IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-933

DCA CASE NO. 3D99-47

CHARLES L. BRYANT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, CHARLES L. BRYANT, was the Petitioner in the trial court and the Appellant in the Third District Court of Appeal. Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the Third District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief. The symbol "R" designates the record on appeal, the symbol "T" designates the transcript of proceedings, and "Supp" designates the sentencing transcript on appeal.

STATEMENT OF THE CASE AND FACTS

The State is before this Court on review of the decision of the Third District Court of Appeal affirming the trial court's departure sentence without written reasons on the authority of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Jordan v. State, 728 So. 2d 748 (Fla. 3d DCA 1998), *affirmed*, 761 So. 2d 320 (Fla. 2000).; Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998), *affirmed*, 761 So. 2d 318 (Fla. 2000).

Petitioner was charged by Information in lower case number 97-39023, December 30, 1997, with attempted first-degree premeditated murder for the shooting of Everett Steward on November 27, 1997, and unlawful possession of a firearm or weapon by a convicted felon. (R/Vol.I:1). Tried to a jury and found guilty on Count I, Petitioner was adjudicated guilty of the lesser included offense,

attempted second degree murder - a first degree felony. Count II was severed and Petitioner entered a plea of *nolo contendere* to unlawful possession of firearm or weapon by convicted felon - a second degree felony. (R/Vol.I:46-50).

The victim testified at trial that two days before Thanksgiving he and a friend were on the street where he was working on his car when the Petitioner called him over and asked him if he knew what had happened to the bars on the Petitioner's window. (T/Vol.II:245). The Petitioner was carrying a shotgun which he had cocked and the victim replied that he knew nothing about the bars on the window. (T/Vol.II:245-246). The victim and his friend left shortly after that. (T/Vol.II:247). The next time that the victim encountered the Petitioner was on Thanksgiving night when he went to his sister's house to change the tire of his car. (T/Vol.II:247).

The Petitioner drove up in a dark Maxima and the passenger of the car got out carrying a gun and ordered them not to move. (T/Vol.II:247). The victim testified that he was not concerned when they drove up because he knew he had had nothing to do with the Petitioner's window bars. (T/Vol.II:248). Jose Zuniga testified that he was with the victim when he changed the tire of his car and that he became concerned when a dark car with tinted windows rolled up with no lights on. Zuniga testified that the victim told him not to worry about them because "[T]hey're my

homeboys." (T/Vol.II:218). The victim testified that when he saw the gun he said to the Petitioner "Oh, you still think I did that?" And that was when the Petitioner shot him. (T/Vol.II:248).

The witness, Jose Zuniga, testified that when he saw the driver pull the gun and heard it being cocked he ran around the corner. As he ran away, he heard a shot. Once the shooter was gone, Zuniga went back and found the victim unconscious. (T/Vol.II:218-220). While he was attempting to revive the victim, Officer Tara Richardson arrived on the scene. She found the victim slumped against the fence and called for fire rescue. Officer Richardson treated the victim until Fire Rescue arrived, and she ascertained the victim's name and that he knew who had shot him prior to victim's being transported to the hospital. (T/Vol.II:209). Officer Richardson then questioned Zuniga concerning the descriptions of the suspects. Zuniga described suspect one as approximately five feet ten inches tall, with brown eyes, and short, black afro-style hair. The second suspect was a black male, approximately five feet tall. (T/Vol.II:210-211).

Detective Diana Hedrick, the lead detective on the case, arrived on the scene and relieved Officer Richardson. She briefly interviewed Zuniga and then took him to the station to get a taped statement. Based upon Zuniga's taped statement Detective Hedrick put out a "BOLO" (Be On the Look Out), for a suspect who was not

“very tall, five feet eight or nine, heavy set, with a little bit of an afro, not shaved, short.” (T/Vol.I:174-178).

Following the shooting, on or about November 29, 1997, the victim’s mother, Brenda Wright, was visited by the Petitioner known to her only by his nickname “Brutus”. During this visit the Petitioner confessed to Ms. Wright that he had shot her son. (T/Vol.II:276). Ms. Wright reported this information to Detective Hedrick about a week after the shooting on December 3, 1997. (T/Vol.I:178-170).

