that the Fifth Amendment barred the introduction in federal cases of involuntary confessions made in response to custodial interrogation, the Court did not initially recognize the Clause's applicability to state cases. In Miranda v. Arizona, 384 U.S. 436 (1966), however, the privilege against self-incrimination was extended to state custodial interrogations. Withrow v. Williams, 113 S.Ct. 1745, 1752, 507 U.S. 680 (1993). Subsequently, the Court analyzed the admissibility of confessions in such cases as a question of due process under the Fourteenth Amendment. Under this approach, the Court examined the *totality of circumstances* to determine whether a confession had been "made freely, voluntarily and without compulsion or inducement of any sort." A statement is voluntary where it is the product of a free and deliberate choice rather than intimidation, coercion or deception and is not the result of the

defendant being worn down by improper police interrogation tactics or lengthy questioning or by trickery or deceit. Colorado v. Connelly, 479 U.S. 157 (1986).[1] This Court has likewise held that the determination of voluntariness in a custodial setting is based upon the totality of the circumstances, with the determination to be made by the judge based on a multiplicity of factors. Traylor v. State, 596 So.2d 957, 964 (Fla. 1992).

Significantly, however, all of these cases refer to ***custodial*** interrogations. In a custodial interrogation it is presumed that without proper safeguards the circumstances of the custodial interrogation deny an individual the ability freely to choose to remain silent or otherwise refrain from admitting guilt. Whereas, in a noncustodial setting, statements freely given [including those given in pursuit of the commission of another crime] do not give rise to any of these concerns. Accordingly, this Court has made it clear that the Fifth Amendment does not apply to voluntary statements initiated by the suspect or statements obtained in noncustodial settings or through means other than interrogation. Traylor; Voorhees v. State, 699 So.2d 602 (Fla. 1997).

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[1] Additionally, police misrepresentation alone does not render a confession involuntary. Escobar v. State, 699 So.2d 984, 987 (Fla. 1997); Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969); Burch v. State, 343 So.2d 831 (Fla.1977). A confession obtained by a misstatement of fact is admissible as long as it is voluntarily made. State v. Mallory, 670 So.2d 103, 107 (Fla. App. 1 Dist. 1996).

Thus, in the instant case, where Kessler's statements to his former roommate, Barkett, were clearly not the result of a custodial interrogation, the concerns and protections afforded a citizen in custodial interrogations are inapplicable. Miranda at 467. Cf. Garner v. U.S., 424 U.S. 648 (1976). Kessler's claim that his confession was not voluntary because it was induced by the promise of $50,000 which would be unavailable unless the informant could convince his investor that Kessler had secured the murder of John Deroo for the purpose of collecting insurance proceeds, does not establish any Fifth Amendment violation. Kessler confessed to Barkett about John Deroo's murder two years after the murder. At that point, Kessler had not been charged and was not in custody. Further, at the time of his meetings with Barkett, Kessler was living in Ohio and was of the belief that he was in no jeopardy for the murder of John Deroo. (V, R685-686, 744, XXI, T2011, 2027)

Even under a totality of circumstances analysis, there is simply no evidence of police coercion or that Kessler's will was overborne by Barkett's offer. In fact, Kessler testified at trial that he lied to Barkett about killing John Deroo to show that he was a bad person capable of doing anything because he wanted to get the money. (XXV, T2863; XXVI, T2928, 2933-35). Kessler's stated intent to lie demonstrates that he voluntarily responded to Barkett's overtures. That the statement may or may not have been true does not render it involuntary or inadmissible. Smith v.

State, 424 So.2d 726, 730 (Fla. 1982)(truthfulness of confession is a credibility question for the jury). Accord, Nickels v. State, 106 So. 479, 483, 90 Fla. 659 (1926). Thus, unlike those cases where promises of leniency or other relief is offered to a defendant in custody, Kessler was not in custody and his motivation here was not to get relief from his responsibility for the murder of John Deroo, but, rather, to profit from the murder of another victim. Cf. Cannady v. State, 427 So.2d 723 (Fla. 1983)(promise not to prosecute); Bradley v. State, 356 So.2d 849 (Fla. 4DCA 1978) (promise of a lighter sentence); Paramore v. State, 229 So.2d 855 (Fla. 1969)(statement that things would be easier if accused told the truth); Puccio v. State, 440 So.2d 419 (Fla. 1DCA 1983)(promise to release accused).

