IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,512

NORMAN PARKER,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

BRIEF OF APPELLEE

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INTRODUCTION

The appellant was the defendant in the court below. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appeared in the trial court. The symbol "R" will be used to designate the record on appeal, the symbol "T" will be used to designate the transcript of proceedings and the symbol "ST" will be used to designate transcript of proceedings held on September 9, 1981. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State makes the following additions and/or corrections to the defendant's statement of the case and facts:

A. Admission of Defendant's Statements to Metro-Dade Police Officers

Before speaking to the Metro-Dade police officers, the defendant asked for an attorney under the belief that they wanted to talk to him about the Washington case; but when told that the Washington case would not be discussed he agreed to talk without an attorney. (T.735-738, 752, 753, 758). Contrary to his trial testimony, the defendant told the Metro-Dade police officers that he did not know

co-defendant Robbie Lee Manson. (T.742). The defendant did not object during trial to the admission of his statements to the Metro-Dade police officers, or to the evidence derived therefrom. (T.1291, 1488, 1492, 2268, 2280, 2281).

B. Admission of Defendant's Statements to Detective Sharkey of the Washington, D.C. Police Department.

The trial court denied the defendant's motion to suppress statements made to Detective Sharkey because the motion was not made until the middle of trial although the defendant had the opportunity to make the motion prior to trial. (T.1761, 1762). This finding was based upon defense counsel's admission that he was aware of the statement, and had seen it prior to trial, and the prosecutor's filing of a notice of intent to rely on the crime, which was admitted in the statement, three weeks prior to trial. (T.1739-1741, 1746, 1747).

While making it clear that it was denying the motion to suppress because it was untimely, the trial court agreed to hold a voluntariness hearing in case it was wrong on the procedural issue. (T.1762, 1851). When the defendant was interrogated by Detective Sharkey, he did not appear to be in pain or intoxicated and never asked to see a doctor. (T.1855, 1856). The defendant was advised of his Miranda rights, which he understood, and waived since he wanted to

tell what happened. (T.1857, 1871). The defendant himself testified at the hearing that he understood his rights and knew what he was doing when he agreed to talk to Detective Sharkey. (T.1887, 1889). No promises were made to induce the defendant to talk. (T.1857, 1878). The defendant told what happened regarding the shooting of Thomas Spriggs in a straightforward, calm, very alert manner. (T.1857). The defendant testified at the hearing that he agreed to talk after being told that he could it easier on himself, and did not claim that he was confronted with illegally seized evidence. (T.1887, 1888).

There was evidence, independent of the statement to Detective Sharkey, to connect the defendant to the bullet removed from Thomas Spriggs. (T.1812).

C. Jury Issues

The defendant's motion to quash the jury panel was heard and denied on January 10 and 11, 1980. (R.179A). Transcripts of these hearings have not been served on the State, and are not before this Court.

When defense counsel asked to remove juror Purnell for cause, the court reserved ruling. (S.T.75, 76). Without ever requesting or receiving a ruling on his challenge for

cause, defense counsel subsequently indicated that juror Purnell's answers to his questions demonstrated that he could be fair, and temporarily accepted him. (T.820, 851, 875).

During voir dire, juror Purnell stated that he would be a fair and impartial juror, would base his verdict on the evidence, would follow the court's instructions, and would not be influenced by his prior experience as an investigator with the State Attorney's Office. (S.T.12, 98; T.851). He further stated that he had never worked with the prosecutor or any of the police officers involved in this case, (S.T. 98; T.814, 815), and would consider a police officer's testimony and judge his credibility as he would any other witness. (T.820).

Juror Kaufman stated on voir dire that she could put the experience of a burglary aside and would base her verdict on the evidence. (S.T.58, 59). She repeatedly stated that she would follow the court's instructions and render an impartial verdict according to the evidence, and indicated that her sentence recommendation would be based on the court's instructions and a weighing of the evidence. (T.831, 834, 835, 869, 876).

D. Corpus Delecti of the Washington Shooting.

Defense counsel consistently maintained that the jury should not be told that a criminal agency was involved in the Washington shooting. (T.1200, 1201, 1548, 1549, 1729, 1730, 1732-1735, 1771, 1818, 1819, 1898, 1907-1909).

E. Sufficiency of the Evidence

David Ortigoza, Luis Diaz, and Silvia Arana made positive and unequivocal identifications of the defendant based upon their observations of him before and after the crimes for which he was convicted. (T.1263-1277, 1537-1546, 1645-1662). All three eyewitnesses got a good look at the defendant. (T.1358, 1540, 1658, 1659). David Ortigoza and Luis Diaz were with the defendant for 1 1/2 to 2 hours and Silvia Arana was with him for 20-25 minutes. (T.1266, 1292, 1681).

The defendant was the only witness who testified that he was in Washington when the crimes were committed. (T.2093, 2103, 2119, 2178, 2200, 2217).

F. Testimony About Defendant's Other Names

The first time the jury was informed that the defendant

used another name in Washington was during defense counsel's opening argument. (T.1226). When testimony about the defendant's use of other names was first admitted there was no objection. (T.1814, 1927). When defense counsel did finally object to such testimony, the trial court ruled tht the objection was untimely. (T.1933, 1934).

G. Admission of the Bullet

When Dr. Font removed the bullet from the deceased, he initialed it. (T.1779, 1780, 1783). This was the only bullet initialed by Dr. Font that night. (T.1782, 1786). Dr. Font recognized his initials on State's Exhibit 16, and testified that it appears to be the bullet removed from the deceased. (T.1784, 1786). The day after Dr. Font removed the bullet from the deceased, Officer Hart examined the bullet, which is undisputedly Exhibit 16. (T.1961).

According to Officer Hart, it is impossible to tamper with a bullet so as to make it match another bullet. (T.1951).

H. Sentencing

The defendant did not object to the prosecutor's argument during the penalty phase on the basis he raises on

appeal. (T.2605, 2606). The standard jury instruction were given during the penalty phase. (T.2543, 2544, 2619, 2624). The record of defendant's conviction and sentence to life imprisonment for first degree murder entered on August 10, 1967, was admitted into evidence. (R.409, 410).

During trial, defense counsel referred to the murder committed in this case as a cold blooded execution. (T.1365).

POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE DERIVED THEREFROM?

II

WHETHER THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO QUASH THE JURY PANEL?

III

WHETHER THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES AND HIS REQUEST THAT TWO PROSPECTIVE JURORS BE EXCUSED FOR CAUSE?