Detective Hedrick went to the hospital to interview the victim on December 4, following her conversation with his mother, Ms. Wright. While there, the victim was able to identify the suspect by his nickname of “Fats” or “Brutus”. He was also able to tell her approximately where the suspect lived. (T/Vol.I:179-180). On December 9, 1997, Detective Hedrick made a positive identification of the Petitioner and arrested him. Following Petitioner’s arrest, Detective Hedrick prepared a photo array consisting of one picture of the Petitioner and five pictures of other individuals fitting his general description. The detective showed this array separately to the victim, Steward, and to the witness, Zuniga, who without hesitation were both able to pick out the Petitioner as the man who had shot the victim. (T/Vol.I:189-195).

During trial, commencing on October 1, 1998, before the Honorable Gill S. Freeman, the Petitioner objected to three

statements by Detective Hedrick during her direct examination, on grounds they were improper comments on his right to remain silent. The first comment occurred when, in response to the State's inquiry as to the significance of being lead detective, Hedrick stated:

> As lead detective, we are responsible for knowing anything that happens in the case, for making sure that all evidence is followed up properly, all the witnesses have been spoken to, all the victims. When the subject is apprehended, we are generally the one that does the interview unless there's some type of circumstances that maybe a supervisor does.

(T/Vol.I:185). The Petitioner objected and reserved a motion. (T/Vol.I:186).

The second instance occurred following the State's question as to what further work the detective had done on the case. The witness responded that she had picked up the subject and "attempted to interview the subject." (T/Vol.I:187). The defense objected. At sidebar the Petitioner moved for mistrial. The trial court stated the comments did not rise to the level necessitating a mistrial and gave the following curative instruction:

> Ladies and gentlemen of the jury, if you remember in the beginning of the case I told you that the defendant has no obligation to make any comment, as we all probably know from watching T.V. and otherwise.
>
> That also applies to the time when the defendant may have been picked up. So we don't want you to think, or expect, or in any way feel that the defendant had any obligation to talk to this officer or any other officer. That was the import of what we addressed in sidebar. Defendant has no obligation to speak to anybody and you should not derive or think

> that he had any obligation to speak to any officer at any time. Thank you.

(T/Vol.I:189).

The State continued the line of questioning eliciting the police detective's operating procedure and the third comment was made in which the detective stated that she had "read the defendant Miranda." (T/Vol.I:189). The Petitioner objected a third time and at sidebar moved for mistrial claiming that the jury was "certainly looking forward to what my client said or didn't say." (T/Vol.I:196). The trial court denied the motion, saying "[A]ll she said was she gave him the right to remain silent." (T/Vol.I:196).

During the trial both the victim and the witness testified that the Petitioner shot the victim. (T/Vol.I:179-180, 189-195). The victim's mother, Ms. Wright, testified that the Petitioner had confessed the shooting to her. (T/Vol.II:276).

The victim described his injuries, saying that he had gone in and out of consciousness after being shot, he was taken by ambulance to the hospital and was there for about two and a half weeks:

> **A.** All I know, they cut me open and did surgery. That's all I know. And they said a nerve system in my leg -- they had to tie up something, because the gun hit my abdomen. The bullet had hit my abdomen.
>
> **Q.** Do you feel any pain today from that?
>
> **A.** Not now. Not this minute.

> **Q**. Do you ever feel any pain today from that?
>
> **A**. Only like -- not that much. But if I'm asleep, if I move, it's like a sharp pain. But it won't last no more than five or ten minutes.

(T/Vol.II:249). The victim showed the jury the scar that he sustained from the injury and surgery. The victim further testified when asked if he had lost any organs as a result of the gunshot wound, that:

> **A**. Later on they said that. Now I just found out. I didn't know. It was because of the gun wound that something had wrapped around my small intestine and they had to take that out. That was the last time it was cut.

(T/Vol.II:250). The victim's medical records from Jackson Memorial Hospital relating to the treatment for the gunshot wound were admitted in evidence pursuant to defense counsel's stipulation. (T/Vol.II:285-286).

At sentencing before the Honorable Gill Freeman on December 2, 1998, the State moved *ore tenus* for a sentence in excess of the guidelines based on the facts adduced at trial, for the lack of remorse that Petitioner displayed, and for the condition and the injuries suffered by the victim. (Supp. T/14).

