No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR MANNS, – Petitioner,

v.

STATE OF FLORIDA, ET. AL., – Respondent.

APPENDIX

APPENDIX "A"

DECISION OF STATE COURT OF APPEALS

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

VICTOR L. MANNS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-1828

Opinion filed December 23, 2020.

Appeal from the Circuit Court for Polk County; Jalal Harb, Judge.

Howard L. Dimmig, II, Public Defender, and J. Rafael Rodríguez, Special Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and C. Todd Chapman, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

LaROSE, MORRIS, and ATKINSON, JJ., Concur.

APPENDIX "B"

DECISION OF STATE TRIAL COURT

ORIGINAL

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

VICTOR LEMOND MANNS, JR.,
Defendant.

CASE NO: 2016CF-007451-XX
SECTION: F9

_____/

ORDER ON DEFENDANT'S MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION AND DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

THIS MATTER came before the Court upon Defendant's Motion to Suppress Eyewitness Identification filed on January 31, 2019; and the Defendant's Motion to Suppress Statements[1] filed on February 4, 2019. Upon review of the Motions, court file, the testimony and evidence presented at the evidentiary hearing held on February 28, 2019, and applicable law, the Court finds as follows:

FINDINGS OF FACT:

Detective Tonya Wright was investigating the murder of Jeffery W. Morrow, Jr. Morrow was accompanying a friend to sell an iPhone listed on the LetGo app. During her investigation, Wright learned of recent similar incidents.

Andre Gipson testified that on September 1, 2016, he arranged through the LetGo app to meet with another individual to sell a cell phone. They planned to meet in front of an apartment located in the Combee area of Lakeland in the middle of the day. Gipson arrived and was flagged down by the individual he believed he was meeting. The individual entered Gipson's car and the

[1] This motion was filed without a caption. The Court will address this motion as the Defendant's "Motion to Suppress Statements" as it seeks to have the Defendant's statements to law enforcement officers suppressed.

two spoke about the phone for approximately ten minutes. The individual exited the car with the phone, pointed a weapon at Gipson, and told him to leave. Gipson gave law enforcement a description of the suspect as a short, thin black male, with an afro, burn marks on his face, and wearing a white tank top.

On September 7, 2016, Wright showed Gipson a photo pack lineup depicting six individuals. This photo pack was entered into evidence at the evidentiary hearing as State's Exhibit 6. Wright testified that prior to showing the photo pack, she informed Gipson of the following: the suspect may or may not be depicted; the photo pack consisted of six individuals; if Gipson was not certain, he should not make an identification; again stated that the suspect may or may not be depicted; and to try not to imagine the marks on the faces. Gipson identified the Defendant, and was 100% certain of the identification. After making the identification, Gipson was asked "was this the guy?" Gipson then confirmed the person in the photograph he had selected–the Defendant–was the person that robbed him.

Cory Peace and Edward Sanchez were both victims of a robbery that occurred on August 26, 2016. Both Peace and Sanchez testified on February 28, 2019. Peace testified that he communicated with an individual over the LetGo app, and arranged to meet at a Walgreens around noon to sell an iPad. Sanchez stated he "felt weird" as it seemed like this individual was stalling, and repeating the same questions about the iPad and its features. Peace testified that the conversation lasted for approximately ten minutes; Sanchez stated it lasted for approximately fifteen minutes. The individual then grabbed the iPad, said "fuck you" and ran off. Peace described the individual as an African American with burns or tattoos on his arms, approximately six feet tall, with a thin build. Sanchez described the individual as having tattoos of stars, scars on

the right side of his face, taller than Sanchez (who is 5'9"), with fuzzy hair approximately three inches in length.

On September 5, 2016, Joel Dempsey–then a deputy with the Polk County Sheriff's Office–presented Peace with a photo pack. This photo pack was entered into evidence as State's Exhibit 3, and did not include a picture of the Defendant. Dempsey stated that based upon the descriptions provided, he believed Deon Ghent, who was included in the photo pack, to be a suspect. Peace did not make an identification from this lineup.

On September 7, 2016, Dempsey returned with a second photo pack, this time with a picture of the Defendant. This photo pack was entered into evidence as State's Exhibit 5. Peace viewed this lineup in his dining room where it was well lit. Peace did not recall being provided any instructions as the lineup was presented. Upon viewing it, Peace quickly made an identification of the Defendant, and was 100% certain of the identification.

Sanchez was also shown a photo pack on September 7, 2016, entered into evidence as State's Exhibit 4. Sanchez and Peace were not in the same room when they were presented with the photo packs. Sanchez immediately identified the Defendant and was 100% certain of the identification.

On September 8, 2016, the Defendant was arrested at his grandmother's house. Officer Steven Britton was tasked with transporting the Defendant from the arrest site to the Polk County Sheriff's Operation Center. The Defendant was placed in Britton's patrol vehicle, and Wright spoke with the Defendant briefly. Britton did not recall the conversation; however, Wright testified that at that time she read the Defendant his *Miranda*[2] rights from a card. The Defendant indicated to Wright that he understood his rights. Britton did not recall the conversation he had

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

with the Defendant during the transport. Britton also did not recall the Defendant invoking his rights in any way, however, Britton stated he would have informed Wright had that occurred.