IV

WHETHER THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S STATEMENT AS TO A WASHINGTON, D.C. SHOOTING EVEN IF THE CORPUS DELECTI HAD NOT BEEN ESTABLISHED?

V

WHETHER THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS?

VI

WHETHER THE TRIAL COURT CORRECTLY ALLOWED TESTIMONY THAT THE DEFENDANT USED OTHER NAMES WHILE IN WASHINGTON?

POINTS INVOLVED ON APPEAL
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VI

WHETHER THE TRIAL COURT CORRECTLY ADMITTED INTO EVIDENCE A BULLET RECOVERED FROM THE DECEASED'S BODY?

VII

WHETHER THE TRIAL COURT CORRECTLY ADMITTED INTO EVIDENCE A BULLET RECOVERED FROM THE DECEASED'S BODY?

VIII

WHETHER THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY?

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE DERIVED THEREFROM.

On October 31, 1979, the defendant filed a motion to suppress statements he made to Metro-Dade police officers. (R.122, 123). On September 16, 1981, in the midst of trial, he filed a motion to suppress statements he made to a Washington, D.C. police officer. (R.122, 123). On appeal he argues that the trial court erroneously denied both these motions to suppress. The State disagrees and submits that the trial court's rulings can be upheld for numerous reasons.

A. Statements to Metro-Dade Police Officers

On August 29, 1978, Metro-Dade police officer, George Pontigo, spoke to the defendant about his involvement in the crimes charged. (T.738). While the defendant denied any involvement in the crimes charged, (T.738, 742), he did make the following three statements, which were introduced at trial: (1) he agreed to let the officers take his jewelry to Miami so it could be determined if it had been taken in the robbery; (2) he said that he had gotten the jewelry from his girlfriend in Washington; and (3) he claimed not to know

his co-defendant, Robbie Lee Manson. (T.741, 742). The State initially submits that the trial court correctly admitted all three statements during trial since a contemporaneous objection to this admission was not made.

The jewelry, which according to the defendant, was illegally derived from his statement to Officer Pontigo, was first discussed during the testimony of David Ortigoza, one of the robbery victims, who identified the watch and chains recovered from the defendant as his own. (T.1291, 1292). No objection when interposed. Later, when Officer Al Lopez testified that the defendant had told him and Officer Pontigo during their August 29, 1978, interview that they could take the jewelry back to Miami, an objection was not made. (T.1488). Indeed, at the close of Officer Lopez' testimony, defense counsel expressly noted that he had not objected to the testimony about defendant's statement regarding the jewelry. (T.1492).[1] The defendant's statements that he had been given the jewelry by his girlfriend, (T.2268), and that he did not know Robbie Lee Manson (T.2280, 2281), were elicited during his own testimony, and again no objection was made.

[1]The defendant so informed the court so it would know that any elaboration as to other statements would have been objectionable.

Since the defendant failed to renew his objection to the statements he made to the Metro-Dade police officeers when the statements were introduced at trial he has failed to preserve the admission of these statements for review. Routly v. State, __So.2d__ (Fla. 1983)(Case No. 60,066, opinion filed September 22, 1982); G.E.G. v. State, 417 So.2d 975 (Fla. 1982); Fraterrigo v. State, 151 Fla. 634, 10 So.2d 361 (1942); Robertson v. State, 94 Fla. 770, 114 So. 534 (1927); Alvarez v. State, 400 So.2d 768 (Fla. 4th DCA 1981); Witt v. State, 388 So.2d 1 (Fla. 4th DCA 1980); DeLuca v. State, 384 So.2d 212 (Fla. 4th DCA 1980); Kiddy v. State, 378 So.2d 1332 (Fla. 4th DCA 1980); Jones v. State, 360 So.2d 1293 (Fla. 3d DCA 1978); Stanley v. State, 357 So.2d 1031 (Fla. 3d DCA 1978).

It should be noted that while a defendant's failure to review a motion to suppress at trial would bar appellate review of the motion to suppress under normal circumstances; this case presents an even more compelling reason than normal for refusing to consider the defeidant's appellate challenge to the admission of his statements to the Metro-Dade police officers. The defendant argues on appeal that these statements were illegally obtained and hence inadmissible because of Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Since Edwards was decided on May 18, 1981, it was not available for consideration when the court

denied the motion to suppress on January 15, 1980, but could have been brought to the trial court's attention at the time of trial in September of 1981.[2] Since the defendant did not apprise the trial judge of the alleged applicability of Edwards to this case, the court cannot be faulted for admitting the evidence in question.

If the defendant had made a timely objection to the admission of his statements, the trial court, could have justifiably found that such an objection would have been without merit. The defendant's argument, reduced to a footnote, that the Metro-Dade police could not talk to the defendant about the Miami crimes since they knew he was represented by counsel for the Washington crimes, has been repeatedly rejected by the Florida Courts. See Ferguson v. State, 417 So.2d 361 (Fla. 1982); Miller v. State, 403 So.2d 1017 (Fla. 5th DCA 1981); Sanders v. State, 378 So.2d 880 (Fla. 1st DCA 1979); Kimble v. State, 372 So.2d 1014 (Fla. 2d DCA 1979). The defendant's argument as to the applicability of Edwards v. Arizona, supra, requires some analysis.

In Edwards, the petitioner, after waiving his rights and denying involvement in the crimes being investigated,

[2]The trial judge, who denied the motion to suppress, was not the judge who presided over the trial.

sought to "make a deal". After being given the telephone number of a county attorney, the petitioner said, "I want an attorney before making a deal," and the questioning ceased. The next day the police readvised the petitioner of his rights, which he waived, and he eventually confessed. The Court held that this confession must be suppressed because once the petitioner invoked his right to have counsel present during interrogation into the crimes for which he was convicted, interrogation about those crimes cannot be resumed unless his attorney is present or unless he has initiated the resumption of questioning.