The trial court reviewed her notes from the trial and stated:

> THE COURT: I reviewed my notes from the trial, and my notes reveal that Mr. Stewart, (the victim) again, **was shot in the abdomen area. He had to have surgery including having something removed from his small intestine. I don't know whether that was as a result of**

> **scar tissue or the injury itself. He's had nerve damage which affects his leg, and if he moves too sharply he still has pains. He was in the hospital for two and a half weeks,** including several days in Intensive Care.
>
> The testimony with regard to Mr. Bryant when Mr. Stewart came home from the hospital was that Charles walked up to the car. He said, "I am still the same Charles," and started banging on the car. And out of fear the Petitioner's family and the victim's family took him to the aunt's house to stay because they were afraid. **I didn't hear any remorse here. I think this was a pretty cold and calculated crime.**
>
> Mr. Bryant was going to teach Mr. Stewart a lesson because he believed he had participated in having stolen some things from his apartment. Mr. Stewart didn't even have an appreciation of what was going to happen to him. At the time he told his friend who had taken him to his car, you know, "No problem. These are my home boys," or "my brothers," or whathaveyou was the comment. And then all of a sudden he was shot.
>
> I think the offense created a substantial risk of death or great bodily harm to Mr. Stewart, and I think that at this time it is appropriate to depart from the guidelines, and that there are aggravating circumstances from which I can depart. And in particular, ...
>
> **The victim suffered extraordinary physical or emotional trauma or permanent physical injury, or was treated with particular cruelty.** As a consequence, I'm going to sentence Mr. Bryant to 15 years in State prison with credit for all time served.

(Supp. T/20-22). Defense counsel objected to the departure as improper and invalid on grounds that it was covered by the guidelines that includes victim injury. (Supp. T/22).

The Petitioner's revised sentencing guidelines scoresheet, totaled 137.2 points indicating a minimum 81.9 months and a maximum 136.5 months state prison or 6.8 years minimum and 11.3 years maximum state prison. (R/Vol.I:44-45). The trial court indicated by checking the appropriate box on the sentencing guidelines scoresheet, that she was imposing a guidelines aggravated departure sentence. (R/Vol.I:45). On December 2, 1998, the trial court imposed a sentence of fifteen (15) years on Count I and five (5) years on Count II to be served concurrent to each other. (R/Vol.I:48-50).

The certified court reporter's transcript of the sentencing proceeding was filed in the court, twelve days after sentencing on December 14, 1998. (Supp. T/34). No separate written reasons were filed. No motion to correct sentence pursuant to Rule 3.800(a), of the Florida rules of Criminal Procedure was filed in the circuit court.

The Petitioner's appeal was filed on December 29, 1998, alleging as error 1) that Detective Hedrick's three comments on silence were fundamental error warranting reversal, and 2) that the trial court's failure to file written reasons for departure warranted reversal. The Third District Court of Appeal affirmed.

This petition followed.

QUESTIONS PRESENTED

I

WHETHER THE TRIAL COURT'S FAILURE TO FILE WRITTEN REASONS FOR A VALID UPWARD DEPARTURE SENTENCE WITHIN SEVEN DAYS OF THE ORAL PRONOUNCEMENT OF SENTENCE IS REVERSIBLE ERROR WHERE THE PETITIONER'S UNPRESERVED CLAIM DID NOT CONSTITUTE FUNDAMENTAL ERROR AND PETITIONER WAS NOT PRECLUDED FROM CHALLENGING THE DEPARTURE SENTENCE ON DIRECT APPEAL? [RESTATED]

II

WHETHER THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR MISTRIAL WHERE THE DETECTIVE'S COMMENTS WERE NOT FAIRLY SUSCEPTIBLE OF BEING INTERPRETED AS COMMENTS ON THE PETITIONER'S EXERCISE OF HIS RIGHT TO REMAIN SILENT AND WHERE THE COMMENTS COULD NOT HAVE CONTRIBUTED TO THE VERDICT? [RESTATED]

SUMMARY OF THE ARGUMENT

1. The trial court properly departed upward of the sentencing guidelines where valid reasons for departure -- that the victim suffered extraordinary physical or emotional trauma or permanent physical injury and was treated with particular cruelty -- were orally pronounced at sentencing, and reversal is not warranted where Petitioner failed to preserve the issue for appeal and has not shown that he was prejudiced by the failure to file written reasons within seven days of the oral pronouncement of sentence.