The Defendant was escorted to an interview room where he was interrogated by Wright and another female detective. The interview was audio and video recorded, a recording of which was entered into evidence as State's Exhibit 1, and reviewed by the Court in chambers. It is undisputed that the Defendant was not re-warned of his *Miranda* rights prior to, or during the interview. The Defendant did not sign a written waiver or acknowledgement of his rights. The Defendant is seen wearing only boxer shorts, and has a white tee shirt on the table in front of him. During the interview the Defendant informed the Detectives that he was fully dressed at his grandmother's house shortly before he was arrested. The Defendant explained he undressed himself after learning the police were outside, as he feared being shot in the event he were to try and pull his pants up. The Defendant's hands were cuffed behind his back, and the Defendant made multiple complaints during the interview that the cuffs were too tight. At one point Wright attempted to help the Defendant adjust to be more comfortable, but did not remove or loosen the cuffs. During the interview the Defendant made several incriminating statements. The interview began at approximately 4:00 A.M., and ended at approximately 6:17 A.M.

The Defendant testified at the hearing that he did not recall Wright reading *Miranda* warnings, and that she did not do so at any time.

CONCLUSIONS OF LAW:

Defendant's Statements:

In *Miranda*, "the United States Supreme Court enunciated a bright-line rule to guard against compulsion and the coercive nature and atmosphere of custodial interrogation and 'assure that the individual's right to choose between silence and speech remains unfettered throughout the

interrogation process.' " *Ramirez v. State*, 739 So. 2d 568, 573 (Fla. 1999) (quoting *Miranda*, 384 U.S. at 469, 86 S.Ct. 1602). Waiver of *Miranda* rights "can be established even absent formal or express statements." *Berghuis v. Thompkins*, 560 U.S. 370, 383, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). The State does "not need to show that a waiver of *Miranda* rights was express. An 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence." *Id.* (quoting *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)). It is the State's burden to establish any post-*Miranda* statements were made with a knowing and intelligent waiver by the defendant. *Ross v. State*, 45 So. 3d 403, 418 (Fla. 2010) (citing *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985)). "[O]nce *Miranda* has been complied with, the . . . test for admissibility of statements made in subsequent or successive custodial interrogations is whether the statements were given voluntarily. Such an inquiry must consider the totality of the circumstances." *Davis v. State*, 698 So. 2d 1182, 1189 (Fla. 1997).

The Defendant argues his *Miranda* rights were violated, and his statements were not voluntarily made. Having evaluated the testimony, this Court finds Detective Wright's testimony to be credible. The Defendant was clearly taken into custody when he was arrested at his grandmother's house. At this time, Wright informed the Defendant of his *Miranda* rights.

Although it is true the Defendant was not specifically asked if he understood each individual right as they were read, he did indicate to Wright that he understood his rights after the full warning was administered. The interview occurred less than two hours after the Defendant was informed of his *Miranda* rights. The Defendant did not indicate in any way that he wished to invoke any of his rights. Although an express or written waiver was not obtained, the testimony and review of the recorded interview make it clear to the Court that the Defendant provided an

implied waiver by acknowledging his understanding of his rights, and subsequently speaking to the detectives.

The Court also does not find that the Defendant's waiver was coerced or involuntarily made. There are no indications that the Defendant was under any duress by the lack of water or food during the two hour and seventeen minute interview. While the Defendant was wearing boxer shorts, this was not due to being roused out of bed in a compromising state. The Defendant himself informed the detectives he deliberately undressed upon first noticing law enforcement. The Defendant's discomfort during the interview does not appear to have risen to the level of coercion. The detectives did not utilize any improper interrogation techniques. Having considered the totality of the interview, the Defendant's waiver and willingness to continue speaking to the detectives was knowing and voluntary.

Eyewitness Identification:

The Defendant first argues that the procedure for the photo lineups was unduly suggestive. "The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification." *Rimmer v. State*, 825 So. 2d 304, 316 (Fla. 2002). Photo lineups have been held as not unduly suggestive when an array of six photographs is used, and the witness is not directed to any particular photograph. See *Green v. State*, 641 So. 2d 391 (Fla. 1994); *Johnson v. State*, 438 So. 2d 774, 777 (Fla. 1983). Although the bare fact of the Defendant having burn marks on one side of his face may give cause for concern, a review of the photographs used alleviates any suspicion that the array of photos used in this case was

unnecessarily suggestive. In the photo packs which contained the Defendant's photos, any such marks are minimal and difficult to see in any of the photos due to the resolution of the images. The characteristics of each person appear similar, and there is nothing to draw one's attention to any particular photograph.

Even if there was some unnecessarily suggestive procedure utilized in the identification by the witnesses, the procedure does not give rise to a substantial likelihood of irreparable misidentification. In making such a determination, a court should consider:

> The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Grant v. State, 390 So. 2d 341, 343 (Fla. 1980) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). Both incidents occurred during the daylight hours. Each witness was able to clearly view the Defendant's face during the confrontation, which lasted for several minutes. The description given by the three witnesses were mostly consistent with one another, and mostly consistent with the description of the Defendant himself.[3] Each witness stated they were 100% certain of the identification, having made the identification almost immediately. The identifications occurred only days after the incidents.

Second, the Defendant argues the eyewitness identifications should be suppressed for failing to comply with §92.70, Florida Statutes, also known as the Eyewitness Identification Reform Act. This Act provides specific procedures which must be followed by law enforcement agencies. It is undisputed that the procedures utilized by law enforcement in this case fail to comply with the procedural requirements of this Act. However, this Act became effective on

[3] There was some inconsistencies regarding the Defendant's height.