This case is distinguishable from Edwards on several grounds, foremost of which is that the defendant never invoked his right to have counsel present at the interrogation into his involvement in the Miami crimes. According to the defendant, immediately before he spoke to the Metro-Dade police officers he was told by Washington police officer James Greenwell that some people from the District Attorney's Office wanted to talk to him. (T.751, 752). The defendant thought that government people from Washington wanted to talk to him about his Washington crimes, so he said that he would like to speak to his attorney before being interrogated. (T.752, 753). Officer Greenwell replied that the defendant has nothing to worry about, and that he should talk to the police since he might be able to

help himself. (T.752, 753). When the defendant was told by the Metro-Dade Officers that they only wanted to talk to him about the Dade County case, he waived his rights and agreed to talk to them without his attorney as long as the Washington case was not mentioned. (T.735-738, 753, 758).[3]

The State submits that Edwards is inapplicable when, as in this case, the police obtain a waiver of rights and interrogate a suspect about his involvement in a crime after he has invoked his right to counsel when interrogated about a different crime. This argument is supported by Stone v. State, 378 So.2d 765 (Fla. 1979), in which this Court held that the police may continue to interrogate a suspect even after he has requested counsel for an unrelated purpose. Although Stone was decided before Edwards, its holding is still valid.

In Miller v. State, 403 So.2d 1017 (Fla. 5th DCA 1981) the Court distinguished Edwards and cited Stone for the proposition that, "A request for counsel for an unrelated charge does not require that interrogation cease if adequate

[3]The defendant testified that he thought the Metro-Dade Officers only wanted to talk to him about his escape from a work release center in Dade County. (T.753, 758). This misperception is irrelevant to the issue before this Court, since the testimony, establishes that the defendant's invocation of his right to counsel pertained only to the Washington case. (T.737, 738).

Miranda warnings have been given." Miller v. State, supra at 1019. Cf. Tuff v. State, 408 So.2d 724 (Fla. 1st DCA 1982).

This Court's most recent opinion in Delap v. State, _ So.2d __ (Fla. 1983), (Case No. 56,235, opinion filed September 15, 1983), can properly be viewed as a reaffirmation of Stone. In Delap the appellant informed the police officers, who were interrogating him, that he was represented by the public defender's office in an unrelated matter. The Court held, "[d]efendant's statement that he was represented in another matter does not constitute a demand for the presence of an attorney in the matter at hand." The State recognizes that in Delap the appellant never requested counsel; but submits that the aforequoted sentence from the opinion indicates that even had the appellants's statement that he is represented by the public defender in an unrelated case, been construed as a request for counsel in that case, it would not have barred the police from interrogating the appellant in the matter at hand.

Another case from this Court of definite relevance to this case is Shriner v. State, 386 So.2d 525 (Fla. 1980). In Shriner the appellant, while being interrogated by police officers, said he no longer wants to talk about a specific robbery. The Court confronted the issued raised by Michigan

v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1974) of whether the police were required at this point to stop all questioning of the appellant. The Court held that the police did not violate Mosley when they continued to interrogate the appellant about matters other than the specific robbery he said he no longer wanted to talk about.

In this case the defendant invoked his right to have counsel present at any interrogation into his involvement in the Washington crimes. This right was in no way infringed upon, and his statements to the Metro-Dade police officers were therefore properly admitted into evidence.

Indeed, the State submits that even if the defendant had invoked his right to have counsel present when he was interrogated by the Metro-Dade officers, his statements after he waived his rights would still have been properly admitted. Had the defendant invoked his right to have counsel present when he was interrogated by the Metro-Dade police officers, those officers could not have interrogated him outside counsel's presence. Edwards v. Arizona, supra. While the defendant's statements that his girlfriend gave him the jewelry he was wearing and that he did not know Robbie Lee Manson, were the product of custodial interrogation, the defendant's consent to the taking of the jewelry was not.

When Officer Pontigo asked the defendant if he could take the jewelry back to Miami, (T.741), he was seeking consent to a seizure. If the request of a suspect for consent to conduct a search or seizure constituted "interrogation" advice that the suspect could refuse consent would be an indispensable requisite to effective consent. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Both the United States Supreme Court and this Court have held that such advice is not essential to a valid consent. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Shapiro v. State, 390 So.2d 344 (Fla. 1980); See also Interest of R.L.J., 336 So.2d 132 (Fla. 1st DCA 1976). Thus, Officer Pontigo did not "interrogate" the defendant when he asked him if he could take the jewelry to Miami. The State would therefore urge this Court to follow the well reasoned opinion in United States v. Clymore, 515 F.Supp. 1361 (E.D.N.Y. 1981), and hold that the defendant's statement consenting to a seizure of his jewelry was properly admitted even had he previously invoked his right to counsel in this case.

The defendant's statements that he was given the jewelry he was wearing by his girlfriend, and that he did not know Robbie Lee Manson, were admitted during the

defendant's own testimony.[4] Prior to their admission, the defendant testified that he knew Robbie Lee Manson as early as February or March of 1978, (T.2260), and that Manson had given him the jewelry. (T.2265). Since the defendant's statements to the Metro-Dade police officers on August 29, 1978, directly contradicted this testimony, and their voluntariness is unchallenged, they were properly admitted, even if taken in violation of Edwards v. Arizona, supra. See Hughey v. State, 411 So.2d 1021 (Fla. 5th DCA 1982), Accord Coleman v. State, 422 So.2d 1106 (Fla. 5th DCA 1982).

If this Court should determine, that despite the foregoing arguments, the defendant's statements to the Metro-Dade police officers were improperly admitted, and that the admission of the statements was properly preserved for review, it must then determine if the defendant was prejudiced by the admission of the statements. Salvatore v. State, 366 So.2d 745 (Fla. 1978); Section 924.33 Florida Statute (1981). The defendant cannot argue that he was prejudiced by the admission of the statements in and of themselves, but rather argues that he was prejudiced because

[4]Indeed, the statement that the defendant got the watch from his girlfriend was elicited by defense counsel, (T.2268), and thus could not have been improperly admitted under any circumstances. Clark v. State, 363 So.2d 331 (Fla. 1978).

his consent to the taking of the jewelry allowed for the seizure of the jewelry, which he contends should have been suppressed.[5]

The defendant's argument for suppression of the jewelry is based on the fact that the police would not have obtained his consent to the seizure of the jewelry had they not interrogated him allegedly in violation of Edwards v. Arizona, supra. This argument is faulty since even if the interrogation of the defendant by the Metro-Dade police officers was in violation of Edwards, the jewelry would not be suppressed unless it was obtained by exploitation of the illegality and not by means sufficiently distinguishable to be purged of the primary taint. Delap v. State, __So.2d__ (Fla. 1983)(Case No. 56, 235, opinion filed September 15, 1983). As recognized in Delap, if evidence could have been obtained through information independent from an illegal search or seizure such evidence is admissible.