2. The trial court properly denied Petitioner’s motion for mistrial where the detective’s comments were not fairly susceptible of being interpreted as comments on the Petitioner’s exercise of his right to remain silent and where the comments could not have contributed to the verdict.

ARGUMENT I

THE TRIAL COURT'S FAILURE TO FILE WRITTEN REASONS FOR A VALID UPWARD DEPARTURE SENTENCE WITHIN SEVEN DAYS OF THE ORAL PRONOUNCEMENT OF SENTENCE IS NOT REVERSIBLE ERROR WHERE THE PETITIONER'S UNPRESERVED CLAIM DID NOT CONSTITUTE FUNDAMENTAL ERROR AND PETITIONER WAS NOT PRECLUDED FROM CHALLENGING THE DEPARTURE SENTENCE ON DIRECT APPEAL.

Petitioner contends that the trial court's failure to enter a written order supporting the departure sentence within seven days of sentencing warrants reversal and remand for further proceedings on the authority of Maddox v. State, 760 So. 2d 89 (Fla. 2000) and Butler v. State, 761 So. 2d 319 (Fla. 2000). The State submits that the Third District Court of Appeal correctly affirmed the judgment and sentence of the lower court on the authority of Jordan v. State, 728 So. 2d 748, 753-754 (Fla. 3d DCA 1998), *affirmed*, 761 So. 2d 320 (Fla. 2000) and Weiss v. State, 720 So 2d 1113 (Fla. 3d DCA 1998), *affirmed*, 761 So. 2d 318 (Fla. 2000), where the absence of written reasons did not constitute fundamental error and Petitioner was not precluded from attacking the substance and validity of the reasons for departure by collateral attack or direct appeal.

To preserve for appeal a Petitioner's claim that a written departure order had not been filed within seven days of sentencing, the Petitioner is required to file with the trial court a motion to correct sentence between the eighth and thirtieth days following sentencing. Jordan v. State, 728 So. 2d at 753-754. Under the

Criminal Reform Act a "sentence may be reversed on appeal only when an appellate court determines after a complete review of the record that *prejudicial error* occurred and was properly preserved... or, if not properly preserved, would constitute fundamental error." Section 924.051(3), Fla. Stat. Where an error is unpreserved, appellate court jurisdiction to review the purported error lies only as to fundamental error, including unpreserved fundamental sentencing errors. Bain v. State, 730 So. 2d 296, 304-306 (Fla. 2d DCA 1999). Even where a sentence departs from the guideline calculations on a scoresheet, the departure does not constitute fundamental error if the sentence falls within the maximum period allowed by law. Fagundo v. State, 667 So. 2d 476, 477 (Fla. 3d DCA 1996).

This Court's decision in Maddox held that a departure sentence in which the trial court failed to file statutorily required reasons for departure is a fundamental sentencing error that can be corrected on direct appeal even if not preserved. In deciding Jordan and Weiss as part of those cases of the express and direct conflict among the sister courts, this Court concluded:

> ...We agree that when written reasons for imposing a departure sentence were filed late, this late filing does not constitute a fundamental sentencing error **if the defendant was not hindered in his or her efforts to challenge the grounds for imposing the departure sentence on direct appeal.** *See Weiss*, 720 So. 2d at 1115; *Jordan*, 728 So. 2d at 753. (Emphasis added.)

Maddox v. State, 760 So. 2d at 108, *citing* Weiss v. State, 720 So. 2d at 1114 (finding that even if the trial court had filed the written reasons for departure three days late, the defendant had not been prejudiced thereby); Jordan v. State, 728 So. 2d at 753 (finding the defendant had not been prejudiced when the written reasons for departure were filed twenty-two days late but the defendant was able to attack the court's reasons for imposing the departure sentence on appeal).