This Court has had the occasion to review similar cases where noncustodial statements made to informants were found to be admissible. Echols v. State, 484 So.2d 568 (Fla. 1986); Hill v. State, 422 So.2d 816, 818 (Fla. 1982). In Echols, the victim, Baskovich and his brother-in-law, Dragovich were business partners. Dragovich hired Echols to murder Baskovich. The motive for the murder was both personal antipathy and a desire to obtain control of the victim's estate through Dragovich's relationship with his sister-in-law. Dragovich and Echols planned to use the assets of the victim's estate as a means of promoting certain business enterprises and to share in the proceeds. Echols and "Mad Dog"

Nelson subsequently went to the Baskovich home and killed Baskovich. During the investigation, the Clearwater police requested a photograph of Echols from the Indiana state police. The state police then asked an informant, Adams, who lived in a common law relationship with Echols's daughter, to obtain the photograph. Instead, Adams wired himself with a small hidden tape recorder and asked Echols if he was involved in a Florida murder. Echols promptly stated that he was and boastfully recounted details of the crimes and the scheme between himself and Dragovich to obtain control of the victim's estate. Adams allowed the state police to hear the tape but retained custody, apparently as a bargaining ploy to obtain their assistance on criminal charges against him. Approximately fifty days later, Adams surrendered the tape to the police and agreed to, and did, tape another conversation with Echols. The Clearwater and Indiana police then executed an arrest warrant on Echols at his home and, with his permission, searched the home. Very shortly after the arrest of Echols, and before Dragovich had heard of the arrest, Adams and an undercover Florida policeman contacted and met Dragovich for the purported purpose of receiving payment for the murder of Baskovich. The two meetings were simultaneously recorded on video and audio tapes. Although Dragovich was guarded in his remarks, the tape corroborated Echols' statements that he and Dragovich had planned and executed the Baskovich murder. On appeal, this Court rejected

Echols claim that the tapes obtained by informant Adams should have been suppressed, stating:

> The primary purpose of the exclusionary rule is to deter future official police misconduct. United States v. Janis, 428 U.S. 433, 446, 96 S.Ct. 3021, 3028, 49 L.Ed.2d 1046 (1976). We do not believe exclusion of the evidence would have any discernible effect on police officers of other states who conduct investigations in accordance with the laws of their state and of the United States Constitution. Further, we do not believe that the interest of Florida is served by imperially attempting to require that out-of-state police officials follow Florida law, and not the law of the situs, when they are requested to cooperate with Florida officials in investigating crimes committed in Florida. We agree with Justice White that:
>
> > [A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official unlawlessness.
> >
> > Illinois v. Gates, 462 U.S. 213, 257-58, 103 S.Ct. 2317, 2342, 76 L.Ed.2d 527 (1983) (White, J., concurring in the judgment). See also United States v. Leon, --- U.S. ----, 104 S.Ct. 3430, 82 L.Ed.2d 702 (1984).

Id. at 572

Similarly, in Hill, this Court denied Hill's claim that the trial court committed reversible error in not suppressing a tape-recorded conversation between an informant and Hill. Hill was a suspect in the murder and sexual battery of a young girl. After hearing Hill make incriminating statements and relating those

statements to the police, Munson, a friend of Hill's was persuaded to go to Hill's home wired with electronic surveillance equipment for the purpose of eliciting incriminating statements from Hill. Munson agreed to do so after authorities promised to drop a pending burglary charge against him, drop pending parole violation charges, and not to charge him with accessory after the fact for the murder. Munson went to Hill's home, persuaded Hill to accompany him into the backyard, and there obtained statements in which Hill admitted committing the murder. On appeal, Hill argued that because Munson was acting pursuant to police instructions, he was an arm of the police department, and the statements he obtained were a violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Upon rejecting this claim this Court noted that Miranda only applies to instances of custodial interrogation and Hill, like Kessler in the instant case, was not in custody, nor was his freedom of movement restricted in any manner. Id. at 818 (Fla. 1982)

Based on the foregoing, the state urges this Court to find that the trial court properly denied the motion to suppress and admitted the statements of appellant at trial.

ISSUE III

WHETHER EVIDENCE OF OTHER CRIMES OR BAD ACTS BY APPELLANT BECAME A FEATURE OF THE TRIAL SO THAT THE DANGER OF PREJUDICE OUTWEIGHED THE PROBATIVE VALUE OF THE EVIDENCE.

Appellant next contends that the trial court erred in allowing the state to introduce evidence: 1) that he planned with the informants Barkett and Walcutt to employ Bo Yankee in Walcutt's video store, to obtain key man life insurance, then murder Yankee to collect the insurance proceeds and 2) that after his arrest Kessler attempted to have Vessey kill Barkett and Walcutt and to influence the testimony of Cheryl Hamilton. Appellant contends that the evidence constituted "collateral crimes" evidence was inadmissible under Section 90.404, Florida Statutes (1995) and that this "collateral crime evidence" became an impermissible feature of the trial which deprived him of a fair trial.

