IN THE SUPREME COURT OF FLORIDA

ROBERT RIMMER,

Petitioner,

vs. Case No. SC09-1250

WLATER McNEILL,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner, Robert Rimmer, will be referred to as “Rimmer,” State of Florida, will be referred to as “State”. Reference to the appellate record will be by “R”, to the postconviction record will be “PCR”, and supplemental materials will be designated by the symbol “S” preceding the type of record referenced, Rimmer’s petition will be notated as “P.”

STATEMENT OF THE CASE AND FACTS

On May 27, 1998, Rimmer was indicted for two counts of first-degree murder, two counts of armed robbery, and two counts of armed kidnapping of Aaron Knight and Bradley Krause, Jr.; one count of armed robbery and one count of armed kidnapping of Joe Louis Moore; one count of armed kidnapping and one count of attempted armed robbery of Luis Rosario; and on count of aggravated assault upon Kimberly Davis-Burke (R.20 2112-2115). After jury trial, Rimmer was found guilty as charged on all counts (R.21 2283-2293). On February 25, 1999, the jury recommended a sentence of death, by a vote of 9 to 3 and on March 19, 1999, the trial court followed the jury’s recommendation and sentenced Rimmer to death for the first-degree murders of Aaron Knight and Bradley Krause, Jr. (R.21 2320, 2346-2378, 2383-2399). Rimmer also received consecutive life sentences for the armed robberies and armed kidnappings of

Aaron Knight, Bradley Krause, Jr., Joe Louis Moore and Luis Rosario. The court imposed a 30 year sentence for the attempted armed robbery of Luis Rosario, and a 10 year sentence for the aggravated assault of Kimberly Davis-Burke, which were to run consecutive to the death sentences, but concurrent to life sentences and to each other (R.21 2346-2378).

This court found the following facts on direct appeal.

> Appellant and codefendant Kevin Parker were jointly tried and convicted of two counts of first-degree murder, armed robbery, armed kidnaping, attempted armed robbery, and aggravated assault for the robbery and murders that occurred at the Audio Logic car stereo store in Wilton Manners, Florida. The facts in this case reveal that on May 2, 1998, appellant Robert Rimmer and possibly two others, including co-felon Kevin Parker, robbed Audio Logic, during which Rimmer shot and killed two people.FN1 The two employees, Bradley Krause and Aaron Knight, who were in the installation bay area of the store, were told to lie face down on the floor and their hands were duct-taped behind their backs. Two customers, Joe Moore and Louis Rosario, were also told to lie face down on the floor and their hands were then bound by duct tape. According to eyewitness Moore, appellant stopped him as he was leaving the store, showed him a gun tucked into the waistband of his pants, and ordered Moore to go back inside the store. Rosario, who was outside smoking a cigarette when the robbery began, also had been ordered to go inside the store, but he did not see the person who had told him to go inside. Personal items were taken from Knight, Krause, and Moore, including Moore's wallet and cellular telephone. During this episode, appellant was armed with a Vikale .380 caliber semiautomatic weapon.
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> > FN1. The State argued that a third man was also involved but he was never located.
>
> While this was taking place, another victim, Kimberly Davis Burke ("Davis"), FN2 was sitting in the waiting

room of the store with her two-year-old daughter. While there, she had observed a purplish Ford Probe and a Kia Sephia drive up to the store. The Kia Sephia stopped in front of the store and co-felon Parker got out. He entered the store through the front door, looked inside a display case that was in the waiting room, spoke briefly with Davis and her daughter, and then exited through one of the doors that led to the bay area. Soon thereafter, Davis noticed appellant in the installation area. He then entered the waiting room and told Davis that her boyfriend Moore was looking for her. When Davis walked into the bay area of the store and observed the four men lying on the floor, she immediately understood what was happening and sat down, placing her daughter on her lap. Although appellant told Davis not to look, she observed appellant and two other individuals load stereo equipment into the Ford Probe, which was parked in the bay area.

> FN2. The record reflects that this witness was referred to as Kimberly Davis, Kimberly Davis Burke, and Kimberly Burke.

At one point, appellant asked victim Knight for the keys to the cash register. He also asked if anyone owned a weapon. Knight told appellant that he had a gun, which he kept in a desk drawer in the store. Appellant retrieved the gun, a Walther PPK. Appellant also asked the two employees if there were any surveillance cameras, and if so, where the tapes were kept. The employees told appellant that the store did not have any surveillance cameras.

When the men finished loading the Ford Probe, appellant told Davis to move away because “he didn't want this to get on her.” The victims heard appellant start to drive the car out of the bay area and then stop. Appellant returned to the bay area and said to Knight, “You know me.” Knight responded that he did not. Appellant then said, “You do remember me” and walked up to Knight, placed the pistol to the back of his head and shot him. At the sound of the gunshot, Moore jumped to his feet. Appellant pointed the gun at him and told him to lie back down. Appellant then walked over to Krause and shot him in the back of the head. Appellant then thanked the three remaining

victims for their cooperation and told them to have a nice day. According to the surviving victims, the entire episode lasted fifteen to twenty minutes.

Knight died instantly. Krause, who was still alive when the police arrived, was taken to the hospital where he later died. According to the medical examiner, although Krause did not die instantly, he would have lost consciousness upon being shot. The police recovered a spent projectile fragment and shell casings from the scene of the crime, which were later identified as .380 caliber components. According to the State's firearm expert, the projectile fragment and shell casings came from the gun used by the assailant.

On May 4, 1998, Davis provided a sketch artist with a description of the shooter. The resulting sketch was given to Mike Dixon, the owner of the Audio Logic store, and several of his competitors. One competitor, John Ercolano, recognized appellant as the person depicted in the sketch and called Dixon. Apparently, Audio Logic had installed speakers in appellant's car in November of 1997. Appellant had returned in December of 1997 complaining that the speakers were not working properly. He had also taken his car to Ercolano's shop, complaining that Audio Logic had not installed the speakers correctly. Based on records kept by Audio Logic, the police learned appellant's identity, phone number, and address.

On May 8, Davis and Moore picked appellant out of a photographic lineup and later identified him from a live lineup as the person who shot the victims. Dixon identified appellant as the person who he had spoken to about installing equipment in his car.FN3

> FN3. Dixon was not present at the Audio Logic store at the time of the shooting. When the shooting occurred, he was working at the sister store, located in Davie, Florida.

Appellant was arrested on May 10, 1998, after leading the police in a twelve-minute, high-speed car chase which ended at his residence. During the chase, appellant threw several items from his car, including

Moore's wallet, the firearm used during the shooting,FN4 and the Walther PPK stolen from the store. At the time of his arrest, appellant was driving a 1978 Oldsmobile. Shortly after his arrest, appellant's wife drove up in the Ford Probe. Both the Probe and the Oldsmobile were registered to appellant and both cars were impounded. During a subsequent court-ordered search of the Oldsmobile, the police discovered a day-planner organizer which contained a lease agreement for a storage facility. Appellant had rented the storage unit on May 7, just five days after the shooting incident. When the police searched the storage facility pursuant to a search warrant, they found the stolen stereo equipment. Both appellant's and Parker's fingerprints were on the equipment.FN5 A surveillance tape, which was admitted in evidence, showed appellant renting the storage unit. Parker was arrested on June 12, 1998.

> FN4. According to the State's firearm expert, the projectile fragment and shell casings found at the scene of the crime matched this firearm.
>
> FN5. At trial, a fingerprint expert testified that approximately twenty-four prints matched appellant's fingerprints and twenty-one prints matched Parker's.