Petitioner alleges that neither Jordan nor Weiss apply in this case because the written reasons were filed late, as opposed to this case in which a written order was not filed. It is patently clear that the ministerial act of filing written reasons is grounded in the principle of fair notice to a defendant of the charges and issues against which he must defend himself. If, as in Johnson v. State, the court here had failed to announce orally the reasons for departure at sentencing, and then had also failed to file written reasons, Petitioner would have had no notice and would have been precluded from a defense against the reasons for departure. Johnson v. State, 717 So. 2d 1057, 1065 (Fla. 1st DCA 1998). But, here, the record demonstrates that the trial court orally pronounced the reasons for departure at sentencing (Supp. T/20-22), and marked the sentencing guidelines scoresheet in the appropriate box for a guidelines aggravated departure sentence. (R/Vol.I:45). The certified court reporter's transcript of the

sentencing proceeding was filed in the court twelve days later on December 14, 1998. (Supp. T/34). Rule 3.703(d)(30)(A), Fla.R.Crim.P.; Torres-Arboledo v. State, 524 So. 2d 404, 414 (Fla. 1988), *cert. denied* 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988)(Notations written by the clerk at the bottom of the sentencing guidelines scoresheet under reasons for departure, at the direction of the court are sufficient written reasons for departure for purposes of imposing a sentence for attempted armed robbery.); Law v. State, 639 So. 2d 1102 (Fla. 5th DCA 1994); Pearson v. State, 650 So. 2d 210, 211 (Fla. 3d DCA 1995). Court status reports listing a trial court's reasons for departure from the sentencing guidelines are sufficient contemporaneous writing to support downward departure sentences. State v. Stone, 617 So. 2d 355 (Fla. 4th DCA 1993).

Therefore, Petitioner was on notice of the articulated reasons for departure and had a written transcript of the reasons with sufficient time to challenge their validity. By failing to file a motion to correct illegal sentence within the allotted time, Petitioner failed to preserve the issue of the trial court's failure to file written reasons. Nonetheless, Petitioner was not precluded from challenging the propriety of the reasons used for departure from the guidelines.

Petitioner's contention that reversal is warranted on grounds that the trial court failed to file written reasons within the

required seven day period is without merit, first, because the Petitioner failed to preserve the issue for appeal by failing to move to correct the sentence prior to filing notice of appeal, in order to give the trial court the opportunity to address and correct the error if any. Jordan v. State, 728 So. 2d at 753-754. Moreover, secondly, any error in the trial court's late filing of a written departure order was not prejudicial to the Petitioner where the oral reasons were pronounced on the date of sentencing, December 2, 1998, and the court reporter's written transcript of the sentencing proceeding delineating the reasons for departure was filed on December 14, 1998, twelve days later and fifteen days prior to Petitioner's notice of appeal on December 29, 1998. Jordan v. State, 728 So. 2d at 753-754 (The theory of requiring the entry of written reasons was to allow the written reasons to be available to the Petitioner in deciding to take an appeal). Where the record, as here, reveals no prejudice to the Petitioner in that the Petitioner filed a timely appeal and in his appeal he challenges the substance of departure order, the delay in the filing of the departure order must be treated as harmless error.

Petitioner's reliance upon Butler v. State for the proposition that failure to file written reasons for departure is fundamental error warranting reversal is misapplied. Butler v. State, 723 So. 2d 865 (Fla. 1st DCA 1998), *quashed* 761 So. 2d 319 (Fla. 2000). In Butler the defendant failed to show that he was prejudiced by the

trial court's failure to file written reasons justifying upward departure sentence, where trial court explained on the record at the sentencing hearing why it was imposing an upward departure sentence, and the defendant did not challenge sufficiency of those reasons on appeal; so to the extent that error occurred, it was not fundamental. Butler v. State, 723 So. 2d at 865. In this case, Petitioner's counsel objected to the upward departure sentence, thus preserving the sufficiency of the reasons for appeal. In order to preserve the failure to file written reasons for appeal here, Petitioner needed to file a motion to correct illegal sentence allowing the trial court the opportunity to comply with the ministerial duty.

Parenthetically, the top of the guidelines range for the Petitioner was 11.3 years, and adding the 25% increase which is permitted without the necessity of filing written reasons for upward departure, totals 14.1 years sentence which the trial court could have given without written reasons. Here, the trial court sentenced the Petitioner to 15 years, or 9 tenths of a year over 14.1 years, but not exceeding the statutory maximum sentence permitted for attempted second degree murder with a firearm - a first degree felony punishable by a term of years not exceeding thirty (30) years or life. Section 775.082(3)(b), Fla. Stat. Petitioner was awarded 359 days credit for time served. The departure sentence was not excessive nor illegal.