Pursuant to a motion by the state, Circuit Judge William R. Webb held a pretrial evidentiary hearing on September 10, 1996, to address the admissibility of this evidence. (I, R34, V, R660, VII, R1205) The state argued that this evidence was admissible as inextricably intertwined evidence of the defendant's involvement in the death of John Deroo. (I, R36) On December 5, 1996, Judge Webb entered an order granting the state's motion regarding the admissibility of trial evidence as inextricably intertwined. (II, R205-206)) It is the state's position that this ruling by the trial court was within the court's discretion and appellant has

failed to show an abuse of that discretion.

Contrary to appellant's argument that this evidence was inadmissible Williams rule evidence, it is the state's position that subsections 90.404(1) and 90.404(2), do not govern the admissibility of this evidence. As this Court explained in Coolen v. State, 696 So.2d 738, 743 (Fla. 1997) and Griffin v. State, 639 So.2d 966, 968 (Fla. 1994) evidence of crimes which are inseparable from the crime charged, or evidence which is inextricably intertwined with the crime charged, is not Williams rule evidence. It is admissible under section 90.402 because "it is a relevant and inseparable part of the act which is in issue. Coolen at 743; Griffin at 968.

Similarly, in Consalvo v. State, 697 So.2d 805, 813 (Fla. 1996), this Court held that evidence of a subsequent burglary by Consalvo was admissible in Consalvo's murder trial though it may not have qualified as similar fact evidence as it established how law enforcement discovered Consalvo's part in the murder and the context in which Consalvo made certain inculpatory statements. This Court specifically stated:

> The evidence was also admissible as inextricably intertwined. As we noted above, claim three relating to the admission of evidence of the Walker burglary was not preserved for appeal. Nevertheless, even if it were preserved, it would be. In Florida, evidence of other crimes, wrongs and acts is admissible if it is relevant (i.e., it is probative of a material issue other than the bad character or propensity of an individual).

> Charles W. Ehrhardt, Florida Evidence § 404.9, at 156 (1995 ed.). See Hartley v. State, No. 83,021, slip op. at 7 (Fla. Sept. 19, 1996) (citing Griffin v. State, 639 So. 2d 966 (Fla. 1994), cert. denied, 115 S. Ct. 1317, 131 L. Ed. 2d 198 (1995)) (both stating that evidence of other crimes which are "inseparable from the crime charged" is admissible under section 90.402).
>
> *The Walker burglary was closely connected to the murder of Pezza and was part of the entire context of the crime. When the police caught appellant burglarizing the Walker residence, they found Pezza's checkbook on his person. It was also as a result of the Walker burglary that police placed appellant in custody. Furthermore, appellant was in jail for this burglary when he placed the incriminating call to his mother and stated that the police were going to implicate him in a murder.*

Id. at 813

Appellant contends, however, that even though Kessler's statements concerning his part in the murder of John Deroo was interwoven in the taped statements made during the "planning" of the murder of Yankee, that the portions concerning the subsequent plan could have been redacted. A review of the tapes, however, does not support this claim. As this Court noted in Henry v. State, 649 So.2d 1361 (Fla. 1994), the prior murder of the victim's mother was so inextricably intertwined with murder of her son that to separate them would have resulted in disjointed testimony that would have led to confusion. Any attempt to so limit the testimony herein, would have been unwieldy and likely have led to confusion. See, also, Henry v. State, 649 So.2d 1366, 1368 (Fla. 1994) (facts

relating to son's murder inextricably intertwined with facts pertaining to mother's murder and to try to totally separate the facts of both murders would have been unwieldy and likely have led to confusion.)

While the state maintains that this evidence was properly admitted as inextricably intertwined, it was also admissible under Rule § 90.404 (2)(a), 1996. In its pretrial motion, the state also noted that the evidence was admissible pursuant to Rule § 90.404 (2)(a), 1996 for the purpose of demonstrating motive, intent, knowledge, identity, absence of mistake or accident, and consciousness of guilt. (I, R36) The court below agreed that the evidence concerning Kessler's actions relative to his efforts to murder Bo Yankee were so strikingly similar as to constitute virtual fingerprint actions of the defendant. (II, R205-206)

As this Court noted in Chandler v. State, 702 So.2d 186 (Fla. 1997), the common thread in this Court's Williams rule decisions has been that startling similarities in the facts of each crime and the uniqueness of modus operandi will determine the admissibility of collateral crime evidence. Although, appellant contends that there were substantial differences between the two plans to commit murder for the key man insurance proceeds, the only real difference he can point to is the legitimacy of the business interest. This Court has made it clear, however, the fact that the crimes are not exactly the same does not preclude admission of collateral crime

evidence and, indeed, would erect an almost impossible standard of admissibility. Gore v. State, 599 So.2d 978, 984 (Fla.), cert. denied, --- U.S. ----, 113 S.Ct. 610, 121 L.Ed.2d 545 (1992) (observing that this Court has never required "the collateral crime to be absolutely identical to the crime charged"). Further, as in Chandler v. State, 702 So.2d 186 (Fla. 1997), even large dissimilarities which may be attributed to "differences in the opportunities with which the defendant was presented, rather than differences in modus operandi do not preclude the admission of similar fact evidence." Id. Gore, 599 So.2d at 984