During appellant's case-in-chief, appellant's wife testified that on the day of the murders, appellant had intended to go fishing with his son. She further testified that she drove the Ford Probe that day, not appellant. The defense also called two experts who testified about appellant's visual impairment. Apparently, appellant wears corrective lenses. It was the defense's theory that appellant could not have been the shooter because he wears glasses and the person who committed the murders was not wearing any glasses. The State presented rebuttal testimony from a Detective Kelley who also wears corrective lenses. Over defense counsel's objection, Detective Kelley testified about his ability to see without wearing glasses. At the close of all the evidence, the jury returned guilty verdicts on all counts charged in the indictment as to both defendants.

During the penalty phase, the trial court severed the proceedings so that each defendant could present mitigation evidence separately from the other. The court held Rimmer's penalty phase proceeding first. Parker's penalty phase proceeding commenced after the jury rendered an advisory sentence for Rimmer. During Rimmer's penalty phase proceeding, the State introduced facts surrounding Rimmer's conviction of prior felonies and victim impact evidence. The defense presented several witnesses, who testified about Rimmer's background, work, and family relationships. The defense also presented testimony from Dr. Martha Jacobson, a clinical psychologist who testified about appellant's mental illness. According to Dr. Jacobson, appellant suffers from a schizophrenic disorder.FN6 However, she offered no opinion as to whether appellant's mental condition supported any statutory mitigators.

> FN6. At the hearing held in compliance with *Spencer v. State*, 615 So.2d 688, 690-91 (Fla. 1993), the defense presented a second expert, Michael Walczak, a neuropsychologist, who agreed with Dr. Jacobson's diagnosis.

The jury recommended that appellant be sentenced to death for both murders by a vote of nine to three.FN7 The trial court followed the jury's recommendation, finding six aggravating factors: (1) the murders were committed by a person convicted of a felony and under a sentence of imprisonment; (2) the defendant was previously convicted of another capital felony and a felony involving use or threat of violence to the person; (3) the murders were committed while the defendant was engaged in a robbery and kidnaping; (4) the murders were committed for the purpose of avoiding or preventing lawful arrest; (5) the murders were especially heinous, atrocious, or cruel (HAC); and (6) the murders were cold, calculated, and premeditated (CCP). The trial court only gave moderate weight to the HAC and murder in the course of a felony aggravators; the court gave great weight to the remaining four aggravators. The trial court found no statutory mitigators,FN8 but found several nonstatutory mitigators: (1) Rimmer's family background (very little weight); (2) Rimmer is an

> excellent employee (some weight); (3) Rimmer has helped and ministered to others (minimal weight); (4) Rimmer is a kind, loving father (not much weight); and (5) Rimmer suffers from a schizoaffective disorder (little weight).

Rimmer v. State, 825 So.2d 304, 308-11 (Fla. 2002) (footnotes omitted).

Rimmer presented 10 issues on direct appeal:

> (1) the trial court erred in denying a motion to suppress physical evidence where the items seized were not part of the search warrant for defendant's vehicle; (2) the trial court erred in admitting the pretrial and trial identifications of appellant by two witnesses where the procedures employed by the police were unnecessarily suggestive; (3) the trial court erred in excusing two prospective jurors; (4) the trial court erred in allowing Detective Kelley to testify about his ability to see without prescription eyeglasses as rebuttal testimony to evidence that appellant could not function without his glasses; (5) the trial court erred in failing to declare a mistrial when the prosecutor asked the appellant's wife whether she had ever asked her husband about the murders, thereby encroaching upon appellant's right to remain silent; (6) prosecutorial comments during the guilt phase proceedings denied appellant of a fair trail; (7) the trial court erred in allowing the prosecutor to cross-examine the defense's mental health expert about appellant's criminal history where the expert did not rely on the evidence in her evaluation or opinion; (8) improper prosecutorial comments during the penalty phase proceedings denied appellant a fair trial; (9) the evidence is insufficient to support the heinous, atrocious and cruel (HAC) aggravator; and (10) the trial court erred in permitting the jury to consider victim impact evidence.

Rimmer, 825 So.2d at 311 n.9. S*ua sponte*, proportionality was addressed by this Court.

Following this Court's affirmance of the convictions and sentences, Rimmer sought certiorari review with the United States Supreme Court where he raised five issues.[1] On November 18, 2002, certiorari review was denied.

By order dated August 26, 2002, Capital Collateral Regional Counsel–South (CCRC-South) was appointed to represent Rimmer in his collateral proceedings. Rimmer v. Florida, 537 U.S. 1034 (2002). Rimmer was allowed to amend his initial postconviction relief motion and was granted an evidentiary hearing on six claims. The evidentiary hearing was conducted on May 10-13, 2005, during which testimony was taken regarding Rimmer's guilt and penalty phase issues. The trial court denied relief on all claims. Subsequently, Rimmer appealed (case no. SC07-1272) and filed the instant petition simultaneously with his postconviction relief initial brief.

[1] (1) Whether Petitioner's constitutional rights were violated by the admission of in-court and out-of-court identifications by two witnesses; (2) Whether Petitioner's constitutional rights were violated by admitting Rimmer's day planner/organizer seized during search; (3) Whether Petitioner's constitutional rights were violated by the for cause excusal of Juror David Vandeventer; (4) Whether Petitioner's constitutional rights were violated as a result of the prosecutor's comments; and (5) Whether Petitioner's constitutional rights were violated as a result of the admission of rebuttal testimony.

ARGUMENT

ISSUE I

APPELLATE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY NOT CHALLENGING ON APPEAL THE TRIAL COURT'S DECISIONS ON THE DEFENSE'S CLAIM OF A DISCOVERY VIOLATION AND MOTION FOR SEVERANCE (restated)

Rimmer makes two claims of ineffective assistance of appellate counsel related to the discovery violation the trial curt found and the denial of the defense motion for severance. With respect to both the discovery violation and severance, (1) Rimmer asserts that counsel should have challenged the prosecutor's statement that he had no further questions for Detective Lewis based on the trial court's evidentiary ruling in the context of the discovery and severance issues instead of as one of prosecutorial misconduct (P 9, n. 3). Referencing the discovery violation alone, (2) Rimmer criticizes appellate counsel for not arguing that a mistrial should have been granted based upon the discovery violation for the State's late disclosure of Potter Mallard's ("Mallard") statement to the prosecutor. (P 11-12). With respect to the motion to sever, (3) Rimmer maintains that counsel should have argued on appeal that the motion to sever should have been granted because Mallard's statement was admitted, and had the severance been granted, the statement would not have been admissible. The State asserts the initial complaint is procedurally barred and

disagrees that appellate counsel was ineffective for not having raised these issues on direct appeal.

Claims of ineffective assistance of appellate counsel are presented appropriately in a petition for writ of habeas corpus. See Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000). When analyzing the merits of the claim of ineffectiveness of appellate counsel, the criteria parallel those for ineffective assistance of trial counsel outlined in Strickland v. Washington, 466 U.S. 668 (1984). See Rutherford v. Moore, 774 So.2d 637, 643 (Fla. 2000) (explaining that the standard of review applicable to claims of ineffective assistance of appellate counsel raised in a habeas petition mirrors the Strickland standard for trial counsel ineffectiveness, i.e., deficient performance and prejudice from the deficiency)).

In Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000), this Court set out the review appropriate for claims of ineffective assistance of appellate counsel stating:

> In evaluating an ineffectiveness claim, the court must determine
>
> > whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

> *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So.2d at 470; *Hardwick*, 648 So.2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So.2d 997 (Fla. 1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id. at 1001*. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So.2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman, 761 So.2d at 1069. Appellate counsel cannot be deemed ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error." Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (citations omitted). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." Rutherford, 774 So.2d at 643. (quoting Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994).

Additionally, "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been

raised, on direct appeal or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal." Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). As noted in Chavez v. State, 12 So.3d 199, 213 (Fla. 2009):

> capital defendants may not use claims of ineffective assistance of appellate counsel to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000). Moreover, appellate counsel cannot be ineffective for failing to raise a meritless issue. *See Lawrence v. State*, 831 So.2d 121, 135 (Fla. 2002); *see also Kokal v. Dugger*, 718 So.2d 138, 142 (Fla. 1998) ("Appellate counsel cannot be faulted for failing to raise a nonmeritorious claim.").

Chavez, 12 So.3d at 213.

(1) Challenge of prosecutor's comment in context of discovery and severance issues (P 9, n.3) - With respect to how counsel addressed the prosecutor's statement regarding Detective Lewis, the matter is procedurally barred and meritless. On direct appeal, the prosecutor's comment following the court's ruling on Detective Lewis' testimony was raised as one of prosecutorial misconduct. This court found the comment was preserved for appeal, but that the court's instruction to the jury to disregard the comment, sufficiently remedied the issue, thus rendering the claim of prosecutorial misconduct at trial

meritless. Rimmer's allegation that counsel should have argued the point differently is procedurally barred. See Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987) (announcing habeas corpus may not be used to obtain a second or substitute appeal). Moreover, the claim is meritless given the ruling on direct appeal that the remedy was sufficient to render the meritless the claim of misconduct. Where the comment was found remedied, it cannot be said that reversible error would have been found related to the remedy given for a discovery violation or the denial of a severance where the admitted testimony did not inculpate Rimmer. Rutherford, 774 So.2d at 643 (noting "[i]f a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.") Furthermore, Rimmer does not explain how failing to raise this argument on appeal prejudiced him; i.e., how confidence in the result of the direct appeal is undermined.

(2) Challenge to the discovery violation – Appellate counsel did not challenge the court's ruling following a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971). The trial court found a discovery violation for the State's failure

to turn over Mallard's December 22, 1998 statement[2] to the defense until January 15, 1999, a few days before trial, but found no evidence that such was a willful violation. Although it was found to be substantial, and prejudiced the defense (R.2 130), the court noted that under the law, it was "required to use the least restrictive remedy with exclusion of the witness being a case of last resort." (R.2 130) With this law in mind, the court declined to exclude Mallard, but ordered the State to make her available to defense counsel, Richard Garfield ("Garfield") at a mutually agreeable time before opening statements. (R.2 130-31).

A trial court has broad discretion in determining whether a discovery violation occurred, in handling any violation, and in determining the proper remedy. Pender v. State, 700 So. 2d 664, 667 (Fla. 1997). Further, a trial court's decision on a Richardson hearing is subject to reversal only upon a showing of abuse of discretion. See Conde v. State, 860 So.2d 930, 958 (Fla. 2003). As provided in State v. Sowers, 763 So.2d 394, 399-400 (Fla. 1st DCA 2000), "'A determination whether to impose exclusion depends upon the totality of the circumstances.' Miller v. State, 636 So.2d 144, 149 (Fla. 1st DCA 1994). The

[2] Mallard's statement noted that co-defendant, Kevin Parker ("Parker") was at the Audio Logic store on May 2, 1998, saw something happening, and left. She also revealed having met Rimmer with Parker on several occasions (R.2 125-29)

exclusion of a witness is 'an extreme remedy which should be invoked only under the most compelling circumstances.' Wilkerson v. State, 461 So.2d 1376, 1379 (Fla. 1st DCA 1985). Under the general standard of review in a direct appeal, a trial court's ruling on whether a discovery violation justifies the exclusion of testimony is discretionary and should not be disturbed absent a clear showing of abuse. See Wilkerson, 461 So.2d at 1379."

In this case, Garfield knew of Mallard since at least July 1998 as her statement to Detective Lewis was included in the discovery. There, she had reported to the police that Parker had confided that the police were looking for him, that she had not seen Parker since May 31, 1998, and that he drives her Kia Sephia. (R.2 123, 127-28). In her December, 1998 statement, Mallard admitted that Rimmer and Parker knew each other. He has not offered what appellate counsel should have argued to support a claim that the trial court abused its discretion in ordering a deposition of Mallard, as opposed to her exclusion as a witness. The closest Rimmer comes to this is to claim that "there is no telling what argument [Garfield] would have made to prevent this (Mallard's) testimony no is there any way of knowing what strategy he would have adopted to handle this testimony." (P. 11). Yet, Rimmer's defense at trial, and throughout these collateral proceedings, has been one of misidentification by the eyewitnesses. Mallard's testimony does not inculpate Rimmer; it

does not put him at the scene of the crime. As such, it is mere speculation that the trial strategy, which has continued for the ten years since the trial, might have been changed had counsel obtained Mallard's December statement earlier.

Rimmer points to State v. Evans, 770 So.2d 1174, 1183 (Fla. 2000) for support, in an attempt to link the giving of a new statement could effect trial strategy. However, Evans is distinguishable on its facts. First, the new statement was not revealed until the witness was testifying at trial and such was different than the account she gave in her deposition. A Richardson hearing was not conducted until after the defense had rested its case. In Evans, the new testimony transformed an eyewitness who saw nothing, into the only eyewitness to see the shooting. It was determined by the District Court that the trial court failed to hold a timely Richardson hearing, instead waiting until after trial, and the finding of no discovery violation was clearly incorrect based on the prosecutor's initial questions to the witness which indicated knowledge of an anticipated change in testimony. Id. at 1177. This Court agreed that a discovery violation had occurred when the state failed to turn over the witness' statement pre-trial. Id. at 1183.

The facts of Evans reveal a situation much different than what is presented here where the disclosure in the instant case was made pre-trial, a Richardson hearing was held immediately,

and a reasonable remedy was selected. Moreover, the new information did not put the case in such a different light as Mallard's statement was not inculpatory as to Rimmer. Nothing she disclosed linked Rimmer to the crime, and there is only speculation as to what more could have been argued or what strategy could have been developed. Based on this, and the wide discretion afforded trial court's remedying of discovery violations was not abused. See Banda v. State, 536 So.2d 221, 223-24 (Fla. 1988) (finding no abuse of discretion where trial court held Richardson hearing and determined proper remedy imposed to alleviate prejudice to defense); Ross v. State, 474 So.2d 1170, 1173 (Fla. 1985) (finding no abuse of discretion where in allowing witness to testify after "trial judge complied with Richardson, conducted a proper inquiry, and, after allowing a deposition of the witness, determined that appellant was not prejudiced"). Given this, it has not been shown that appellate counsel was deficient in not raising the issue on direct appeal or that confidence is the appellate result is undermined as required by Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986) (announcing petition must show deficiency and that deficiency compromised appellate process to undermine confidence in result).