October 1, 2017. See Ch. 17-91, § 1, Laws of Fla. It would have been an impossibility for law enforcement to have been aware of, and complied with this statutory provision, in 2016. Furthermore, "[t]he general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." *Metropolitan Dade Co. v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). "[I]f a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases, absent clear legislative intent favoring retroactive application." *Id.* The language of the Act contains no express language mandating retroactive application. The legislative history of the Act describes an issue of eyewitness misidentification. Florida Staff Analysis, S.B. 312, 3/28/2017. Preventing misidentification is not addressed through imputing future procedural requirements on already completed past conduct, and the conduct in this case was not unnecessarily suggestive. Retroactive application of this Act is not warranted, and even if it were, the remedies provided therein do not mandate suppression of the identification in this case.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's "Motion to Suppress Eyewitness Identification" and the Defendant's "Motion to Suppress Statements" are **DENIED**.

DONE AND ORDERED at Bartow, Polk County, Florida, this 7th day of March, 2019.

JALAL A. HARB
Circuit Court Judge

Copies furnished to:
- Shiobhan Olivero, Esq., 669 W. Lumsden Road, Brandon, FL 33511
- Steven Alamia, Esq., A.S.A.

JAH/jwl

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

VICTOR MANNS,

Appellant,

v. Case No. 2D19-1828

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Manns." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are in italics; other emphases are contained within the original quotations.

Citations to the trial transcript are by page number as follows: (T ___). Citations to documents or exhibits in the record and the pretrial transcripts are by page number as follows:(R_____).

STATEMENT OF THE CASE AND FACTS

Victor Manns ("Appellant"), was charged by way of an indictment with five (5) offense, to wit: 1) first degree murder, 2)robbery with a firearm, 3) burglary of a conveyance while armed with a firearm, 4) possession of a firearm by a convicted felon, and 5) unlawful use of two-way communication device. (R27). Jeffrey William Morrow, Jr. ("Victim") was alleged to have been murdered in Polk County, Florida on Sunday, September 4, 2016. (R26).

The State filed a "Notice of Intent" which advised of its intent to introduce evidence of a robbery on 8/26/2016 of Cory Peace and an armed robbery on 9/1/2016 of Andre Gipson. (R83). A hearing was conducted on this issue. (R305-336). The trial court took the matter under advisement and, thereafter, issued an order. The order stated, in part, as follows:

A.The August 26, 2016 incident (Corey Peace).

i. Mr. Corey Peace was attempting to sell an Apple iPad.

ii. He **posted the device** on the application known as **Letgo**. (Footnote: The Letgo application in a mobile marketplace to sell and buy goods).

iii. The Defendant responded to the posting and said: "Hi I'm Freddy James.. .I'm interested."

iv. On August 26, 2016, Mr. Peace and the Defendant **met at a parking lot** of a Walgreens store in **Lakeland, Florida**.

v. **During the meeting, the Defendant took the iPad and ran away.**

vi. When the Defendant was interviewed by Detective Sealey, he **admitted to the theft and also admitted to pawning the iPad.**

vii. The **box for the iPad was recovered from the scene of** the theft. It was processed for **fingerprints** and the subsequent analysis resulted in a **match to the Defendant's known prints.**

viii. The suspect's description provided by Mr. Peace matched the Defendant's description.

B.The September 1. 2016 incident (Andre Gipson).

i. Mr. Gipson was **attempting to sell a cellphone.**

ii. He **posted the device** on the application known as **Letgo.**

iii. The Defendant responded to the posting and said: "Hi, I'm Freddy James...I'm interested."

iv. On September 1, 2016, the Defendant and Mr. Gipson met at the Crystal Grove Apartments in **Lakeland, Florida.**

v. While the **Defendant** was examining the cellphone, he **pulled a gun at Mr. Gipson and robbed him of the mentioned cellphone** as well as another cellphone that Mr. Gipson had in his pocket. The Defendant ordered Mr. Gipson to leave the area and Mr. Gipson complied.

vi. The **handgun** that Freddy James possessed during the robbery was **described as a semi-automatic handgun.**

vii. The suspect's **description** provided by Mr. Gipson **matched the Defendant's description.**

viii. **One of the stolen phones** were **recovered**

from the **Defendant's residence** at the time of his arrest.

ix. **The Defendant admitted to the theft of the two (2) cellphones.**

C. **The instant case**.

i. Mr. **Blake Fitez was attempting to sell an iPhone.** He listed it on the **Letgo application.**

ii. The Defendant responded to the listing and said: "Hi, I'm Freddy James.. .I'm interested."

iii. Initially, the Defendant suggested that he and Mr. Fitez could meet at a Walgreens store in Lakeland. The parties met on September 4, 2016, at a **Family Dollar store in Lakeland.**

iv. Mr. Fitez was **accompanied by his friend, Mr. Jeffery Morrow,** and both arrived in a vehicle.

v. The **Defendant reached into the vehicle, grabbed the phone and ran away.**

vi. Mr. Fitez and Mr. Morrow exited the vehicle.

vii. Mr. Fitez heard the Defendant yell "Stop, I have a gun." He then heard two (2) shots and subsequently observed Mr. Morrow laying on the ground. Shortly thereafter, **Mr. Morrow died as a result of gunshot wounds.**

viii. During the processing of the scene, law enforcement **recovered casings which is consistent with the shooter using a semi-automatic handgun.**

ix. The **Defendant admitted "regarding the murder case"** when he was interviewed by Detective Wright.

(R87-89).