Furthermore, even though the similarity between the facts of the charged offense and the other crime may serve to enhance the probative value of other crime evidence, similarity is not always a prerequisite to consideration of such evidence. See Bryan v. State, 533 So.2d 744, 746 (Fla.1988), cert. denied, 490 U.S. 1028 (1989). While overall similarity between the facts of the two offenses generally is necessary before the other crime evidence is considered relevant to the issue of identity, such is not the case when other crime evidence is used to prove motive. Finney v. State, 660 So.2d 674 (Fla. 1995). For example, as this Court noted in Finney, other crime evidence would be relevant to prove that there was a pecuniary motive for a murder if the evidence established that at the time of the murder the defendant needed money for some reason, such as the payment of a debt. Accord

United States v. Beechum, 582 F.2d 898, 915 n. 15 (5th Cir.1978), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Thus, evidence of Kessler's plan to murder Yankee for the key man insurance, not only established his identity with regard to the Deroo murder, but, it also established his motive-the key man insurance proceeds-for effecting the murder of John Deroo.

Additionally, with regard to the evidence concerning Kessler's attempts to murder or otherwise tamper with the prosecution witnesses against him, this Court in Heath v. State, 648 So.2d 660 (Fla. 1994), addressed a similar issue stating:

> As his third issue, Heath asserts that the court erred in admitting the testimony of cellmate Wayburn Williams regarding Heath's plans to escape from pretrial detention. On direct examination by the State, Williams testified:
>
> > He wanted to escape; he wanted to get two girls. There was only two people--his exact words: "There's only two people in this world can tie me to the murder; that's Cindy and Jennifer." He wanted to get out and "... blow their fucking brains out."
>
> During cross-examination, the defense elicited that the State would assist Williams' placement in a suitable corrections facility in exchange for his testimony against Heath. Williams responded that he wasn't looking for easy time, but just "wanted to stay away from Ronnie Heath." During redirect examination, Williams further explained that his desire to be placed in a facility outside Alachua County was also motivated by his encounter with a guard who had offered to help him and Heath escape in exchange for $150,000. Heath had no objection to Williams' testimony regarding the

> desire to kill the two witnesses, but he objected to the jury hearing about any plans to escape.
>
> ***We find no error in admitting Williams' testimony. None of his testimony can be fairly characterized as improper evidence of escape, but instead relates primarily to Heath's desire to eliminate two witnesses. Evidence that a suspected person in any manner endeavors to evade a threatened prosecution by any ex post facto indication of a desire to evade prosecution is admissible against the accused where the relevance of such evidence is based on consciousness of guilt inferred from such actions.*** Sireci v. State, 399 So.2d 964, 968 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Moreover, a defendant's attempt to intimidate a state witness is relevant and admissible. Id. The reference to escape is incidental to this relevant testimony regarding Heath's desire to kill two witnesses that he perceived to be detrimental to him. The testimony regarding the guard's offer to assist in an escape was incidental to Williams' explanation of his plea agreement with the State in response to the defense's attempt to impeach his credibility.

Id. at 664.

As the evidence concerning Kessler's attempts to murder Yankee, Barkett and Walcutt and to influence the testimony of Cheryl Hamilton, was relevant and properly admitted, appellant has failed to establish any abuse of discretion in the trial court's admission of the challenged evidence. See, also, Anderson v. State, 574 So.2d 87, 93 (Fla. 1991)(evidence of a suspect's desire to evade prosecution or attempt to prevent witness from testifying is admissible as relevant to the consciousness of guilt that may be

inferred from such evidence)

Because the evidence was highly probative, the danger of unfair prejudice did not preclude its admission. This Court has repeatedly approved the admission of highly prejudicial evidence, such as the defendant's commission of other murders, when sufficient probative value has been shown. See, Henry v. State, 649 So. 2d 1361, 1365 (Fla. 1994), cert. denied, ___ U.S. ___, 116 S.Ct. 101, 133 L.Ed.2d 55 (1995); Henry v. State, 649 So. 2d 1366, 1368 (Fla. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 2591, 132 L.Ed.2d 839 (1995); Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994) (finding relevance of six similar murders committed by Wuornos "clearly outweighs prejudice" of their admission), cert. denied, 514 U.S. 1069 (1995); Buenoano v. State, 527 So.2d 194 (Fla. 1988); Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885 (1979).