(3) Claim that severance motion should have been granted (P 12-16) – Pointing to the testimony of Mallard and Detective

Lewis, Rimmer asserts that appellate counsel should have raised the denial of severance issue on appeal under Bruton v. United State, 391 U.S. 123 (1968) and in light of the discovery violation, and failure to do so prejudiced him. At trial Mallard was instructed not to "say that Robert Rimmer was named or identified by Mr. Parker as being anyone in the back of the Audio electronics store." (R.8 946). Mallard testified that Parker and Rimmer knew each other, that Parker had Mallard's Kia that day, and that Parker was at the auto shop to check the car's speakers, where he encountered a woman and her little girl in the waiting area, before going to the back of the store, seeing some people, and then leaving. (R.8 930-32, 937, 940-41). Detective Lewis testified that Parker denied involvement in the crime, but admitted he had taken Mallard's car to Audio Logic that morning. Parker told Lewis he had walked to the side where he saw "something going down," a man was standing with his head down and a lot of people were lying on the floor. See this, he left. (R.10 1230-31).

The standard of review for denial of a motion for severance is abuse of discretion. See Crum v. State, 398 So.2d 810, 811 (Fla. 1981). This Court has announced:

> Rule 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendants ...." ... The object of the rule is not to provide defendants with an absolute right, upon

> request, to separate trials when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants. A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

McCray v. State, 416 So.2d 804, 806 (Fla. 1982)

With respect to a claim of a Bruton error, this Court reasoned:

> In *Bruton*, the United States Supreme Court held that a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution were violated by the introduction of a non-testifying codefendant's confession which named and incriminated the defendant at a joint criminal trial. *Id.* at 126, 88 S.Ct. 1620. The crux of a *Bruton* violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant.
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> ...
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> ... this Court has also recognized that a *Bruton* violation does not automatically require reversal of an otherwise valid conviction but, rather, is subject to a harmless error analysis. *See Farina v. State*, 679 So.2d 1151, 1155 (Fla. 1996) (*citing Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 23

> L.Ed.2d 284, (1969)); *see also Franqui v. State*, 699 So.2d 1312, 1322 (Fla. 1997) (holding Confrontation Clause violation was harmless beyond a reasonable doubt and thus upholding first-degree murder conviction); *Smith v. State*, 699 So.2d 629, 644-45 (Fla. 1997) (finding *Bruton* violation in first-degree murder case harmless beyond a reasonable doubt).
>
> Indeed, the United States Supreme Court has recognized that:
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> > The mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.
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> *Schneble v. Florida*, 405 U.S. 427, 430, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) (upholding murder conviction after finding *Bruton* error harmless).

Looney v. State, 803 So.2d 656, 671-72 (Fla. 2001).

Citing Matthews v. State, 353 So.2d 1274 (Fla. 2d DCA 1978), Rimmer suggests that Parker's statements along with the testimony that they knew each other caused a Bruton problem necessitating severance. Rimmer makes too much of Matthews. There the co-defendants, Matthews and Baker were tried together and their respective statements, wherein each had admitted kicking the victims and that neither victim had provoked the brutal treatment, were sanitized so that neither referred to the other co-defendant. However, a portion of Matthews' statement

noting he did not believe he hit the victim very hard because he wore tennis shoes was stricken, while Baker's account that he knew the victim was being seriously injured because he was on the floor holding his side and bleeding profusely. The District Court concluded that testimony of the victims, one of which noted that one assailant had on heavy wooden shoes, when taken with the statements of the defendants[3] prejudiced Matthews. It permitted the jury to believe that Matthews inflicted the more severe injuries because his exculpatory statement that he wore tennis shoes was omitted, while Baker's, arguably exculpatory statement, that he knew the victim was badly injured could be viewed as Baker was merely watching, was allowed to go to the jury. Id. at 1276.

Such is not the case here. Parker never reported that Rimmer was at the store or that they were together that day.

[3] The court concluded: "Although the confession of Baker did not mention appellant, the testimony of Pratt, Fetzer, and Copeland placed appellant in the same cell with Baker and the victims during the time period in issue. While the jury may have wondered why the statement of neither defendant mentioned the other, they were obviously not confused by the omissions. Moreover, not only was the jury " highly likely" to infer from Baker's statement that appellant was the one who inflicted Pratt's more severe injuries, the fact that they did draw such an inference is apparent from their verdict. Appellant was convicted of aggravated assault upon Pratt, while Baker was convicted of a simple battery. The excision of appellant's exculpatory statement that he was wearing tennis shoes at the time of the offense may also have prejudiced appellant and was error." Mathews v. State, 353 So.2d 1274, 1276 (Fla. 2d DCA 1978).

Likewise, Mallard did not place Rimmer with Parker. There statements from Mallard and Lewis did not tend to inculpate Rimmer while exculpating Parker. Moreover, the jury could not have been confused by this testimony in light of the strong eyewitness identifications given by Davis and Moore. Also, both defendants were found guilty as charged. Rimmer can draw no assistance from Matthews.

The Bruton issues arose in Looney where the State's witness testified about a hearsay statement by a non-testifying codefendant which incriminated Looney. Looney, 803 So.2d at 671-72. Such is not the case here. Neither Mallard nor Lewis' recounting of what Parker said implicated Rimmer in the least. Rimmer was not identified as being with Parker nor was he identified by Parker as the man he saw standing over those on the floor of Audio Logic. Absent a Bruton error, appellate counsel had no preserved basis to object to the lack of severance. See Jones v. Moore, 794 So.2d 579, 587 (Fla. 2001) (rejecting claim of ineffectiveness of appellate counsel for not arguing denial of severance motion on appeal as co-defendant's statement did not state that defendant committed the crime)

However, even if a Bruton error could be teased from the testimony, a harmless error standard would be applied on appeal. See Looney, 803 So.2d at 672 (applying harmless error test to denial of mistrial where non-testifying co-defendant's statement

incriminated Looney and finding error harmless as the "State presented live, direct testimony showing beyond a reasonable doubt that Looney was guilty of first-degree murder"). Such would have been the case here where eyewitnesses Joe Louis Moore and Kimberly Davis Burke identified Rimmer as the person who committed the robbery/homicide in this case. Rimmer, 825 So.2d at 315-18 (discussing identifications given by Moore and Davis in affirming the denial of the motion to suppress). There testimony supports the conclusion that there was no confusion regarding who killed the victims in this case. Rimmer has not carried his burden of proving his claim under Strickland; Pope.

ISSUES II AND III

RIMMER HAS FAILED TO ESTABLISH DEFICIENCY OR PREJUDICE[4] ARISING FROM APPELLATE COUNSEL'S FAILURE TO CHALLENGE THE DENIAL OF TWO MOTION FOR MISTRIAL (restated)

Rimmer claims in **Issue II** that it was error for the trial court to deny a mistrial following Michael Dixon's disclosure that he had testified at a motion to suppress hearing. (P16-17) In **Issue III**, he asserts it was ineffective assistance not to have challenged the denial of a mistrial following the playing of the police tape of the chase and Rimmer's arrest where an

[4] To prevail on a claims of ineffectiveness of appellate counsel, petitioner must show, consistent with Strickland, that counsel (1) specific errors or omissions which fell below the range of professionally acceptable performance and (2) that those errors so compromised the appellate process that confidence in the fairness and correctness of the appellate result is compromised. See Rutherford, 774 So.2d at 643; Freeman, 761 So.2d at 1069.

unidentified voice announces "we can't let him barricade himself in the house." The State disagrees.