The trial court went on to find, in its written order, that

there were significant similarities between the charged offense and the two previous incidents. (R90). The trial court held that the State proved the commission of similar fact evidence and concluded that the evidence of the similar fact evidence was admissible. (R91). The trial court noted that it would guard against the similar fact evidence becoming a feature of this case. (R90).

As relevant to Issue Two, Appellant filed a motion to suppress. (R291-296). In the motion, Appellant cited to the following **alleged** deficiencies with the *Miranda*[1] waiver: lack of a written waiver, the time between the waiver and the interrogation, failure to re-*Mirandize*, Appellant's unheeded requests to loosen his hand cuffs, and Appellant being cold during the interrogation. (R296).

A hearing on the motion to suppress as well as another motion was conducted on 2/28/19. (R547-669). The State presented two witnesses, Det. Tonya Wright (R604-619) and (former) Dep. Steven Britten (R620-625). Appellant briefly testified in his own behalf at the motion hearing. (R626-627).

Detective Tonya Wright stated that she was with the Homicide Unit of the Polk County Sheriff's Office ("PCSO") and testified as to her investigation into the homicide of Victim. (R604-619). Det. Wright testified that her first contact with Appellant occurred

1 *Miranda v. Arizona*, 384 U.S. 436 (1966).

after Appellant had been handcuffed and removed from a residence in Mulberry (Polk Co.) by other PCSO Deputies and placed in the back of Deputy Britten's marked vehicle. (R609).

Det. Wright testified that she read Appellant his rights from a pre-printed *Miranda* card while he was in the back of Dep. Britten's patrol vehicle. (R609). After Det. Wright completed reading from her *Miranda* card, she testified that she asked Appellant if he understood his rights and he said "Yes." (R610).

Dep. Britten testified that he transported Appellant from the residence in Mulberry, Fl., where he was arrested, to the Sheriff's Operation Center ("S.O.C.") in Winter Haven, Fl. (T621 & T610). Dep. Britten stated that Det. Wright was present at the scene in Mulberry, had contact with Appellant and that he believed Det. Wright "spoke to him while he was in the back of my car." (R622). Although Dep. Britten had a limited memory of what was said by Appellant in the ride from Mulberry to Winter Haven, and he had prepared no report with which to refresh his recollection, he testified that, **if Appellant had invoked, he "absolutely" would have told Det. Wright.** (R625). Dep. Britten recalled Det. Wright being present when he dropped Appellant off at the S.O.C. (R623).

Det. Wright testified that, after Appellant was delivered to the S.O.C. by Dep. Britten, she inquired of Dep. Britten if Appellant had said anything. (R612). She testified that Dep. Britten told her Appellant "had just talked about his kids" during the

ride to the SOC. (R612). Dep. Britten did not inform Det. Wright that Appellant had invoked his rights nor that he wanted to talk about the case. (R612).

Det. Wright interviewed Appellant and the entire unredacted video was introduced at the motion hearing and **the DVD is part of the record of this Court.** (R612-613 & Ex.1).

Appellant briefly testified at the motion hearing and denied that Det. Wright ever read him his *Miranda* rights. (R627).

The trial court thereafter issued a written order which stated, in part, as follows:

> On September 8, 2016, the Defendant was arrested at his grandmother's house. Officer Steven Britton2 was tasked with transporting the Defendant from the arrest site to the Polk County Sheriffs Operation Center. The **Defendant was placed in Britton's patrol vehicle, and Wright spoke with the Defendant briefly.** Britton did not recall the conversation; however, **Wright testified that at that time she read the Defendant his Miranda rights from a card. The Defendant indicated to Wright that he understood his rights.** Britton did not recall the conversation he had with the Defendant during the transport. **Britton also did not recall the Defendant invoking his rights in any way,** however, Britton stated he would have informed Wright had that occurred.
>
> The Defendant was escorted to an interview room where he was interrogated by Wright and another female detective. **The interview was audio and video recorded,** a recording of which

2 Per his trial testimony, the correct spelling of this witnesses' last name is "Britten."

was entered into evidence as State's Exhibit 1 and reviewed by the Court in chambers. It is undisputed that the Defendant was not re-warned of his Miranda rights prior to, or during the interview. The Defendant did not sign a written waiver or acknowledgement of his rights. The Defendant is seen wearing only boxer shorts and has a white tee shirt on the table in front of him. **During the interview the Defendant informed the Detectives that he was fully dressed at his grandmother's house shortly before he was arrested. The Defendant explained he undressed himself after learning the police were outside,** as he feared being shot in the event he were to try and pull his pants up. The **Defendant's hands were cuffed behind his back,** and the Defendant made multiple complaints during the interview that the cuffs were too tight. **At one point Wright attempted to help the Defendant adjust to be more comfortable,** but did not remove or loosen the cuffs. During the interview the Defendant made several incriminating statements. The interview **began at approximately 4:00 A.M., and ended at approximately 6:17 A.M.**

The **Defendant** testified at the hearing that he **did not recall Wright reading Miranda warnings, and that she did not do so at any time.**

(R508-509).