In this case, the Metro-Dade police officers could have seized the jewelry worn by the defendant without interrogating him. Prior to speaking to the defendant in Washington, the Metro-Dade police officers had probable cause that

[5]The jewelry was an important, though not critical, part of the state's proof.

he had committed the robbery-homicide, and had accordingly obtained arrest warrants. (T.1483, 1484). Assuming arguendo that under Edwards the officers should not have interrogated the defendant, there was no reason for them not to be able to observe him. When Officer Pontigo saw the defendant, who he had probable cause to believe had committed the robbery-homicide, wearing jewelry which matched the description of the items taken in the robbery-homicide, (T.740), he surely had probable cause to seize the jewelry. Since the jewelry was in plain view, he oculd have seized it without a warrant and without consent. Neary v. State, 384 So.2d 881 (Fla. 1980). Thus the jewelry was properly seized even if the defendant was illegally interrogated.

Finally, the State submits that even if the defendant's statement to the Metro-Dade officers, and the evidence derived therefrom were improperly admitted, the overwhelming evidence of guilt made such an error harmless. Odum v. State, 403 So.2d 936 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981). In this case, the contested evidence is less incriminating than in Odom or Barfield. The other evidence of guilt is equally as overwhelming. Three eyewitness-victims made positive and unequivocal identifications of the defendant based upon their observations of him

before and during the homicide, sexual battery and robbery.[6] (T.1263-1277, 1537-1546, 1645-1662). The three eyewitness-victims were also able to pick out the defendant's picture from a photo display even though the photo was taken eleven years before the crimes were committed. (T.1288, 1362, 1473, 1474, 1566, 1567, 1677, 1678). The identification testimony of these witnesses was corroborated by the evidence that the bullet fired in the homicide in this case was fired from the same gun from which the defendant shot a bullet in Washington. (T.1952, 1953, 1971).

In sum, the State submits that the trial court correctly admitted testimony about the defendant's statements to the Metro-Dade officers and evidence derived therefrom, because there was no contemporaneous objection to the admission of the evidence, or because the statements and evidence derived therefrom were properly obtained. Moreover, if the testimony wes improperly admitted, it was harmless error due to the overwhelming evidence of guilt.[7]

[6]David Ortigoza and Luis Diaz were with the defendant for 1 1/2 to 2 hours (T.1266, 1292), while the third eyewitness-victim, Silvia Arana was with him for 20-25 minutes. (T.1681). All three witnesses got good looks at the defendant. (T.1358, 1540, 1658, 1659).

[7]In response to the state's evidence, the defendant raised an alibi defense. The defendant, however, was the only witness who testified that he was in Washington on the day he was placed in Miami committing the homicide, sexual battery and robberies. (T.2093, 2103, 2119, 2178, 2200, 2217).

B. Statement to Detective Sharkey of the Washington, D.C. Police Department

On September 16, 1981, during the midst of trial, the defendant filed a motion to suppress the statement he made to Detective Sharkey of the Washington Police Department about his involvement in the shooting of Thomas Spriggs.[8] The trial court denied the motion because it was not timely filed prior to trial even though the defendant had the opportunity to do so. (T.1761, 1762).[9] Accordingly, this Court should not reach the merits of the motion to suppress the statement to Detective Sharkey unless it should conclude that the trial court abused its discretion in ruling that the defendant could have raised the issue prior to trial. Savoie v. State, 422 So.2d 308 (Fla. 1982); Wingert v. State, 353 So.2d 643 (Fla. 3d DCA 1977); Davis v. State, 226 So.2d 25 (Fla. 2d DCA 1969); Fla.R.Crim.P. 3.190(i)(2). The State submits that the trial court's ruling was not an abuse of discretion.

[8]The defendant's admission that he shot Mr. Spriggs was significant because the evidence established that the bullet, which was recovered from Mr. Spriggs, was fired from the same gun as the bullet which killed the deceased in this case. (T.1952, 1953, 1971).

[9]While the court made it clear that it was denying the motion because it was untimely, it did allow a voluntariness hearing to proceed so that this Court can determine if the motion should have been granted if it should rule that the motion should have been decided on the merits. (T.1762, 1851).

At the beginning of trial, the trial court ordered the prosecutor to submit the defendant's statement to Detective Sharkey so it could determine if any portions had to be excised. (T.1201). Defense counsel did not indicate surprise at the intended admission of the statement and stated that he believes he has a copy. (T.1201, 1202). After the testimony of several witnesses, the court announced that it would admit the statement with several deletions. (T.1547). At this point, defense counsel stated, for the first time, that he was surprised that the prosecutor planned on introducing the statement. (T.1550). The court noted that defense counsel was making allegations regarding the statement for the first time, which were contrary to its prior understanding, and ordered the trial to continue. (T.1550).

Later, when the court initiated a discussion about the statement, (T.1726-1729), defense counsel stated that he would have no objection to the admission of defendant's statement that he shot Thomas Spriggs but would object to anything else in the statement to Detective Sharkey. (T.1729, 1730, 1732, 1733). Based upon this argument, the trial court stated its belief that the voluntariness of the statement would not be contested. (T.1733). Defense counsel in response, for the first time, stated that he was objecting to the admission of the statement in its entirety. (T.173-1736). The prosecutor then cited Wingert v. State,

supra, and argued that it was too late to contest the admissibility of the statement for the first time. (T.1736). Defense counsel replied that he did not know of the prosecutor's intention to introduce the statement until the first day of trial, and therefore asked for a continuance so a proper motion to suppress could be filed. (T.1737, 1738). In reply, the prosecutor informed the court that the Public Defender's Office had been supplied with the statement two years before trial. (T.1739). Defense counsel admitted that he was aware of the statement, and had seen it prior to trial. (T.1739-1741).

The court reviewed its file and ascertained that a motion to suppress the statement to Detective Sharkey had not been filed. (T.1742-1744). Although defense counsel continued to maintain that they had no way of knowing that the prosecutor intended to introduce this statement, (T.1744-1746), the trial court noted that three weeks before trial the prosecutor had filed a notice of intent to rely on the crime, which was admitted to by the defendant in his statement to Detective Sharkey. (T.1746, 1747). Before adjourning, the court told the defense counsel to put his motion to suppress in writing. (T.1747, 1748).

The next day, September 16, 1981, the defendant filed a motion to suppress. (R.294, 295; T.1758). The prosecutor

noted that a copy of the statement to Detective Sharkey had been sent to the Public Defender's Office on July 6, 1979. (T.1759). The court then ruled that the motion to suppress was untimely since the defendant knew of the statement and that the prosecutor intended to introduce evidence covered in the statement prior to trial. (T.1761, 1765). Since these findings are supported by the record, the trial court denial of the motion to suppress because it was not timely filed should be affirmed.