"A ruling on a motion for a mistrial is within the sound discretion of the trial court and should be 'granted only when it is necessary to ensure that the defendant receives a fair trial.' Gore v. State, 784 So.2d 418, 427 (Fla. 2001). The use of a harmless error analysis under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), is not necessary where 'the trial court recognized the error, sustained the objection and gave a curative instruction.' Gore, 784 So.2d at 428. Instead, the correct appellate standard of review is abuse of discretion. See id." Smithers v. State, 826 So.2d 916, 930 (Fla. 2002). Additionally, the jury is presumed to follow judge's instruction absent evidence to the contrary. See United States v. Olano, 507 U.S. 725, 740 (1993).

Issue II – Following the witnesses answer that he had met Garfield at a prior motion to suppress hearing, a curative instruction for the jury to disregard the witnesses answer was given upon Rimmer's request. It cannot be said that appellate counsel would have had any success on direct appeal, thus, excluding the issue was not deficient performance and no prejudice sufficient to undermine confidence in the appellate proceedings has been shown.

Rimmer must show that the trial court abused its discretion

in not granting a mistrial. Toward this end, he relies on Walsh v. State, 418 So.2d 1000 (Fla. 1982). However, the improper information entailed the defendant's testimony that he passed a polygraph examination after he was ordered not to disclose that information. It is well settled that the admission of polygraph results is forbidden unless the consent of both parties has been obtained. Id. Such is different than an inadvertent disclosure that a suppression hearing was held, especially where the ruling was not disclosed. Walsh does not further Rimmer's position.

Conversely, in Evans v. State, 995 So.2d 933, 953-54 (Fla. 2008), this Court denied habeas relief on a claim of appellate counsel ineffective assistance reasoning:

> Evans also asserts that appellate counsel was ineffective for failing to challenge on direct appeal the trial court's denial of a motion for a mistrial based upon Waddell's testimony that Evans was in a gang. However, the claim would likely have been found to be without merit even if it had been raised on direct appeal because this Court has previously held that a trial court did not abuse its discretion in similar circumstances. *See, e.g., Mendoza v. State*, 964 So.2d 121, 130-31 (Fla. 2007) (holding that trial court did not abuse its discretion in denying motion for mistrial because it gave a curative instruction following an improper comment on the jury's responsibility). Because Evans cannot demonstrate that the trial court abused its discretion in denying the motion, appellate counsel cannot be ineffective for failing to raise the meritless issue on direct appeal.

Evans, 995 So.2d at 953-54 (footnote omitted)

Like in Evans, Rimmer has not shown the trail court abused its discretion when denying a mistrial, but telling the jury to

ignore a passing reference to a motion to suppress hearing. The Fourth District Court of Appeal, affirmed the denial of a mistrial under a similar situation opining:

> Appellant also complains that a passing reference to a suppression hearing by a testifying detective was reversible error. Not only was the objection to this reference sustained, the court gave a curative instruction. The court then refused appellant's motion for mistrial. "A mistrial should be declared only when the error is so prejudicial and fundamental that it denies the accused a fair trial. Even if the comment is objectionable, the proper procedure is to request a curative instruction from the trial judge that the jury disregard the remark." *Buenoano v. State*, 527 So.2d 194, 198 (Fla. 1988). *See also Herrera v. State*, 879 So.2d 38 (Fla. 4th DCA 2004) (holding that curative instruction was sufficient to cure any prejudicial effect of officer's statement). We conclude that the comment did not deny the appellant a fair trial, and the trial court properly exercised its discretion.

Ellick v. State, 925 So.2d 1170 (Fla. 4th DCA 2006).

Given Evans and Ellick, along with the court's instruction to the jury to disregard the objectionable comment, it has not been shown that Rimmer would have prevailed had his counsel challenged the denial of the motion for mistrial on appeal. Likewise, Rimmer has failed to show that his appellate review was undermined by counsel's failure to raise this claim. Relief must be denied.

Issue III - Without identifying whether a motion in limine or motion to suppress was raised and denied, nor where a motion in limine was made and denied, Rimmer points to the playing of a

police tape of the chase which ensued when the police tried to stop Rimmer and his motion for mistrial following the playing of the tape for the jury. Rimmer's counsel, Garfield, had objected to the tape before it was played on hearsay grounds, but that was overruled. Following the playing of the tape, Garfield complained that "an unidentified voice is saying we can't let him barricade himself in the house"[5] and that a mistrial is required because the statement implies Rimmer is dangerous. (R.5 587). Based on this, Rimmer submits that appellate counsel should have raised the denial of a mistrial as an appellate issue. The State disagrees as Rimmer has failed to show deficiency and prejudice.

Rimmer has not pointed to a place in the record where, prior to it being published to the jury, he tried to exclude that portion of the tape where an officer is heard to suggest "we can't let him barricade himself in the house. Only after the jury had heard the tape, did trial counsel raise this matter as a basis for mistrial. Although the State maintains the statement was admitted properly, counsel's tactics boarder on the decried "gotcha" technique. See Huck v. State, 881 So.2d 1137, 1151 (Fla. 5th DCA 2004) (addressing whether motion for

[5] While the tape as transcribed for the appellate record does not contain this phase, Garfield reported the phrase to the court and his recitation of the phrase was not refuted by the prosecutor R.5 583-87)

mistrial should have been granted following the jury hearing officer comment that he did not trust the defendant as far as he could throw him and concluding defense counsel's failure to object to the comment before the jury heard it smacked "of invited error" and noting "[i]f the defense did not feel compelled to raise this issue with the court before the cat was out of the bag so that the tape could have been redacted, then it should be satisfied with a curative instruction). While Rimmer did not seek a curative instruction here, and none was given, he has not shown that the issue would have been found to have any merit on appeal.

For support that the comment should not have been played and a mistrial was required, Rimmer cites Bello v. State, 547 So.2d 914 (Fla. 1989); Jackson v. State, 698 So.2d 1299 (Fla. 4th DCA 1997) and case cited therein addressing whether shackling of the defendant before the jury is proper. These cases are not on point as they are addressing the defendant's treatment in court where he is presumed innocent. Here, however, the jury is being informed of defendant's actions as he leads the police on a chase and an officer's comment on how to apprehend Rimmer. Such comment cannot be construed as a comment on Rimmer's dangerousness, but merely the police tactic in preventing a continued escape or a prolonged standoff. Cf. Powell v. State, 908 So.2d 1185, 1187 (Fla. 2d DCA 2005) (stating that

"[e]vidence of flight is relevant to infer consciousness of guilt where there is a sufficient nexus between flight and the crime with which a defendant is charged."). Rimmer has failed to offer a basis for excluding the comment and as such has failed to show that the trial court abused its discretion in denying the motion for mistrial. Hence, appellate counsel cannot be deemed deficient for not raising meritless issue. Moreover, this comment was not argued to the jury or made a feature of the trial. Also, given the overwhelming evidence of Rimmer's guilt based on the eyewitness testimony and the fact that he had the proceeds from the robbery, it cannot be said that having failed to raise this issue on appeal, confidence in the appellate review is undermined. Relief must be denied.