Assuming, arguendo, that it was error to admit any of the challenged testimony, appellant has failed to carry his burden to establish that the alleged error was harmful.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT EVIDENCE OF APPELLANT'S FEDERAL TAX OFFENSE CONVICTIONS.

During cross-examination of Detective Lawless, defense counsel initiated the following exchange:

> BY MR. EBLE [defense counsel]:
>
> Q. He also admitted to you that he had been indicted and charged with tax evasion for the handling of a client's books; correct?
>
> A. [Detective Lawless] Yes. He had.
>
> Q. On the February 3rd conversation?
>
> A. That's correct.

(XVII, T1327)

On redirect, the state was allowed to ask Detective Lawless about the statement and whether he was able to verify it. Detective Lawless confirmed that he had gotten a copy of a judgment and sentence reflecting that appellant had pleaded guilty to one charge of aiding and assisting in the preparation and presentation to the Internal Revenue Service documents which were false and fraudulent and one charge of conspiracy to defraud by impeding, impairing, obstructing and defeating the lawful government functions of the Internal Revenue Service. (XVII, 1350-51) He noted that Kessler received probation for the offenses. (XVII, 152) On the judgment and sentences, which were entered into evidence, there was a notation that Counts 2,3,4,5,6,7,8,9 and 10

were dismissed.

Kessler now contends that the trial court erred by admitting evidence of his federal tax offense convictions. It is the state's position that this evidence was properly admitted during the state's redirect examination of Detective Lawless because defense counsel "opened the door" to this line questioning by asking Detective Lawless about Kessler's admission to him that he had been charged and indicted for tax evasion in the handling of his client's books. It is well settled that during redirect a witness may be questioned about matters brought up during cross-examination, and the trial court has broad discretion to determine the proper scope of the examination of the witness. Harmon v. State, 527 So.2d 182 (Fla. 1988).

In Floyd v. State, 569 So.2d 1225, 1230-31 (Fla. 1990), this Court rejected a similar argument made by Floyd that the state improperly introduced evidence of his criminal record. On one occasion, a defense witness, Thomas Snell, testified on direct examination that Floyd previously had not been in any kind of trouble. On cross-examination, the prosecutor asked Snell if he knew that Floyd had committed five burglaries. The trial court overruled defense counsel's objection, finding that counsel "opened the door" to this inquiry during direct examination. Snell responded that he was not aware of those offenses, but they would not change his opinion of Floyd. The court then admitted documents

pertaining to the *five* burglaries supporting the assertion implied in the prosecutor's question. Floyd, like Kessler in the instant case, argued that the prosecutor misled the jury when he introduced the documents evincing the crimes because Floyd was adjudicated guilty of only two of the five charged offenses. In the remaining three cases, adjudication was withheld. This Court agreed with the trial court that the question posed to Snell and the evidence of the guilty pleas were appropriate because direct examination opened the door to the question of whether Floyd previously had been in trouble. Id. at 1231.

Similarly, in Capehart v. State, 583 So.2d 1009, 1013 (Fla. 1991), this Court found no merit to Capehart's argument that the trial court erred in permitting the state's fingerprint expert to testify that the Florida Department of Law Enforcement confirmed his conclusions because the record shows that defense counsel "opened the door" during cross-examination. Id. at 1013. *Sub judice*, the trial court properly found the testimony admissible inasmuch as the defense clearly "opened the door" to this line of questioning. *See, also,* Tompkins v. State, 502 So.2d 412 (Fla. 1987).

Kessler also contends that since he admitted during his direct examination that he had been convicted of fourteen prior violent felonies, that it was error to allow the state to inquire of him concerning the details of his two tax convictions. He apparently

concedes, as the record reflects, that during direct, he gave the jury his version of the events surrounding the guilty pleas to tax evasion. (XXV, T2791-92) He contends, however, that this was an anticipatory rehabilitation and that it did not open the door to the state's line of inquiry. It is the state's position that this claim is not only without merit, it is procedurally barred as no objection was raised to the prosecutor's questions during cross-examination on the basis now presented.

Specifically, on direct, Kessler testified:

> Q.[defense counsel] Why was that, sir?
> A. I had a conflict with Internal Revenue where they were attempting to collect 100 percent penalty on a payroll tax from a corporation.
> Q. And how long had that problem been with the IRS?
> A. That was going on for probably the last several years prior to 1990.
> Q. We have heard about two federal convictions involving the IRS. What was that about?
> A. One of them where my office attempted to assist an individual or client who had failed to file a tax return for ten years, and the government ruled out our input out of that.
> MR. ANDRINGA: Judge, I'm sorry, I'd object to this as hearsay.
> THE COURT: Sustained.
> BY MR. FIRMANI:
> Q. Did you go to trial on those two charges, sir, or did you plead?
> A. I pled out on those.
> Q. And what was your understanding as to what you pled to, what was the criminal act you pled to?