After setting out the relevant legal authority, the trial court went on to conclude as follows:

The Defendant argues his Miranda rights were violated, and his statements were not voluntarily made. Having evaluated the testimony, this **Court finds Detective Wright's testimony to be credible.** The Defendant was clearly taken into custody when he was arrested at his grandmother's house. At this time, **Wright informed the Defendant of his Miranda rights.**

Although it is true the Defendant was not specifically asked if he understood each individual right as they were read, **he did**

indicate to Wright that he understood his rights after the full warning was administered. The interview occurred less than two hours after the Defendant was informed of his Miranda rights. The Defendant did not indicate in any way that he wished to invoke any of his rights. Although an express or written waiver was not obtained, the testimony and review of the recorded interview make it **clear to the Court** that the **Defendant provided an implied waiver by acknowledging his understanding of his rights, and subsequently speaking to the detectives.**

The Court also **does not find that the Defendant's waiver** was **coerced** or **involuntarily** made. There are no indications that the Defendant was under any **duress** by the lack of water or food during the two hour and seventeen-minute interview. While the Defendant was wearing boxer shorts, this was not due to being roused out of bed in a compromising state. The Defendant himself informed the detectives he **deliberately undressed upon first noticing law enforcement. The Defendant's discomfort during the interview does not appear to have risen to the level of coercion.** The detectives did **not utilize** any **improper interrogation techniques. Having considered the totality of the interview, the Defendant's waiver and willingness to continue speaking to the detectives was knowing and voluntary.**

(R509-510).

Trial

For ease of reference, the following table of witnesses is provided (the case at bar is referenced as "murder case" although Appellant was charged and convicted of offenses in addition to murder):

Name:	Roll	Page #s:
Paul Wright	Sgt PCSO murder case	543-556
Blake Fitez	Eyewitness murder case	557-576
Joshua Colon	Paramedic murder case	546-584
Joshua Lasalle	Dep PCSO murder case	588-591
Paula Maney	Crime Scene Supervisor murder case	592-596
Anna Lopez	CSI PCSO murder case	597-617
Seth Morozomski	K9 Deputy PCSO murder case	618-625
Brittany Simmons	Appellant's girlfriend murder case	675-681
Cory Peace 1	Victim Williams Rule case	682-708
Edward Sanchez 2	Eyewitness Williams Rule case	709-717

Joel Dempsey 3	Det. PCSO Williams rule and murder cases	718-729
Devin Persall 4	Pawnbroker Williams Rule case	729-738
Jack Murphy 5	SAO Investigator Williams Rule	739-746
Peter Lawton 6	Det PCSO Williams rule and murder cases	769-774
Christopher Broadhead	Dep PCSO murder case	774-789
Tracy Wright	CSI PCSO murder case	790-804
Cody Russell	CSI PCSO	805-824
Vera Volnikh	Medical Examiner murder case	984-990
Andre Gipson 7	Victim Williams rule case	992-1005
Edward Sealley 8	Det LPD Williams Rule cases	1006-1013
Leggie Boone 9	Fingerprint Examiner	1013-1023

	PCSO Williams Rule case	
Carol Greenwell	FDLE Analyst Biology section murder case	1038-1046
Christine Smith	PCSO computer crimes analyst murder case	1046-1064
Sylvia Dyer	Appellant's grandmother murder case	1064-1066
Ronald Witt	T-mobile records custodian murder case	1075-1114
Tonya Wright	Lead Detective PCSO murder case	1115-1274
Michael Gamache	Forensic Psychologist murder case	1294-1350
DEFENSE WITNESESS: Bruce Frumkin	Forensic Psychologist murder case	871-983

Peter Lawton	PCSO murder case	1385-1393

To the extent it is supported by the record, the State accepts the summary of witness testimony that Appellant provides in his Initial Brief. (I.B. 5-31).

During the course of the trial, the trial court instructed the jury on the limited use of *Williams* Rule evidence on multiple occasions. (R687, T681, T991, T1127).

Appellant moved for a mistrial alleging the at the Williams Rule evidence had become a feature of the trial. (T1352-1353). The trial court denied the motion. (T1357).

The State introduced 126 exhibits at trial. (R733-739). Of those 126 exhibits, 106 of them pertained solely to the "murder case." (R733-739). Of the remaining 20 exhibits, 11 pertained solely to the collateral crimes, to wit: Exhibit 7, 11-12, 28-29, 102, and 112-116. (R733-739). Nine (9) exhibits were related to the "murder case" and the collateral crimes, to wit: Exhibits 12, 23, 25, and 84-90 (R733-739).

Closing argument was offered by the State. (T1423-1460 & T1490-1503). Within these 49 pages, there was one reference to the *Williams* Rule cases which occupies one-half of one transcript page. (T1440).

During the final instructions to the jury, the trial court instructed the jury on the limited use of Williams Rule evidence. (R708).

Appellant was found guilty as charged. (R722). He was sentenced to life in prison. (R1164-1188). On 5/8/2019 he filed a notice of appeal. (R1156).

SUMMARY OF THE ARGUMENT

Appellant's contention that the collateral crime evidence became a feature of the trial is belied by the record. The vast majority of the witnesses and exhibits were only related to the crimes at bar. The collateral crimes were substantially less serious than the crimes charged. In closing arguments, the State made only one brief reference to the collateral crimes in its initial closing and no reference to them in rebuttal closing.

There was competent, substantial evidence for the trial court to find that:

1) Appellant was apprised of his *Miranda* rights and that he acknowledged that he understood his rights,

2) Appellant implicitly waived his right when he spoke to detectives post- *Miranda*, and, that

3) Appellant's statement was not coerced, given under duress or involuntary.

ARGUMENT

ISSUE ONE

Whether *Williams* Rule evidence became a feature of the trial? [RESTATED]

Standard of Review

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's ruling will not be reversed unless there has been a clear abuse of that discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000).