Petitioner is mistaken in thinking that Section 921.0016 "precludes" the imposition of a departure sentence without a written order, thus rendering all such sentences facially illegal as a matter of law, mixing the proverbial oranges and apples to create "fundamental error." A reading of the statute shows that a departure sentence (the orange) is imposed and in addition the trial court must file written reasons (the apple) as an additional step in the process of sentencing, and is permitted to do so in a number of ways. Only when the integrity of the "apple" is called into question, does a challenge arise as to the sustainability or legality of the "orange," but they are separate entities litigated as matters of fact, and are not to be taken together to create "fundamental error." Nelson v. State, 719 So. 2d 1230, 1232 (Fla. 1st DCA 1998).

Therefore, where Petitioner failed to preserve for appeal his claim that written departure order had not been filed within seven days of sentencing by timely filing a motion to correct sentence, and where such error was not shown to be prejudicial to the Petitioner, the upward departure sentence is permissible. Jordan v. State, 728 So. 2d at 753-754; Weiss v. State, 720 So. 2d at 1115.

ARGUMENT II

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR MISTRIAL WHERE THE DETECTIVE'S COMMENTS WERE NOT FAIRLY SUSCEPTIBLE OF BEING INTERPRETED AS COMMENTS ON THE PETITIONER'S EXERCISE OF HIS RIGHT TO REMAIN SILENT AND WHERE THE COMMENTS COULD NOT HAVE CONTRIBUTED TO THE VERDICT.

Petitioner claims that the lead detective's repeated references to his attempts to obtain a statement from him constituted comments on his silence and was cumulative error warranting reversal. The Petitioner is mistaken where the three statements were not repetitive, not fairly susceptible of interpretation as comments on his silence, were properly cured upon objection and motion for mistrial, and did not contribute to the verdict.

The standard of review on a motion for mistrial is that such a motion should be granted only in circumstances where the error committed is so prejudicial as to vitiate the entire trial. Solomon v. State, 596 So. 2d 789, 790 (Fla. 3d DCA 1992); Duest v. State, 462 So. 2d 446 (Fla. 1985). Such a motion is addressed to the sound discretion of the trial judge and should only be granted in the case of absolute necessity. Salvatore v. State, 366 So. 2d 745 (Fla. 1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979).

The threshold issue in addressing comments on silence is whether the complained of comments were "fairly susceptible" of

being construed by the jury as a comment on the defendant's right to remain silent. Only those comments which are "fairly susceptible" of being interpreted by the jury as a comment on the defendant's right to silence will be treated as such. State v. DiGuilio, 491 So. 2d. 1129, 1135 (Fla. 1986).

Where a detective stated on the witness stand that he had attempted to interview the defendant at the police station in response to a question relating to his responsibilities in the case, the district court held that the comment was not fairly susceptible of being construed as a comment on the defendant's right to remain silent. McKay v. State, 504 So. 2d 1280 (Fla. 1st DCA 1986). In State v. Roswell this Court held that an officer's comment that he attempted to take a statement from the defendant but "he refused to give me any information" was not fairly susceptible of being construed as a comment on silence. State v. Roswell, 476 So. 2d 149, 150 (Fla. 1985).

In the instant case, the comments made by Detective Hedrick stemmed from a line of questioning relating to the nature of the detective's job and the work which she had done on this particular case. In the first "comment" Hedrick gave the jury a general job description of a lead detective's responsibilities saying that one of her many duties was to interview suspects. (T/Vol.I:185). As in McKay, the detective was merely explaining her job responsibilities when she indicated that once a subject is

apprehended it is her responsibility to interview the suspect or to have her supervisor do the interview. This comment does not lend itself to interpretation as a comment concerning whether or not the Petitioner answered questions, was silent or invoked his right to silence. McKay v. State, 504 So. 2d at 1283.

In the second instance Hedrick described the progress of her investigation by saying, "we picked up the subject and I attempted to interview the subject." (T/Vol.I:187). During side-bar following the Petitioner's objection, the trial court stated that she did not think the comment rose to the level of a mistrial and immediately gave a comprehensive curative instruction to the jury. (T/Vol.I:188). It is presumed that the jury will follow the court's instruction. Sutton v. State, 718 So. 2d 215, 217 (Fla. 1st DCA 1998). The detective never indicated the Petitioner's response to the attempted interview. The First District in McKay found the same fact to be further indication that the officer's comment was not fairly susceptible of being a comment on silence. McKay v. State, 504 So. 2d at 1283; State v. Roswell, 476 So. 2d at 150.