While making it clear that it was denying the motion to to suppress because it was not timely filed, the court agreed to allow defendant to litigate the question of voluntariness in case this Court should find its denial because of untimeliness to have been erroneous. (T.1762, 1763, 1851). The hearing which ensued demonstrates that the motion to suppress could have been properly denied on the merits.

The defendant argues that his statement to Detective Sharkey was involuntary because (1) the injuries he sufferred in the shooting made him incapable of knowingly and intelligently waiving his rights; (2) he was advised that giving a statement was in his best interest; and (3) the illegal seizure of evidence tainted the subsequent statement. These contentions are clearly without merit.

With regard to the defendant's ability to knowingly and intelligently waive his rights, Detective Sharkey testified that when he interrogated him the defendant did not appear to be in pain or intoxicated and never asked to see a doctor. (T.1855, 1856). He advised the defendant of his rights, which the defendant said he understood. (T.1857, 1871). The defendant said he wanted to tell what happened that led to the shooting death of Mr. Spriggs. (T.1857). He then proceeded to do so in a straightforward, calm, very alert manner. (T.1857). The defendant himself corroborated Detective Sharkey's testimony when he testified that he understood his rights, agreed to talk, and knew what he was doing. (T.1889). Clearly the evidence supported the conclusion that the defendant knowingly and intelligently waived his rights. Ross v. State, 386 So.2d 1191 (Fla. 1980).

With regard to the defendant's argument that he was improperly induced to give a statment by police advice that a statement would be in his best interest, the State would initially submit that the trial court could have properly denied the motion to suppress on the basis of Detective Sharkey's testimony that no promises were made by him, (T.1857), and the defendant's failure to mention a promise by another officer to him. (T.1878). Stone v. State, 378 So.2d 765 (Fla. 1979). At any rate, the alleged advice to

the defendant that it would be in his best interest to talk did not render his statement involuntary. Paramore v. State, 229 So.2d 855 (Fla. 1969); State v. Presley, 389 So.2d 216 (Fla. 5th DCA 1980).

The defendant's contention that his statement was involuntary, since tainted by the improper seizure of evidence, is unsupportable since the defendant did not even testify that the improper seizure of the gun was exploited to get him to make a statement. Delap v. State, __So.2d__ (Fla. 1983)(Case No. 56,235, opinion filed September 15, 1983). In this regard, the defendant testified that he decided to make a statement after Detective Sharkey told him he could make it easy on himself, and made no mention of any statements by Detective Sharkey regarding the seizure of the gun. (T.1887, 1888).

Finally, the State submits that if the defendant had timely moved to suppress his statement to Detective Sharkey, and the statement was involuntary, its admission would have been harmless error. Even without the defendant's statement to Detective Sharkey, the evidence established that the defendant was arrested for the shooting of Mr. Spriggs, (T.1812), and therefore he was connected to that crime, which connected him to the fatal bullet in this case. Moreover, there was other overwhelming evidence of guilty,

in the form of three eyewitness identifications, (T.1263-1277, 1288, 1537-1546, 1566, 1567, 1645-1662, 1677, 1678), and the defendant's wearing of jewelry taken in the robbery. (T.1291). Accordingly, if there was error in the admission of defendant's statement to Detective Sharkey, and said error was preserved for review, it was harmless, especially since the statement in question was not a confession, but rather circumstantial evidence, which the defendant had an innocent explanation for. (T.2265). Odom v. State, 403 So.2d 936 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981).

II

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO QUASH THE JURY PANEL.

Prior to trial the defendant filed a motion to quash the jury panel on the ground that Section 40.013(4) Fla. Stat. (1981), which allowed mothers, who are not employed with children under 15 years of age, to be excused from jury service, if they so request, denies him his Sixth and Fourteenth Amendment rights to a jury drawn from a fair cross-section of the community. (R.172-179). After a hearing on January 10 and 11, 1980, the court denied the motion. (R.179A). Since the transcripts of these hearings are not before this Court, it cannot consider the propriety of the trial court's ruling. McMann v. State, 55 So.2d 538 (Fla. 1951).

In any event, it is highly unlikely that anything that occurred at these hearings could have supported the defendant's motion to quash the jury panel. As this Court held in McArthur v. State, 351 So.2d 972 (Fla. 1977), the exclusion of mothers of young children does not deprive a defendant of his constitutional right to a jury drawn from a fair cross section of the community, since the excluded group is not sufficiently distinctive. This holding, which was reiterated in Hitchcock v. State, 413 So.2d 741 (Fla. 1982)

and Vasil v. State, 374 (Fla. 1979), should dispose of this issue. See also Scott v. State, 411 So.2d 866 (Fla. 1982); and Bryant v. State, 386 So.2d 237 (Fla. 1980).

III

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES AND HIS REQUEST THAT TWO PROSPECTIVE JURORS BE EXCUSED FOR CAUSE.[10]

In accordance with Fla.R.Crim.P. 3.350(a) and Section 913.08(1)(a) Fla.Stat. (1981), the defendant was given ten peremptory challenges. Although the defendant was charged with several crimes, he was not entitled to additional peremptory challenges. Fitzpatrick v. State, __So.2d__ (Fla. 1983)(Case No. 60,097, opinion filed July 21, 1983); Johnson v. State, 222 So.2d 191 (Fla. 1969). His argument, as is Fitzpatrick, is premised on the assumption that he was forced to use peremptory challenges on jurors who should have been excused for cause. This assumption is unfounded.

The defendant contends that jurors Purnell and Kaufman should have been excused for cause. While the defendant is wrong on the merits of his claim, it should first be noted that the question of whether juror Purnell should have been excused for cause has not been preserved for review.

When defense counsel moved to excuse juror Purnell for

[10]Both prospective jurors, whom the defendant contends should have been excused for cause, were peremptorily excused. (T.877), 992).

cause, the court announced that it would reserve ruling. (S.T.75, 76). Not only did defense counsel not insist that the court make a ruling, he affirmatively stated on two occasions that Mr. Purnell's subsequent responses to his questions demonstrated that he would be a fair juror. The first time was when Mr. Purnell stated that he would consider a police officer's testimony and judge his credibility like he would any other witness, and defense counsel replied, "Okay. That's good enough for me." (T.820). Later, when Mr. Purnell stated that he could decide the case on the evidence and put his experience aside, because he served as a gatherer of evidence and not a judger while a state attorney investigator, defense counsel replied "That's exactly what I want." (T.851). Subsequently, when the court asked if there was a challenge to Mr. Purnell for cause, defense counsel said that he would accept him at this time. (T.875). Based upon these statements, and defense counsel's failure to request a ruling on his request to excuse Mr. Purnell for cause, the trial court could reasonably conclude that the objection to the juror had been abandoned, and the issue is accordingly not properly before this Court. Ortiz v. State, 30 Fla. 256, 11 So. 611 (1892); Hair v. State, 428 So.2d 760 (Fla. 3d DCA 1983).