Preservation of Error

During the course of the trial, at no time did Appellant raise an objection to the *Williams* Rule evidence become a feature of the trial until he moved for a mistrial after the State rested.

In *Steinhorst v. State* 412 So.2d 332, 338 (Fla.1982), it was held that "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." A party's failure to object in the trial court precludes appellate review of an erroneous jury instruction unless the error is deemed fundamental. *Abbott v. State*, 958 So. 2d 1140, 1142 (Fla. 4th DCA 2007). Although the objection was made, the timing of same made it difficult for the trial court to limit the quantum or manner of collateral crime evidence being introduced. It should be noted, however, the trial court did caution the State that it should be judicious in its use of collateral crime evidence in any rebuttal proof (there was no

rebuttal proof offered) and in its closing argument. As noted above, the State appears to have heeded this admonition.

Merits

Appellant contends that the *Williams* Rule evidence became a feature of the case. A review of the record shows that this did not occur.

This case is not your typical *Williams* Rule case. The *Williams* Rule evidence is what led investigators to Appellant. It would have been impossible to logically present the case to the jury without an understanding of the *Williams* Rule evidence. This case is also distinguishable from many other *Williams* Rule cases in that the severity of the offenses in the *Williams* Rule offenses, robbery and armed robbery, are substantially less than the primary charge of the offense at bar - first degree murder.

The State called 27 witnesses. Only five of those witnesses testified solely as to the *Williams* Rule evidence. (see table of witnesses, *supra*). Two witnesses testified to both the murder case and the *Williams* rule cases. As detailed above, 106 of the 126 exhibits introduced by the State pertained solely to the "murder case." Appellant's trial counsel argued below, and Appellant counsel seems to be adopting that the number of State Exhibits was actually 13 "as grouped as composites." (I.B. p. 30). In considering how much time and attention the State placed on each

exhibits, making the many photographs which appear to have each been given due consideration by the jury, "composite exhibits" for consideration of this issue defies logic and, in fact Appellant's counsel below and here offer none.

The State's two closing arguments span 49 pages of the transcript. (T1423-1460 & T1490-1503). Within these 49 pages, there is only one reference to the *Williams* Rule cases which occupies only one-half of one transcript page. (T1440).

During the course of the trial, the trial court instructed the jury in accordance with Florida Standard Jury Instruction 2.4 on the limited use of *Williams* Rule evidence on multiple occasions. (R687, T681, T991, T1127).

During the final instructions to the jury, the trial court, in accordance with Florida Standard Jury Instruction 3.8(a) again instructed the jury on the limited use of *Williams* Rule evidence. (R708).

In *Conde v. State*, 860 So. 2d 930, 945 (Fla. 2003) our Supreme Court noted that a trial court may not allow relevant collateral crimes to become a feature of a trial, which occurs when inquiry into the collateral crimes **transcends the bounds of relevancy** to the charge being tried and the prosecution **devolves** from development of facts pertinent to the main issue of guilt or innocence **into an assault on the character of the defendant.** *Conde* at 945 citing to *Williams v. State*, 117 So. 2d 473,475 (Fla. 1960).

This Court, in *Headrick v. State*, 240 So. 2d 203, 204 (Fla. 2d DCA 1970), affirmed a conviction of breaking and entering, where the State utilized nine witnesses to prove six other offenses.

The Florida Supreme Court has repeatedly affirmed the admission of extensive collateral crimes evidence where that evidence was probative of material issues. See *Zack v. State*, 753 So.2d 9, 16-17 (Fla.2000) (probative value of extensive evidence of thefts, sexual assault, and murder over a two-week period prior to charged crime outweighed prejudicial effect); *Wuornos v State*, 644 So.2d at 1004-06 (introduction of extensive evidence of six prior murders did not amount to "needless overkill"); *Ashley v. State*, 265 So.2d 685, 692-94 (Fla.1972) (no error in admission of bullet evidence, autopsies, confession, and other witness testimony regarding collateral crimes).

In *Conde, supra* our Supreme Court found that "[i]n the instant case, Conde points to the first three days of trial as excessive introduction of collateral crimes evidence. However, the length of this testimony was unavoidable given the fact that five collateral crimes were involved." *Conde* at 946.

In *Snowden v State*, 537 So.2d 1383,1385 (Fla. 1989) our Supreme Court held that "[m]ore is required for reversal than a showing that the evidence is voluminous." In *Townsend v. State*, 420 So.2d 615,617 it was noted that the number of transcript pages and exhibits related to collateral crimes evidence is not the sole

test when such quantity is result of there being numerous similar crimes.

Appellant's reliance on *Seavey v. State*, 8 So. 3d 1175, 1178 (Fla. 2d DCA 2009) is misplaced. This Court noted that "the collateral crimes involved much more serious criminal offenses than the charged crime." *Seavey* at 1178. The opposite is true in the case at bar. In *Seavey*, this Court further noted that the prosecutor used 10 pages of his closing argument on the collateral crimes where, in the case at bar, the State's reference in closing to the collateral offenses took less than one page.

Appellant's reliance on *Morrow v. State*, 931 So. 2d 1021, 1022 (Fla. 3d DCA 2006) is likewise misplaced. The *Morrow* case involved a charge of a felon in possession of a firearm a collateral offense of robbery. *Morrow* at 1022. The *Morrow* Court noted that " . . . the State referenced the robbery eight times during its opening statement, at least eighteen times during its case-in-chief, and **twenty-five times during closing argument**. In addition, the trial court granted the State's request to admit the jewelry stolen by Morrow." *Morrow* at 1022. The Prosecutor also referenced the collateral offense with each witness. *Morrow* at 1022. These facts are clearly distinguishable from the case at bar where the vast majority of witnesses were not questioned regarding the collateral offenses and there was only one brief reference to the collateral offense in closing argument.