ISSUE IV

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE TRIAL COURT'S INSTRUCTING THE JURY IN THE GUILT AND PENALTY PHASES (restated)

Rimmer asserts that appellate counsel rendered ineffective assistance[6] for not challenging two aspects of the jury instructions: (A) use of the "and/or" phrase was instructing of the charges (P 20-47) and (B) instructing on the avoid arrest

[6] To prevail on a claims of ineffectiveness of appellate counsel, petitioner must show, consistent with Strickland, that counsel (1) specific errors or omissions which fell below the range of professionally acceptable performance and (2) that those errors so compromised the appellate process that confidence in the fairness and correctness of the appellate result is compromised. See Rutherford, 774 So.2d at 643; Freeman, 761 So.2d at 1069.

and financial gain aggravators (P 47-50). The State disagrees.

(A) Using the "and/or" conjunction between the co-defendants' names when instructing the jury on each charge of the indictment (P 20-47) – Rimmer maintains that appellate counsel was ineffective in not raising on appeal the error in the guilt phase instructions based on the court's use of the "and/or" conjunction between him name and Kevin Parker's when defining each charge in the indictment and lesser included offense. While admitting his trial counsel did not object to the instructions, Rimmer submits that fundamental error exists when the alleged error is considered in light of the "prejudicial identifications, prosecutorial misconduct, juror confusion, and the fact that Mr. Rimmer and Parker were convicted of exactly the same crimes." (P 38). Contrary to Rimmer's claim, no fundamental error is shown, thus, appellate counsel cannot be labeled ineffective.

Rimmer cites Green v. State, 968 So.2d 86 (Fla. 2d DCA 2007); Davis v. State, 922 So.2d 279 (Fla. 1st DCA 2006); Dorsett v. McRay, 901 So.2d 225 (Fla. 3d DCA 2005); Concepcion v. State, 857 So.2d (Fla. 5th DCA 2003); Williams v. State, 774 So.2d 842 (Fla. 4th DCA 2000),[7] to support his suggestion that fundamental

[7] Rimmer suggests that appellate counsel representation of the defendant in Williams and his challenging of the "and/or" instruction given in that case necessitated counsel raising the same challenge here. However, in Williams, the challenge was

error has been show. He attempts to distinguish Garzon v. State, 980 So.2d 1038 (Fla. 2008) where this Court rejected a per se fundamental error standard in favor of a harmless error review given the totality of the circumstances. However, the case on point is this Court's recent decision in Hunter v. State, 8 So.3d 1052, 1070-71 (Fla. 2008), wherein it was reasoned:

> Next, Hunter raises instructional error during the guilt phase. For each of the instructions defining a criminal offense, where an element provided for inclusion of the name of the defendant, the trial court instructed as "TROY VICTORINO and/or JERONE HUNTER and/or MICHAEL SALAS." On appeal, Hunter argues that this use of the conjunction "and/or" between the defendants' names resulted in reversible error. And even if there was not a proper objection raised, the error was fundamental. His contention is that given this instruction, the jury may have convicted him solely upon a finding that a codefendant's conduct satisfied an element of the offense. Hunter is not entitled to relief on this claim.
>
> First, of the offenses for which he was convicted, Hunter only preserved the objection as to criminal conspiracy and abuse of a dead human body. Hunter expressly did not join in the objections made by other counsel to the use of "and/or" in the first-degree murder instructions and the burglary instruction. Moreover, he did not object to the felony murder instructions on the basis now asserted.
>
> We recently addressed the propriety of using "and/or" in jury instructions in cases involving multiple defendants. *Garzon v. State*, 980 So.2d 1038 (Fla. 2008). In *Garzon*, the three defendants, each charged

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based on the fact that the "separate crimes" instruction was accurate and fundamental error when multiple defendants are charged and tried together which is not the same issue as raised here.

with criminal conspiracy, armed burglary of a dwelling, armed robbery, three counts of armed kidnapping, and extortion, did not object to the instructions using the conjunction but instead, two codefendants raised the issue on direct appeal. *Id.* at 1039. According to the defendants, "the use of 'and/or' allowed the jury to convict the defendants based on a codefendant committing some or all of the elements of the charged crimes." *Id.* at 1041. We reiterated that use of the conjunction "and/or" in jury instructions is error. Id. at 1045 (*citing Cochrane v. Florida East Coast Ry. Co.*, 107 Fla. 431, 145 So. 217, 218 (1932)). However, because the defendants failed to object, the question presented was whether the error was fundamental. *Id.* at 1042. In *Garzon*, we answered the question in the negative, looking to the totality of the record. *Id.* at 1043. Fundamental error in a jury instruction requires that the error "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Id. at 1042 (*quoting State v. Delva*, 575 So.2d 643, 644-45 (Fla.1991)).

Here, because Hunter failed to object to the use of "and/or" as it related to the murder instructions (both premeditated and felony) and the armed burglary instructions, we must determine if the error was fundamental. Under the totality of the circumstances, the error was not fundamental. In addition to the erroneous instructions, the jury was instructed on both the law of principals and multiple defendants. It was then instructed upon and provided verdict forms that were individualized both as to the defendants and in respect to the crimes charged. Furthermore, in his closing argument, Hunter's counsel focused on his client's actions and discussed how a verdict as to guilt for one defendant did not mean that the same verdict had to be arrived at for the others. Hunter's counsel explained that the evidence was to be weighed "as to each defendant as to each count." The State briefly addressed the principals instruction, explaining that "if someone helps someone else commit a crime, then they must be treated the same as if-the actual perpetrator." The evidence at trial, the testimony of Brandon Graham, the forensic evidence, the testimony of codefendant Salas, Hunter's pretrial

> statements to law enforcement officers, and his own trial testimony strongly tied Hunter to these crimes. Under the totality of these circumstances, the improper use of "and/or" in the murder and armed burglary instructions does not constitute fundamental error.

Hunter, 8 So.3d at 1070-71 (footnote omitted, emphasis supplied)

In the instant case, no objection was made to the instructions which included the "and/or" conjunction (R.12 1420-37; R.13 1441-47; R.14 1575-94, 1604-05). As a result, the matter was not preserved for appeal. Hunter, 8 So.3d at 1070. Furthermore, the principal and multiple defendant/separate crimes instructions were given. (R.14 1594, 1599) Separate verdict forms were made up for each defendant and separate closing arguments were given by defense counsel with the prosecutor addressing each defendant separately. (R.13 1447-1557; R.21 2283-93). Moreover, at all times and all eyewitnesses placed the gun in Rimmer's had and identified him as carrying out all of the charged crimes including being the shooter of both victims. Rimmer, 825 So.2d at 308-11.[8]

[8] Joe Moore identified Rimmer as the man who stopped him from leaving the store and had him lie face down on the floor. According to Kimberly Davis Burke, it was Rimmer who had her move from the waiting are to the service bay where the men was tied face down on the floor. Davis watched Rimmer and two other men load stereo equipment into their cars. IT was Rimmer who asked Aaron Knight for the register keys and retrieved the gun Knight had in his desk. Upon completion of the robbery, Rimmer told Davis to move away because "he did not want this to get on her" before shooting the victims. Also, it was Rimmer who had started to leave, only to return and ask the Audio Logic

Rimmer's argument that three members of this Court dissented on the issue of the prosecutor's rebuttal testimony comparing Officer Kelly's eyesight and ability to act without glasses to Rimmer's capabilities somehow equates to confusion by the jurors due to the instructions is not well reasoned. One has to do with identification procedures and the other informs the jury of the elements of the crimes charged. The evidence was such that there was no confusing Rimmer's actions with those of Parker. The State presented evidence and argued throughout that Rimmer was the shooter.