In any event, as previously noted, the court's failure to excuse jurors Purnell and Kaufman was not error since the

defendant is unable to sustain his heavy burden of showing a manifest abuse of discretion. Christopher v. State, 407 So.2d 198 (Fla. 1981); Williams v. State, 386 So.2d 538 (Fla. 1980).

The defendant contends that Mr. Purnell should have been excused for cause because he worked as an investigator for 20 years ending in 1978 for the State Attorney's Office, knows the prosecutor, and knows of the police officers involved in the investigation of the defendant. Since nothing in Mr. Purnell's backgrounds makes him challengeable for cause under Section 913.03 Fla.Stat. (1981), the trial court properly refused to excuse him for cause since Mr. Purnell's statements during voir dire demonstrate that he would be a fair juror and would follow the court's instructions. Morgan v. State, 415 So.2d 6 (Fla. 1982); McCollum v. State, 74 So.2d 74 (Fla. 1954); Brown v. State, 135 Fla. 191, 184 So. 777 (1938); Peri v. State, 412 So.2d 367 (Fla. 3d DCA 1981); Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981), reversed on other grounds, 420 So.2d 877 (Fla. 1982); Wheeler v. State, 362 So.2d 377 (Fla. 1st DCA 1978); McQuay v. State, 352 So.2d 1276 (Fla. 1st DCA 1977); Hunt v. State, 330 So.2d 502 (Fla. 3d DCA 1976).

When Mr. Purnell's employment as an investigator for the State Attorney's Office and his knowledge of the

prosecutor were first brought out, he immediately stated his belief that his ability to be a fair and impartial juror would not be influenced. (S.T.12). He later stated he could not recall ever speaking to the prosecutor or working with him. (S.T.98). Again he stated that he would not be influenced by his past employment, and would follow the court's instructions. (S.T.98). Mr. Purnell later stated that while he knows of the police officers who investigated the defendant, he never worked with them. (T.814, 815). Any doubt as to Mr. Purnell's ability to be a good juror was removed, at least in defense counsel's eyes, when he stated that he would consider a police officer's testimony and judge his credibility as he would any other witness, (T.820), and would put his experience aside and base his verdict solely on the evidence. The State submits that when Mr. Purnell's statements on the whole during voir dire are analyzed in accordance with the aforecited cases, the refusal to excuse him for cause was clearly a proper exercise of the court's discretion.

The propriety of the court's refusal to excuse Ms. Kaufman for cause is even less arguable. With regard to the recent burglary of her house, Ms. Kaufman stated her belief that she could set the experience aside and render a decision based solely on the evidence. (S.T.58, 59). While she admitted that she was frightened by community violence,

and didn't know if she could put it out of her mind, (T.854, 855), Ms. Kaufman never indicated that she had a state of mind which would prevent her from acting with impartiality. However, even if Ms. Kaufman had given such an indication, her repeated statements that she would follow the court's instructions and render an impartial verdict according to the evidence, (S.T.59; T.831, 834, 835), made her a proper juror. Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979; Section 913.03(10) Fla.Stat. (1981) Cf. Singer v. State, 109 So.2d 7 (Fla. 1959); Hall v. State, 136 Fla. 644, 187 So. 392 (1939); Jeffcoat v. State, 103 Fla. 466, 138 So. 385 (1931); Blackwell v. State, 101 Fla. 997, 132 So. 468 (1931); Skipper v. State, supra.

The trial court was concerned with Ms. Kaufman's statement that "--anybody who kills anybody should deserve the same—." (T.853, 854). The court therefore asked Ms. Kaufman if she would automatically vote for death if the defendant was found guilty of first degree murder, or would she base her recommendation on the evidence and the court's instructions. (T.869). When Ms. Kaufman responded that she would weigh the evidence before making a recommendation, the court was satisfied that she could be a proper juror. (T.869, 876). The court's decision in this regard was clearly not an abuse of discretion. Fitzpatrick v. State, supra.

IV

THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S STATEMENT AS TO A WASHINGTON, D.C. SHOOTING EVEN IF THE CORPUS DELECTI HAD NOT BEEN ESTABLISHED.

In arguing that the corpus delecti of the Washington shooting was not established, the defendant brushes over the fact that he was not on trial for that shooting. He therefore does not discuss the question of whether the corpus delecti to a crime not charged must be established before a confession to that crime can be admitted. The State submits that an analysis of the corpus delecti rule indicates that it is inapplicable when a collateral crime is involved.

The corpus delecti rule requires that all the elements of the crime charged be proven before a defendant can be convicted based on his confession to the crime charged. State v. Allen, 335 So.2d 823 (Fla. 1976); Jefferson v. Sweat, 76 So.2d 494 (Fla. 1954), Ruiz v. State, 388 So.2d 610 (Fla. 3d DCA 1980). The purpose of this rule is to prevent a conviction based soley on a misguided confession to a crime which did not in fact occur. State v. Allen, supra; Ruiz v. State, supra. This purpose would not be served by requiring proof of the corpus delecti of the Washington shooting, which is relevant to this case because of the bullet involved, regardless of whether criminal

agency was involved. Since there is no valid reason for requiring proof of the corpus delecti as a condition to the admission of a relevant confession or statement regarding a colateral crime; and such a requirement would have a detrimental effect of making the collateral crime a feature of the trial,[11] the defendant's assumption that the rule is applicable in this case should be expressly rejected.

At any rate, even if it could be said that the corpus delecti rule is applicable to confessions to collateral crimes, the defendant cannot contend that his statement regarding the Washington shooting was improperly admitted. Whenever the Washington shooting was discussed, defense counsel consistently maintained that the jury should only be told that the defendant shot Thomas Spriggs, and no mention should be made as to any other facts regarding the incident, so it would not become a feature of the trial. (T.1200, 1201, 1548, 1549, 1729, 1730, 1732-1735, 1771, 1818, 1819, 1907-1909). Having convinced the trial court that the question of whether criminal agency was involved in the Washington shooting is irrelevant, the defendant cannot now complain that the court erred in not requiring evidence of criminal agency. McCrae v. State, 395 So.2d 1145 (Fla. 1980).