Appellant's reliance on *Steverson v. State*, 695 So. 2d 687, 690 (Fla. 1997) is misplaced. In *Steverson*, the State introduced evidence of a murder that took place after the crime being tried. Our Supreme Court noted that ". . . the jury heard virtually every detail of the Rall case, including every emotional aspect of the shooting, the detective's injuries, his bloodied face, his staggering, his yelling, the frantic 'officer down' response by numerous law enforcement officers and undercover agents, the hospital treatment, and the time he had to take off work due to the 'deadly force' situation." *Steverson* at 690. This is quite different from the case at bar. The two collateral offenses, a robbery and an armed robbery, did not involve emotional testimony or injuries of any kind.

Finally, Appellant's reliance on *Bush v. State*, 690 So. 2d 670, 673 (Fla. 1st DCA 1997) is misplaced. In *Bush*, the charge at issue was for grand theft and paraphernalia possession. *Bush* at 671. The State, over objection, was permitted to introduce evidence of three other victims and numerous items which were stolen from them. *Bush* at 672. The prosecutor spent a substantial amount of time in their closing reviewing all of the collateral crimes items that were stolen. *Bush* at 672. The First District held " . . . the evidence of all of the other stolen property located in appellant's home clearly became a feature of the trial, both with respect to the quantum of evidence presented and the arguments of

counsel." In the case at bar, the collateral crime evidence was not a feature either by the quantum of the evidence or by the arguments of counsel.

Harmless Error

Even if there were a finding of error on this issue, this would still not rise to the level of reversible error insofar as the error should be classified as harmless error as there is **no reasonable possibility that the error contributed to the conviction**. *Cass v State*, 190 So. 3d 1105 (Fla. 2d DCA 2016) citing to *State v Diguillo*, 491 So. 2d 1129, 1135 (Fla. 1986).

The State's case against Appellant was so strong that there no reasonable probability that the *Williams* Rule evidence being an **alleged** feature of the case contributed to the conviction. Appellant gave a detailed admission to this crime. The confession included information that only the perpetrator would know, e.g. the victim was armed. (T1250).

Appellant's confession combined with the testimony of Blake Fitzel as well as the physical evidence made the *Williams* Rule evidence of much less significance.

ISSUE TWO

Whether the trial court erred in denying Appellant's motion to suppress statement? [RESTATED]

Standard of Review

Decisions of a trial court on a motion to suppress evidence

come to the appellate court **clothed with a presumption of correctness** and the reviewing court **must interpret the evidence and reasonable inferences** in a manner **consistent with the trial court's ruling**. *Murray v. State*, 692 So.2d 157, 159 (Fla. 1997).

In *Connor v. State*, 803 So.2d 598, 608 (Fla. 2001), the Florida Supreme Court explained the appellate courts' proper review of orders on motions to suppress.

> [A]ppellate courts should continue to accord a **presumption of correctness** to the trial court's rulings on motions to suppress with regard to the trial court's determination of **historical facts**, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, Article I, Section 9 of the Florida Constitution.

See also, *State v. Smith*, 850 So.2d 565, 567 (Fla. 2d DCA 2003) (in reviewing the trial court's determination on a motion to suppress, this Court must consider the trial court's **findings of fact** pursuant to the **competent, substantial evidence standard**; however, the trial court's legal conclusions are reviewed de novo).

Merits

Appellant contends that the trial court should have granted his motion to suppress his statement.

Det. Wright testified at the hearing on the motion to suppress that she read Appellant his rights from a pre-printed *Miranda* card while he was in the back of Dep. Britten's patrol vehicle. (R609).

After Det. Wright completed reading from her *Miranda* card, she testified that she asked Appellant if he understood his rights and he said "Yes." (R610). Appellant denied that he was read *Miranda*. (R627).

The trial court entered a detailed written order which stated, in part, as follows:

> Wright **informed the Defendant of his Miranda rights.**
>
> Defendant did **indicate** to Wright that he **understood** his rights after the full warning was administered.
>
> The interview occurred **less than two hours after the Defendant was informed** of his Miranda rights.
>
> The Defendant did **not** indicate in any way that he **wished to invoke** any of his rights.
>
> Defendant provided an **implied waiver** by **acknowledging his understanding of his rights, and subsequently speaking to the detectives.**
>
> The Court also does **not find** that the Defendant's waiver was **coerced or involuntarily** made. There are **no indications** that the Defendant was under any **duress** by the lack of water or food during the two hour and seventeen-minute interview.
>
> The Defendant's **discomfort** during the interview does **not appear to have risen to the level of coercion.**
>
> The detectives did **not utilize any improper interrogation techniques.**
>
> Having considered the **totality of the interview,** the Defendant's waiver and willingness to continue speaking to the detectives was **knowing and voluntary.**

(R510-511).

In *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010), the U.S. Supreme Court addressed the issue of an ambiguous *Miranda* waiver and held that **when a defendant makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her Miranda rights.** In *Thompkins*, law enforcement requested that the defendant sign the form from which the *Miranda* rights had been read, but the defendant declined. *Thompkins* at 2256. The Supreme Court noted that the "record contain[ed] conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form." *Thompkins* at 2256. Thereafter, officers began the interrogation, which lasted approximately **three hours** during which the **defendant largely remained silent, except for "a few limited verbal responses"** *Thompkins* at 2256.