A. Well, the one was attempting to file fraudulent returns for this individual, the other one was for the most an abusive tax shelter.

Q. And was that you own tax shelter or somebody else's?

A. That was a national tax shelter, there were partners involved; and one of the partners was Lee Broche (phonetic) incidentally.

Q. Sir, how many felonies have you been convicted of?

A. A total of 14, sir.

(XXV, T 2791-2792)

On cross, the state inquired as follows:

BY MR. ANDRINGA:

Q. Sir, I have in my hand what's been marked as State's Exhibit 84. And isn't it true you were convicted of conspiring to defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service; isn't that right?

A. That's true.

Q. And isn't it true you were also convicted of willfully aiding and assisting in the procurement, counsel, advisement, and preparation and presentment to the Internal Revenue Service of false and fraudulent tax documents?

A. That's right.

Q. Isn't that right?

A. Yes.

Q. So, in fact, you were convicted of an offense of lying to the federal government?

A. Wrong.

MR. EBLE: Objection, Judge, that's argumentative.

THE WITNESS: No, that's not true.

THE COURT: I'll sustain the objection.

MR. ANDRINGA: Can I approach the clerk, you Honor?

THE COURT: Yes.
MR. ANDRINGA: Thank you.
MR. EBLE: Judge, I -- never mind.

(XXVI, T 2885-2886)

The failure to raise the claim as now presented to this court bars relief. § 924.051.(1)(2). Hamilton v. State, 678 So.2d 1228, 1230 (Fla. 1996).

This claim is also without merit. In Chandler v. State, 702 So.2d 186 (Fla. 1997), this Court rejected Chandler's claim that the court erred in allowing the state to inquire of the defendant during cross-examination about the facts of a collateral crime, despite his prior concession of guilt for the collateral crime to the jury. This Court stated:

> As to Chandler's claim regarding the prosecutor's questions about the Blair rape, we believe that this issue constitutes a classic case of trying to take the wind out of your opponent's sails by pre-emptively admitting extremely prejudicial evidence and thereby softening the blow. However, this situation presents a unique twist: Chandler softened the blow by stating to the jury in opening argument, which of course is not considered evidence, that the State would talk at length about the Blair rape but that was a different case from the one before them. Thereafter, when the time came, defense counsel did not allude to the Blair rape during his direct examination of Chandler. In that way, the State presumably could not address that subject matter when cross-examining Chandler since the issue was not broached on direct examination. See Hunter v. State, 660 So.2d 244, 251 (Fla.1995) (finding trial court did not err in limiting attempted cross-examination of police

detective which was "clearly outside the scope of direct"); § 90.612(2), Fla. Stat. (1993)(limiting cross examination "to the subject matter of direct examination and matters affecting the credibility of the witness ... [although the] court may, in its discretion, permit inquiry into additional matters").

Nevertheless, Professor Ehrhardt has noted that:

> All witnesses who testify during a trial place their credibility in issue. Regardless of the subject matter of the witness' testimony, a party on cross-examination may inquire into matters that affect the truthfulness of the witness' testimony. Although cross-examination is generally limited to the scope of the direct examination, the credibility of the witness is always a proper subject of cross-examination. The credibility of a criminal defendant who takes the stand and testifies may be attacked in the same manner as any other witness.

Charles W. Ehrhardt, Florida Evidence § 608.1 at 385 (1997 ed.) (footnotes omitted). See also Shere v. State, 579 So.2d 86, 90 (Fla.1991) (recognizing the general rule that the "purpose of cross examination is to elicit testimony favorable to the cross-examining party ... and to challenge the witness's credibility when appropriate"). Similarly, we have long held that "cross examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief." Geralds v. State, 674 So.2d 96, 99 (Fla.1996) (quoting Coco v. State, 62 So.2d 892, 895 (Fla.1953)); Coxwell v. State, 361 So.2d 148, 151 (Fla.1978) (same).

In Geralds, we recently denied a similar claim from the defendant that the prosecutor's cross-examination about evidence linking him

to the murder was beyond the scope of the defendant's testimony on direct. 674 So.2d at 99-100. We noted that on direct examination, the defendant's testimony covered six general subjects, including his denial that he murdered the victim. Id. at 100. Since the defendant opened the door on that subject, we concluded that the trial court did not abuse its discretion in allowing questions about evidence linking the defendant to the crime. Id.