In the third instance, the detective responded to the State's inquiry regarding the progress of the case stating, "I read the defendant Miranda." (T/Vol.I:196). To tell the jury the Petitioner was given his proper constitutional warning is not the same as telling the jury that the Petitioner himself was, or was not silent. The detective was merely stating, as the trial court

observed at side-bar, that she was reading the Petitioner his Miranda rights, which, obviously, included his right to remain silent. (T/Vol.I:196). The detective's statement did not imply to the jury that she had attempted to obtain a statement, and that the Petitioner refused to give a statement. She only said she had done her job by following standard police procedure in informing him of his constitutional rights. Furthermore, following the Petitioner's objection, nothing further was stated and the detective did not testify as to the Petitioner's response to the Miranda warnings. McKay v. State, 504 So. 2d at 1283; State v. Roswell, 476 So. 2d at 150.

As Florida courts have shown in considering comments on silence, there are no "magic words" which when uttered by a witness automatically create an impression in the minds of jurors that the witness is commenting on a defendant's right to silence. Instead, as this Court indicated in State v. Roswell and the Third District opined in Garrett v. State, the statements must be viewed with an eye towards the totality of the circumstances in which the comments were made. State v. Roswell, 476 So. 2d at 150; Garrett v. State, 645 So. 2d 101, 102 (Fla. 3d DCA 1994)(where a mistrial was not warranted upon a police officer's comment that the defendant "would not answer my questions, but he was very coherent" because the statement was made to show that the defendant was not intoxicated shortly after the charged offense.). The statements made by

Detective Hedrick, viewed in the context and under the circumstances in which they were made, informed the jury of the nature of her responsibilities and the investigation which she had performed on the case, and gave no indication of the Petitioner's response or lack of response to her work.

Furthermore, statements found to be "fairly susceptible" of being interpreted as comments on silence are subject to harmless error analysis. Jackson v. State, 522 So. 2d 802, 807 (Fla. 1988). When applying the harmless error test the appellate court must examine the entire record including both a close examination of the permissible evidence on which the jury could have legitimately relied for conviction, and also an even closer examination of the impermissible evidence which might possibly have influenced the jury to convict. State v. DiGuilio, 491 so. 2d at 1135.

Here, an examination of the entire record shows beyond a reasonable doubt that the evidence of guilt is clearly conclusive and there is no reasonable possibility that the detective's comments affected the verdict of the jury. There were two eye witnesses, one of whom was the victim himself, who identified the Petitioner from a photo array as the person who approached them with a gun. Both the eyewitness -- the victim himself -- and the other witness -- who did not see the actual shooting but heard the shot as he turned and ran for cover -- identified the Petitioner as the shooter without hesitation. (T/Vol.I:192, 195). In addition,

the victim's mother testified that the Petitioner came to her house and confessed that he had shot her son. (T/Vol.II:276).

Thus, there was ample evidence to support the jury's verdict. Indeed, the detective's testimony did little more than put into perspective the circumstances under which the shooting took place and established a time-line for the investigation. The detective's three comments could be expunged from the record and the outcome would have been the same. Therefore, the trial court properly denied mistrial where a comprehensive curative instruction was given, and the statements made by Detective Hedrick taken singly or cumulatively were not fairly susceptible of being construed by the jury as comments on the Petitioner's right to silence. Any error, if error at all, was harmless where there was no reasonable possibility that they contributed to the verdict. State v. DiGuilio, 491 so. 2d at 1135.

CONCLUSION

WHEREFORE, the State respectfully requests that Opinion of the Third District Court be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was mailed to **ROSA C. FIGAROLA and VALERIE JONAS**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 NW 14th Street, Miami, Florida 33125 on this ____ day of January, 2001.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel for Petitioner, the State of Florida, hereby certifies this brief is formatted to print in Courier New 12-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-933

DCA CASE NO. 3D99-47

CHARLES L. BRYANT,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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BRIEF OF RESPONDENT ON THE MERITS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPENDIX TO BRIEF OF PETITIONER** was mailed to **ROSA C. FIGAROLA and VALERIE JONAS**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 NW 14th Street, Miami, Florida 33125 on this ____ day of January, 2001.

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