The *Thompkins* Court further held that **waivers can be established "absent formal or express statements of waiver."** *Thompkins* at 2261. The Court reiterated that the main purpose of *Miranda* is to ensure that the accused is advised of and understands his rights. *Thompkins* at 2261. Thus, the Court concluded that the **prosecution does not need to show that a waiver of Miranda rights was express. An implicit waiver of the right to remain silent is**

sufficient to admit a suspect's statement into evidence. *Thompkins* at 2261. The Court also noted that the **defendant's sporadic answers** to questions throughout the interrogation **confirmed that the defendant had waived his right to remain silent.** *Thompkins* at 2263.

Appellant takes issue with the trial courts reliance on *Thompkins*. (I.B. p. 42). Appellant notes that Mr. Thompkins, unlike Appellant, was provided a written *Miranda* waiver but fails to note that Mr. Thompkins declined to sign the waiver. *Thompkins* at 2256. Appellant further notes that the officers in Thompkins verified that he could read English. (I.B. p. 42). Although this was apparently not done in the case at bar, there was no need to do so insofar as Appellant was, unlike Thompkins, was orally advised of his right.

The Florida Supreme Court addressed an ambiguous waiver situation in *Kalisz v. State*, 124 So. 3d 185 (Fla. 2013). In *Kalisz*, it was held that the defendant's hospital room confession was freely and voluntarily provided after he knowingly and intelligently waived his *Miranda* rights. *Kalisz* at 205-206. The defendant acknowledged he was familiar with the *Miranda* rights based on prior experiences with the criminal justice system, defendant then heard a police detective read those rights before he began to speak with law enforcement and implicate himself in murder cases. *Kalisz* at 205-206. At no point during the interview did defendant indicate he no longer wished to speak with law enforcement and had decided

to invoke his right to remain silent. *Kaliscz at* 205-206. Appellant's brief summary of *Kaliscz* is somewhat misleading where Appellant states that Mr. Kaliscz "knew what his *Miranda* rights were and agreed to speak with law enforcement." (I.B. p. 44 emphasis supplied). The *Kaliscz* Court noted as follows:

> **Kalisz did not execute a written waiver** of his Miranda rights. Based on the transcript and the audio recording, **it does not appear that Kalisz said anything responsive with regard to his right to remain silent after** Detective Faulkingham read him his **Miranda** rights. That is, he **did not expressly state he was waiving his rights or declining to waive them.** Kalisz did, however, **proceed to talk to law enforcement for approximately the next three hours.**

Kaliscz at 199-200.

Appellant relies on this Court's 1976 opinion in *Hogan v. State,* 330 So.2d 557 (Fla. 2d DCA 1976). In *Hogan,* this Court affirmed a conviction where a suppression issue was raised where Appellant did not execute a written waiver. *Hogan* at 559. Although *Hogan* preceded *Thompkins* (U.S. Supreme Court), *supra*, by three decades, this Court noted as follows regarding an argument regarding waiver where the accused answered some questions prior to invoking:

> Does this mean that one must **expressly waive** the right to counsel before his subsequent confession is admissible in evidence? **This question has been answered in the negative many times.**

Hogan 558.

Appellant's reliance on *Sliney v. State*, 699 So. 2d 662, 669 (Fla. 1997) is not helpful to his position. In *Sliney,* our Supreme Court, citing to this Court's holding in *Hogan,* held as follows:

> In accord with *Hogan*, we **do not find** that the officers' **failure to obtain Sliney's signature** on the **bottom portion** of the **Miranda form** necessarily invalidated his waiver.

Sliney at 669.

In his Summary of Argument, Appellant notes that he "was questioned for over **two hours** while sitting in **boxers shorts** with his **hands tied behind his back**." (I.B. p. 31). Appellant notes that these facts distinguish this case from *Thompkins*. (I.B. p. 31). The State does not dispute that, as the trial court found, the interview spanned approximately two hours and 17 minutes. (R509). As for being in boxer shorts the trial courts found, and the record supports the following finding:

> During the interview the Defendant informed the Detectives that he was fully dressed at his grandmother's house shortly before he was arrested. The Defendant explained he undressed himself after learning the police were outside, as he feared being shot in the event he were to try and pull his pants up.

(R509).

As for any concern that Appellant was cold do to his attire, although no testimony was elicited as to the temperature of the interview room, a review of the video itself reveals that both of the officers, both females, were wearing shirt sleeves and gave no indication of being cold. (Ex.1). At one point in the video Det.

Wright can be seen draping Appellant's shirt over his back after he stated it was cold in the room. (R867 & Ex. 14 @ 1:25:30).

Appellant was handcuffed behind his back during the entirety of the interview. Although the trial court notes that Appellant made "multiple complaints during the interview that the cuffs were too tight" the State has only located two such references and a review of the video shows that Appellant appeared in no distress and, as the trial court noted, at one point Det. Wright can be seen on video adjusting Appellant's handcuffs. (R840 & Ex. 14 @ 0:50-0:51)

CONCLUSION

Based upon the foregoing authorities and arguments, Appellee respectfully requests that this court affirm Appellant's convictions and sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida Court's e-portal to J. Rafael Rodriguez, Public Defender's Office, P.O. Box 9000, Bartow, Fl. 33831, via email jrafrod@bellsouth.net and appealfilings@pd.org and on this the 31st day of July 2020.

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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