[11]See Williams v. State, 117 So.2d 473 (Fla. 1960).

In accordance with defense counsel's requests, the jury was only informed that the defendant shot Thomas Spriggs, and was not told if the shooting was criminal. Therefore, if the corpus delecti was required before the defendant's statement in this regard could be admitted, it could be established by testimony that Thomas Spriggs was shot. Such testimony was admitted. (T.1823).

In sum, the State submits that the defendant's statement regarding a shooting in Washington was properly admitted, without a requirement that the corpus delecti he established; and that in any event, the corpus delecti of the shooting, as developed at trial, was admitted. If this Court shoudl disagree and concluded that the statement was improperly admitted, the State would argue, as it did under Point I, that the evidence of guilt, independent of the statement was so overwhelming that any error in the admission of the statement could only have been harmless.

V

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS.

The defendant was convicted of one count of first degree murder, four counts of armed robbery, one count of sexual battery with a firearm, and one count of unlawful possession of a firearm while engaged in a criminal offense. (R.428-431). These convictions were supported, inter alia, by the testimony of three eyewitnesses, who testified that he committed these crimes. (T.1263-1277, 1537-1546, 1645-1662). The defendant cannot attack his convictions on the asserted basis that these witnesses were not credible. Tibbs v. State, 397 So.2d 1120 (Fla. 1981).[12]

[12]This argument should not be taken as a concession that there is a serious question as to the credibility of the eyewitnesses. To the contrary, a review of their testimony demonstrates that they were positive that the defendant perpetrated the crimes, were consistent in all significant respects, and had no reason to falsely accuse the defendant. It should also be noted that the defendant's alibi was not corroborated by anyone. (T.2093, 2103, 2119, 2178, 2200, 2217).

VI

THE TRIAL COURT CORRECTLY ALLOWED TESTIMONY THAT THE DEFENDANT USED OTHER NAMES WHILE IN WASHINGTON.

The defendant contends that he was prejudiced when the jury was informed that he used different names while in Washington. The State initially submits that this argument has not been preserved for review.

The first time in which the jury was told that the defendant was known by another name while in Washington was during the opening argument of defense counsel, who informed them that defense witnesses, who knew the defendant as Shawn Vincent, would testify that he was in Washington throughout the summer of 1978. (T.1226). The second time was when Officer Greenwell testified, without objection that when he first met the defendant he was using the name Shawn Vincent. (T.1814). The third time was when Officer Sharkey testified, again without objection, that when he initially spoke to the defendant he gave his name as Shawn Vincent and Johnny Miller. (T.1927). Defense counsel finally objected to testimony about the defendant being known in Washington as Shawn Vincent and Miller, when Officer Sharkey identified his picture taken upon his arrest. (T.1932, 1933). The court ruled the objection was untimely because it had not been raised previously. (T.1933, 1934). The State submits

that the trial court's was correct, and the argument raised on appeal, has not been preserved for review Simpson v. State, 418 So.2d 984 (Fla. 1982); Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 (Fla. 1978).

At any rate, the testimony in question would have been properly admitted even if a contemporaneous objection had been made. In this case, identity was the crucial issue, and the defendant's activities in Washington were used on both sides of the issue. Since the Washington witnesses could only testify to their knowledge of the defendant by revealing that he used other names, such testimony was relevant and admissible.[13] Lamb v. State, 354 So.2d 124 (Fla. 3d DCA 1978).

Moreover, since the evidence of guilt was overwhelming, the term alias was not used in this case, and the fact that defendant used another name was essential to his case, and therefore elicited from defense witnesses, (T2089-2091, 2096, 2098, 2105-2107, 2175, 2176, 2211, 2212), any error which allegedly occurred could only have been harmless Rodriguez v. State, 413 So.2d 1303 (Fla. 3d DCA 1982).

[13]Lee v. State, 410 So.2d 182 (Fla. 2d DCA 1982), which is heavily relied on by the defendant, is easily distinguishable. In Lee the six aliases read off an FBI rap sheet were irrelevant to the case, and since the jury was told that the other names were actually aliases the testimony was much more prejudicial. Additionally, the evidence in this case, unlike Lee, was not "largely circumstantial".

VII

THE TRIAL COURT CORRECTLY ADMITTED INTO EVIDENCE A BULLET RECOVERED FROM THE DECEASED'S BODY.

A relatively insignificant part of the proof of defendant's guilt, was the bullet recovered from the deceased's body, (hereinafter designated as Exhibit 16), since a comparison of this bullet with the bullet fired by the defendant in Washington established that they were fired from the same gun.[14] (T.1971). The State submits that Exhibit 16 was properly admitted.

The first requirement for the admission of evidence is a showing that the evidence is what its proponent claim. Section 90.901 Fla.Stat. (1981); Alston v. Shriver, 105 So.2d 785 (Fla. 1958). The defendant argues that such a showing was not made with regard to Exhibit 16 since there is a one day missing link in the chain of custody, and because the proof that Exhibit 16 was the bullet recovered from the decedent's body was not conclusive. The defendant's argument is unfounded since a chain of custody and a concclusive showing that an item is what it proponent claims is not essential to its admissibility. Rather an item can

[14]This evidence was relatively insignificant when compared with the eyewitness identifications since the defendant testified to an innocent explanation for his possession in Washington to the gun used in the murder. (T.2265).

be admitted if, as in this case, there is evidence which tends to show that it is what its proponent claims. Hancock v. State, 90 Fla. 178, 105 So. 401 (1925); Landrum v. State, 79 Fla. 189 84 So. 535 (1920); Beck v. State, 405 So.2d 1365 (Fla. 4th DCA 1981). United States v. Gardolfo, 577 F.2d 955 (5th Cir. 1978).