With respect to Rimmer's suggestion that the jury's question regarding the culpability of one who merely helps to move stolen property (R.15 1715) does not fit at all the evidence presented against Rimmer. Rimmer is merely speculating that the jury question is addressed to his case. It could be, and appears more likely to be directed at Parker's[9] activities as

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employees if they knew him, before shooting each in the head and telling the surviving victims to "have a nice day." It was Rimmer who was had possession of the gun taken in the robbery/homicide and Moore's wallet on the day of his arrest. Further, Rimmer's prints were on the stereo equipment taken from Audio Logic. Rimmer, 825 So.2d at 308-11.

[9] In Parker's direct appeal, the District Court summarized the evidence from the time Parker reached Audio Logic to the State's fingerprint evidence in the light most favorable to the State found Parker arrived at the Audio Logic store at the same time as Rimmer, and encountered Davis-Burke in the lobby, before going into the installation area. Shortly thereafter, Rimmer entered the lobby and convinced Davis-Burke to enter the service

his statement placed him at the scene, but not in the service area or as the shooter. Neither Zeno v. State, 910 So.2d 394 (Fla. 2d DCA 2005), Green, 968 So.2d at 90; Davis, 922 So.2d at 279; nor Brown v. State, 967 So.2d 236(Fla. 3d DCA 2007) further Rimmer's position here, as this Court in Garzon, has rejected a per se reversible standard when assessing instruction with the "and/or" conjunction and, as noted above, the correct principal and "separate crimes" instruction were given.

Similarly, the fact that general verdicts were given in this case does assist Rimmer and his reliance on Zant v. Stephens, 462 U.S. 862, 881 (1983); Hitchcock v. Wainwright, 745 F.2d 1332, 1340 (11th Cir. 1984); Mackerley v. State, 777 So.2d

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area where she saw the male victims face down on the floor with their hands tied behind their backs. See Parker v. State, 795 So.2d 1096, 1098 (Fla. 4th DCA 2001). The district court stated that Davis-Burke "sat down on the floor and watched **Rimmer and another male** move boxes out of the store's inventory room into Rimmer's Ford Probe. **The man helping Rimmer was not appellant**. **Davis Burke did not see appellant at any time while in the installation area**. **After Rimmer and the unidentified man finished loading Rimmer's car with boxes, Rimmer shot and killed the two store employees**." Id. When the police searched the storage unit rented by Rimmer and an unidentified male, they recovered merchandise from the store, and found Parker's prints on six of the boxes. "After Rimmer was arrested on May 10, 1998, he called [Parker's] girlfriend, with whom [Parker] stayed three or four times a week, and left the message, "Tell the people I'm all right, I'm all right." Id. During Parker's police interrogation, he "denied he had ever been in the inventory room or office area. Contrary to the testimony of Davis Burke, he claimed he left the store not through the back door in the lobby, but through the front door. He asserted that he then walked around back to the installation area, saw "something going down," and immediately left." Id. He also claimed that his fingerprints must have been planted. Id.

969 (Fla. 2001); Delgado v. State, 776 So.2d 223 (Fla. 2000) or Tricarico v. State, 711 So.2d 624 (Fla. 4th DVA 1998) is misplaced. While "this Court acknowledged that the United States Supreme Court has determined that a conviction under a general verdict is improper when it rests on multiple bases, one of which is legally inadequate." Mackerley v. State, 777 So.2d 969 (Fla. 2001), we do not have that situation here. Both the felony murder-robbery/kidnapping and premeditated murder theories are supported by the evidence. This is not a situation where one of the theories of prosecution was "legally inadequate." As noted above, there was ample evidence that Rimmer, at gun point, stopped Moore from leaving the store and had him return to the service bay (kidnapping) where he was made to lie on the floor with his hands tied along with three other male victims and personal property was taken from Moore. Rimmer, while armed, took property from Moore and loaded stereo equipment from the store into his car (robbery). Subsequently, Rimmer started to leave the store, but returned, asked the owner of the Audio Logic store if he knew him, upon getting an negative answer, shot him in the head. Next Rimmer moved to the store employee, asked him the same question, then shot him in the head. Rimmer, 825 So.2d at 308-11. Under these facts, both premeditated and felony murder are shown without any reliance on the principal theory and Parker's actions.

Under the facts of this case, the jury was not confused with respect to Rimmer's involvement and individual guilt. No fundamental error could be shown arising from the jury instructions as given, thus, appellate counsel's decision not to raise this claim on direct appeal has not been shown to be deficient. Moreover, there is little likelihood counsel would have been successful on appeal as noted above, thus, Rimmer has failed to show prejudice; confidence in the appellate review has not been undermined. Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (stating appellate counsel is not ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error"); Medina v. Dugger, 586 So.2d 317, 318 (Fla. 1991).

(B) Instructing on avoid arrest and pecuniary gain aggravators (P 47-50) – It is Rimmer's claim that appellate counsel should have argued on appeal that the pecuniary gain aggravators should not have been given as it did not apply at a matter of law (P48), that the pecuniary gain instruction was facially vague and overbroad as it did not contain a limiting instruction (P 49), and that the avoid arrest and pecuniary gain instructions should not have been given together, and. (P 48-49). Jury instructions "are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised

on appeal only if fundamental error occurred." State v. Delva, 575 So.2d 643, 644 (Fla. 1991). Rimmer's instant arguments were not preserved for appeal nor do they establish fundamental error, thus, appellate counsel may not be deemed deficient. See Valle v. Moore, 837 So.2d 905, 907-08 (Fla. 2002) (stating appellate counsel is not ineffective for failing to raise issues "that were not properly raised during the trial court proceedings," or that "do not present a question of fundamental error"); Medina v. Dugger, 586 So.2d 317, 318 (Fla. 1991).

During the penalty phase charge conference, Rimmer's counsel, Hale Schantz ("Schantz") argued that the avoid arrest instruction should not be given because three of the five victims were left alive. (R.16 1750). Although initially Schantz did not object to the pecuniary gain instruction, he later adopted the argument of Parker's counsel, Russell Williams ("Williams") challenging the pecuniary gain aggravator. (R.16 1750, 1790). Williams maintained avoid arrest did not apply to Parker because he was not present when Rimmer shot the victims (R.16 1783). With respect to pecuniary gain, Williams asserted that the pecuniary gain aggravator was not proven because the robbery/kidnapping was over before Rimmer returned to the service bay and shot the victims. It was Williams' suggestion that the motivation may have been to avoid arrest, although he did not know what Rimmer was thinking, but Parker was not

present and there was no proof Parker profited from the robbery. (R.16 1784-90). These arguments are different than those that are raised here and thus, were not preserved for appellate counsel to raise on appeal.

Rimmer claims the pecuniary gain aggravator was not proven beyond a reasonable doubt. The trial court found felony murder (robbery/kidnapping) was established based on the armed robbery and armed kidnapping of Bradley Krause, Jr. and the attempted armed robbery and attempted armed kidnapping of Joe Louis Moore,[10] but rejected the pecuniary gain aggravator because the murders were not committed to facilitate the theft of money or electronic equipment. Such does not establish that the giving of the instruction to the jury, and that appellate counsel should have raised the issue on appeal. The record reflects that money was taken from Joe Louis Moore, and stereo equipment valued between $12,000 and $18,000, and a gun were taken from the Audio Logic store. Rimmer, 825 So.2d at 309. As such, there was competent, substantial evidence presented to make pecuniary gain a question for the jury. "If evidence of an aggravating factor has been presented to a jury, an instruction on the

[10] On direct appeal, this Court found that "personal items were taken for Knight, Krause, and Moore, including Moore's wallet and cellular phone" and that the defendants were seen loading stereo equipment into their car, and that Rimmer took a gun that was kept in the Audio Logic store. Rimmer v. State, 825 So.2d 304, 309 (Fla. 2002).

factor is required. ... The fact that the aggravator was not ultimately found to exist does not mean there was insufficient evidence to allow the jury to consider the factor." Henry v. State, 649 So.2d 1366, 1369 (Fla. 1994) (citing Bowden v. State, 588 So.2d 225, 231 (Fla. 1991)).