Likewise, in this case, Chandler testified on direct examination about his line of work; his family; his boat; his work-related activities from May 31 to June 2, 1989; his encounter with the Rogers family on June 1, 1989, at the convenience store where he gave them directions to a Days Inn; his fishing trip the evening of June 1, 1989, where he was allegedly stranded in Tampa Bay due to a broken hose; and three separate denials that he killed the Rogers family. The crux of Chandler's defense was that he met Michelle Rogers only briefly at the convenience store where he gave her directions to a Days Inn; he did not take the Rogers family for a cruise that night; and he did not kill them. We conclude that the State could legitimately attack Chandler's credibility in asserting those claims, Geralds, and could permissibly develop the connection between the Blair rape and the Rogers' murders to that end.

* * *

Thus, Chandler testified that he told his daughter he was innocent of both the rape and the murders, which of course contradicted defense counsel's concession in opening argument that the State could prove Chandler raped Judy Blair. Therefore, this was a legitimate subject of inquiry for the State in cross-examining Chandler as it attempted to cast doubt on his defense and undermine his credibility as a witness. § 90.612(2), Fla. Stat. (1993).

Id. at 196-97

Kessler's explanation of his tax convictions during his direct testimony put the subject matter of those convictions at issue and, therefore, cross-examination about those convictions was within the scope of direct and properly admitted. The fact that Kessler, like Chandler, had hoped to take the wind out of his opponent's sails by pre-emptively admitting extremely prejudicial evidence and thereby softening the blow, does not alter the fact that Kessler testified to these facts during his direct examination, thereby, putting these facts at issue and within the scope for cross-examination. Accordingly, as appellant has failed to carry his burden to show harmful reversible error, this claim should be denied. §924.051 Fla. Stat. (1996).

ISSUE V

WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT KESSLER DISPLAYED NO SYMPATHY OR SORROW FOR THE DEATH OF DEROO.

Appellant next argues that it was error for the prosecutor to inquire of Detective Lawless, Insurance Agent Douglas Stammler and Kessler's girlfriend, Cheryl Hamilton Trotter as to whether Kessler had expressed any sorrow or sympathy about the death of Mr. Deroo.[2] It is the state's position that, in the instant case, this evidence was relevant and admissible.

In considering the admission of such evidence, this Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances. Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990); Robinson v. State, 520 So.2d 1, 6 (Fla. 1988); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). This Court has further noted that to equate a defendant's not-guilty plea with lack of remorse which may be considered in weighing an aggravating circumstance in support of imposition of the death penalty would in effect punish the defendant for exercising rights of due process. Pope v. State, 441 So.2d 1073, 1077 (Fla. 1983), See, also, State v. Mischler, 488 So.2d 523 (Fla. 1986)(Lack of remorse to support upward departure from sentencing guidelines

[2] As appellant notes the objection to Detective Lawless was sustained with the court requesting that the question be researched overnight. (XVII, T1284) The next two objections were overruled. (XVIII, T1439, XX, T1812)

could not be inferred from mere exercise of constitutional right or defendant's continuing assertion of innocence of theft of employer's assets.)

The evidence in the instant case, however, was not presented in the support of any aggravating factor; it was not argued by the state in the penalty phase and was not considered by the trial court in the sentencing order. Cf. Valle v. State, 474 So.2d 805 (Fla. 1985). Appellant's lack of sorrow or sympathy was not assumed from his not guilty plea or inferred from his failure to take responsibility for the crime. Rather, this evidence, presented in the guilt phase, was in the context of appellant's actions upon learning of his friend and partner's death. Appellant's statements to the police and others concerning Mr. Deroo's death demonstrated appellant's guilty knowledge and was, therefore, relevant and admissible. *See*, Wuornos v. State, 644 So.2d 1000, 1009 (Fla. 1994)(the fact that a defendant has confessed in a way that can be construed as showing a lack of remorse does not give rise to error, without more.)

Moreover, this Court has repeatedly recognized that the admission of this type of evidence is subject to harmless error analysis. In light of the brief reference to Kessler's lack of sorrow, the state maintains that appellant has failed to carry his burden to show harmful error. See Shellito v. State, 701 So.2d 837, 842 (Fla. 1997); Wuornos v. State, 644 So.2d 1000, 1010

(Fla.1994), cert. denied, 514 U.S. 1069 (1995); Atwater v. State, 626 So.2d 1325 (Fla. 1993); Sireci v. State, 587 So.2d 450 (Fla. 1991).

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR MISTRIAL WHEN STATE WITNESSES AND THE PROSECUTOR MADE REMARKS ABOUT APPELLANT'S PRIOR TRIAL IN FEDERAL COURT.

This Court has repeatedly held that a ruling on a motion for a mistrial is within the sound discretion of the trial court. Merck v. State, 664 So.2d 939 (Fla. 1995); Power v. State, 605 So.2d 856 (Fla. 1992), cert. denied, 507 U.S. 1037, 113 S.Ct. 1863, 123 L.Ed.2d 483 (1993); Salvatore v. State, 366 So.2d 745, 759 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). A motion for mistrial should be granted only when it is necessary to ensure that the defendant receives a fair trial. Merck v. State, 664 So.2d 939 (Fla. 1995); Marek v. State, 492 So.2d 1055, 1057 (Fla. 1986).

As appellant concedes, this Court in Jennings v. State, 512 So.2d 169 (Fla. 1987), cert. denied, 484 U.S. 1079 (1988), noted that, "It is not uncommon that jurors become aware that the case before them may have been previously tried as a result of references to prior testimony." This Court held that the judge committed no error in denying appellant's motion for mistrial where the jury learned that Jennings had been previously tried. Specifically, this Court stated:

> Point XI involves the discovery by three jurors between the guilt and penalty phases that the appellant had been tried before for the same crimes. Appellant argues that this

> knowledge on the part of the jurors deprived him of his constitutional right to a fair trial on the issue of his penalty. As evidence that the jury may have been influenced, appellant points to the fact that during their deliberations the jury sent a note to the judge asking him if they were allowed to know the reasons for the retrials. The judge replied that the question and answer "should not be considered by you...."
>
> It is not uncommon that jurors become aware that the case before them may have been previously tried as a result of references to prior testimony. There is no indication that the jurors knew what had occurred at appellant's previous trial. We conclude that the judge made the appropriate response and committed no error in denying appellant's motion for mistrial.

Id. at 173

Subsequently, in Robinson v. State, 574 So.2d 108 (Fla. 1991), cert. denied, 502 U.S. 841 (1991), this Court reaffirmed the holding in Jennings, stating:

> We reject Robinson's argument that a mistrial should have been granted because the venire may have known that Robinson was being resentenced. This claim is based upon a sign posted in the courthouse directing Robinson's jury to the proper courtroom. The sign described the proceeding as a "Criminal re-sentencing hearing." Counsel moved for a mistrial, arguing that the sign implied that Robinson previously had been sentenced to death and thus violated his right to due process and a fair trial. Robinson acknowledges that Jennings v. State, 512 So.2d 169 (Fla.1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988), controls, but urges reconsideration of Jennings. We decline. As in Jennings, there is absolutely no indication in this record that the jurors knew anything about

what transpired in the previous trial.

Id. at 111

Nevertheless, appellant urges that the Third District's decision in Lawson v. State, 304 So.2d 522 (Fla. 3DCA 1974), and this Court's decision in Jackson v. State, 545 So.2d 260, 262-263 (Fla. 1989) mandate reversal. Both cases are readily distinguishable.

In Lawson, reversal was mandated because the State, during a prosecution for murder, elicited testimony concerning Lawson's involvement in an earlier collateral crime *for which defendant had been acquitted*. Rejecting the state's contention that the evidence was admissible to prove motive, the court held that the testimony was irrelevant and tended only to show Lawson was a man of bad character with propensity to commit a collateral crime and prejudiced defense.

In Jackson, this Court agreed that it was error for the trial court to allow testimony concerning Jackson's previous convictions for the offenses for which he was being tried and rejected the state's reasoning that the jury should be informed that Jackson had previously been convicted of these offenses as a result of his wife's testimony and in order to correct the erroneous impression left by defense counsel that Jackson was merely awaiting trial at the time he received the letters at issue. This Court noted that although the fact that there has been a prior trial many times is

inadvertently presented to the jury through various means during the course of a second trial, it was error for the trial court to allow the prosecutor to question appellant about his previous convictions. Id. at 262-263

No one in the instant case asserts that "the jury should be informed that [Kessler] had previously been convicted of these offenses" or that the evidence was admissible for any other purpose. In fact, the court specifically instructed the jury that they were to disregard references to the other trial and instructed Richard Vessey to limit his testimony so as to preclude the jury from being informed of the nature of the prior proceeding. (XVIII, T1396-97, XXII, T2147-2149, XXV, T2668-69) References to the prior trial were generally inadvertent and, in large part, were a result of questioning by defense counsel, not the state. (XVIII, T1395, XXII, T2207, XXIII, T2354). Accordingly, the state maintains that no error has been shown.

Furthermore, in light of the appellant's own admissions of guilt, as well as the fact that the jury was repeatedly instructed to disregard the comments, appellant has failed to establish harmful error. § 924.051. This claim should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, P. O. Box 9000 -- Drawer PD, Bartow, Florida 33831, this 23rd day of October, 1998.

COUNSEL FOR APPELLEE