Further, no fundamental error has been shown because the jury was properly instructed and the court did not find the aggravator. Henry, 649 So.2d at 1369. See Stephens v. State, 975 So.2d 405, 423 (Fla. 2007) (noting where there is competent. Substantial evidence to support an aggravator, it is not error to give the instruction even where the trial court does not find it proven). Cf. Lowe v. State, 650 So.2d 969, 977 (Fla. 1994) (affirming sentence even though jury was instructed on HAC and CCP, but trail court did not find aggravators) As such, appellate counsel has not been shown to be ineffective.

Rimmer can garner no support from his citation of Omelus v. State, 584 So.2d 563 (Fla. 1991) (finding aggravator of HAC could not apply vicariously where defendant was not present as scene and had left instructions that victim be shot, but victim was stabbed) and Archer v. State, 613 So.2d 446, 448 (Fla. 1993) (finding facts did not support applying HAC vicariously to defendant). Here, there was no attempt to apply the aggravators to Rimmer through vicarious liability. The testimony established that Rimmer was the defendant to whom the victims

attributed the actions supporting the robbery and shootings.

Rimmer asserts that under Elam v. State, 636 So.2d 1312, 1315 (Fla. 1994), to prove pecuniary gain the State must show that financial gain was the sole and dominant purpose of the murder. Likewise, to prove avoid arrest, the State must prove that avoiding or preventing arrest is the sole and dominant motive. Continuing her asserts that without a limiting instruction, the "pecuniary gain" instruction is unconstitutionally vague and overbroad. While it is unclear whether Rimmer intended to make this claim against the avoid arrest aggravator, the State will address both to show that the standard instructions, as given her, have been held to be constitutional, thus, appellate counsel was not ineffective for excluding these claims.

The jury was instructed: "No. 4, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody. No. 5, the crime for which the defendant is to be sentenced was committed for financial gain." (R.17 1982). Trial counsel did not object to the instructions as written, only on whether they had been sufficiently proven to be offered to the jury. (R.16 1750, 1784-90). Absent a proper objection, fundamental error must be shown. However, the instructions given matched the standard instructions, Florida Standard Jury

Instruction 7.5 and 7.6, which have been upheld against constitutional challenges. See Whitton v. State, 649 So.2d 861, 867 n. 10 (Fla. 1994) (concluding that standard jury instruction for avoid arrest aggravator is not unconstitutionally vague); Kelley v. Dugger, 597 So.2d 262, 265 (Fla. 1992) (rejecting constitutional challenge to pecuniary gain aggravator). Specifically, this Court has held that the limiting instruction is not required. See Knight v. State, 923 So.2d 387, 409 (Fla. 2005) (rejecting claim that pecuniary gain aggravator is unconstitutional because financial gain does not have to be the sole motive for the pecuniary gain aggravator to apply); Whitton, 649 So.2d at 867 n. 10 (holding standard instruction for avoid arrest aggravator did not require a limiting instruction to make aggravator constitutional). Given this, ineffectiveness of counsel has not been proven.

With respect to his complaint appellate counsel should have raised on appeal that it was improper to instruct on both the pecuniary gain and avoid arrest aggravators, he is unable to show deficiency or prejudice. The doubling instruction was given in this case (R.17 1983); the evidence, and case law, more than support the giving of instructions on both aggravators. See Spann v. State, 857 So.2d 845, 856-57 (Fla. 2003); Castro v. State, 597 So.2d 259, 261 (Fla. 1992).

In Spann, the argument on appeal was that the finding of

the three aggravators, felony murder/kidnapping, pecuniary gain, and avoid arrest, amounted to improper doubling. This Court reasoned:

> Spann is correct that the consideration of two or more aggravators is improper when the aggravators are based on the same aspect of the crime. *See Rose v. State*, 787 So.2d 786, 801 (Fla. 2001) (*citing Banks v. State*, 700 So.2d 363, 367 (Fla. 1997)). However, the facts of a case may support multiple aggravating factors "so long as they are separate and distinct aggravators and not merely restatements of each other." *Rose*, 787 So.2d. at 801. This Court in *Banks* said:
>
> > Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other, as in murder committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement.
>
> 700 So.2d at 367 (citation omitted). Therefore, when considering the issue of doubling, the focus is on the aggravators themselves, not on the overlapping facts.
>
> ...
>
> It is clear that the facts in support of these three aggravating factors overlap. However, *Banks* does not prohibit the use of the same facts to support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other.
>
> We have previously upheld the finding of the "pecuniary gain and committed during the course of a kidnaping" aggravators. *See Hartley v. State*, 686 So.2d 1316, 1323 (Fla. 1996) (noting that the assertion that the pecuniary gain and in-the-course-

> of-a-kidnapping aggravators are improperly doubled has been consistently rejected). Where other factors indicate that the defendant did not act with the absolute, sole motive of pecuniary gain, it is not error to find the pecuniary gain and in-the-course-of-a-kidnaping aggravators. Id. Spann's sole motivation for these crimes was not pecuniary gain; he clearly wanted the victim dead to prevent her from identifying him. Therefore, these two aggravators were properly found.
>
> We also reject the argument that the pecuniary gain aggravator is inconsistent with a concurrent finding of the avoid arrest aggravator. *See Thompson v. State*, 648 So.2d 692, 695 (Fla. 1994) (holding that it is proper for a trial court to utilize both the pecuniary gain and avoid arrest aggravators in the same case); see also *Hildwin v. State*, 727 So.2d 193, 195 (Fla. 1998) (holding "in order to establish this aggravator the State must prove beyond a reasonable doubt only that 'the murder was motivated, at least in part, by a desire to obtain money, property or other financial gain' ") (*quoting Finney v. State*, 660 So.2d 674, 680 (Fla. 1995)). The evidence is clear that the murder was motivated by Spann and Philmore's desire to obtain a car so they could leave town in an unsuspicious car after they robbed a bank.
>
> The three aggravators are based on separate and distinct aspects of the criminal enterprise and were properly found. Therefore, relief on this claim is denied.

Spann, 857 So.2d at 856-57.

As noted above, the doubling instruction was given, thus, there was no impediment to the court giving the avoid arrest and pecuniary gain instructions. See Castro v. State, 597 So.2d 259, 261 (Fla. 1992) (reaffirming Suarez v. State, 481 So.2d 1201 (Fla. 1985) to the extent it authorizes the jury to be instructed on both factors as long as the doubling instruction

is given and the trial court does not give the factors double weight in its sentencing order). Based on the state of the law, appellate counsel had no good faith basis to raise the claim. Rutherford, 774 So.2d at 643 (noting "[i]f a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective.").

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court deny the petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to: Linda McDermott, Esq., McClain & McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, FL 33334 and Celeste Bacchi, Esq. Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite #400, Fort Lauderdale, FL 33301 this 26th day of October, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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