In this case the evidence, which tends to show that Exhibit 16 is the bullet recovered from the deceased, was supplied by Dr. Jose Font and Officer Robert Hart. Dr. Font testified that on July 19, 1978, he removed a bullet from the body of the deceased, and he initiated the bullet. (T.1779, 1780, 1783). Dr. Font did not remove and initial any others bullets that night. (T.1782, 1786). When Dr. Font was shown the bullet, which would become Exhibit 16, he testified that he recognized his initials, which he placed on the bullet on July 19, 1978, and that it appears to be the bullet he removed from the decedent. (T.1784, 1786). Officer Hart testified that he examined Exhibit 16 on July 20, 1978. (T.1961). Neither at trial or on appeal has it ever been claimed that the bullet examined by Officer Hart on July 20, 1978, was not Exhibit 16. Therefore, for Exhibit 16 not to be the bullet removed from the decedent's body on July 19, 1978, one of the bullets previously initialed by Dr. Font,[15] would have had to have been

[15]According to Dr. Font, he initialed approximately 40 bullets between 1975 and the date he testified. (T.1794).

located by the police officer who received the bullet removed from the deceased, and substituted for the correct bullet within one day.[16] While the possibility that such occurred could have been argued as a factor going to the weight to be given Officer Hart's comparison of the two bullets, it did not justify the exclusion of obviously relevant evidence. Hancock v. State, supra; Landrum v. State, supra; Beck v. State, supra. United States v. Gandolfo, supra.

The defendant also argues that there was an insufficient chain of custody regarding the bullet, since none of the witnesses who testified could testify as to what was done to the bullet between the time it was removed from the deceased and initialed by Dr. Font and examined by Officer Hart. Such a missing link in the chain of custody did not warrant the exclusion of the bullet since there was not an indication of probable tampering. Peek v. State, 395 So.2d 492 (Fla. 1980); Watson v. State, 190 So.2d 161 (Fla. 1966); Bernard v. State, 275 So.2d 34 (Fla. 3d DCA 1973); United States v. Coades, 549 F.2d 1303 (9th Cir. 1977). It is

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Since the day he removed a bullet from the deceased is roughly halfway between these two dates it would appear that there were approximately 20 such bullets available.

[16]Officer Hart's testimony that a bullet cannot be tampered with to make it match another bullet, (T.1951), would render such an event impossible.

manifest that the fact that Detective Pontigo, who had the bullet during the period in question, was subsequently charged in an unrelated federal case, does not satisfy the required showing of probable tampering. Moreover, the lack of tampering was affirmatively established by Officer Hart's testimony that a bullet cannot be tampered with so as to make it match with another bullet. (T.1951).

Since Exhibit 16 was properly admitted, the admission of the piece of brown paper bag and hospital label, (Exhibit 19, R.253), is a moot question. In any event, Exhibit 19, was not hearsay since not offered for the truth of the matter asserted, but rather to show the basis for Officer Hart's comparison of the two bullets, and his notation of the case number. (T.1964-1966). Ziegler v. State, 402 So.2d 365 (Fla. 1981).

Finally, the State submits even if it had been sufficiently established that Exhibit 16 was the bullet removed from the deceased, and its admission was therefore erroneous, the other overwhelming evidence of guilt, and relative insignificance of the evidence makes such an error harmless. Goddard v. State, 143 Fla. 28 196 So. 596 (1940).

VIII

THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY.

In imposing the death penalty upon the defendant, the trial court found five aggravating factors and no mitigating factors. (R.443-448). In attacking this sentence, the defendant argues that the jury recommendation of death was invalid because of allegedly improper prosecutorial argument and jury instructions, and because the trial court improperly found that two aggravating factors were established. These arguments are without merit.

A. The Prosecutor's Argument

In arguing that the jury should recommend death, the prosecutor argued:

> Now, you may say, "Well, he's already serving one life sentence for the 1967 murder in Florida, and he's serving another life sentence for the 1979 murder in Washington," and you might say, "That's enough life. He's not getting out. He's not going to hurt anybody."
>
> You might want to consider that, but ask yourself, if life meant life, it in 1967 when the Judge said, "I sentence you to life in prison," if that meant anything, Julio Chavez would be alive.
>
> Thomas Spriggs would be alive.
>
> (T.2604, 2605).

On appeal, the defendant argues that this argument inflamed the jury. The State initially submits that this argument has not been preserved for review.

When the argument in question was made, defense counsel objected on the basis that the prosecution was arguing outside the evidence. (T.2605). Defense counsel elaborated on this objection by contending that the prosecutor had informed the jury that the defendant had killed the deceased after two life sentences were imposed, and had implied that something happened as to the first conviction which resulted in the defendant getting out of jail. (T.2605, 2606).[17] The court overruled these objections, which are not reasserted on appeal.

Instead, the defendant asserts a new ground on appeal as to the alleged impropriety of the prosecutor's argument. Sinc this argument that the jury was improperly inflamed was never raised below, it has not been preserved for review. Mason v. State, __So.2d__ (Fla. 1983)(Case No. 60,703); Jones v. State, 411 So.2d 165 (Fla. 1982). This is so even though defense counsel objected to the prosecutor's argument

[17]Since the defendant did avoid life imprisonment for his first conviction by escaping from prison, (R.444), it is apparent that defense counsel felt that the something happening was the escape.

on a different ground. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

At any rate the prosecutor's argument did not justify a mistrial. The defendant's argument that a prosecutor may not argue during the sentence phase of a capital case that a life sentence does not guarantee that a defendant will remain in jail for life has been considered by this Court in two recent cases.

In Teffeteller v. State, __So.2d__ (Fla. 1983)(Case No. 60,337, opinion filed August 25, 1983), the prosecutor repeatedly argued to the jury that if the appellant was given a life sentence he would get out of jail in 25 years and kill again. The Court held that this argument was improper, and necessitated a new sentencing hearing. Teffeteller was limited in Harris v. State, __So.2d__ (Fla. 1983)(Case No. 61, 343, opinion filed Spetember 8, 1983), in which the Court held that the following prosecutorial argument did not require a mistrial.

> The defense may tell you, Well, 25 years is a long time, 25 years without eligibility for parole, but I tell you this: That in 25 years this 27 year old Defendant will be 52 years old. He will walk out of prison as he walked out of prison before.

The State submits that the case is controlled by Harris and not Teffeteller since the prosecutor's agrument did not include an assertion that the defendant would kill again if given life imprisonment. Accordingly, a new sentencing hearing is not mandated.

Finally, the State submits that in light of the overwhelming evidence of guilt, and the unchallenged finding by the trial court of three aggravating factors and no mitigating, any error which occurred during the prosecutor's argument could only have been harmless. Mason v. State, supra; Darden v. State, 329 So.2d 287 (Fla. 1976).

B. The Jury Instructions

The defendant requested that the following jury instructions be given during the penalty phase.

> (1) In recommending a sentence to the Court, I caution you that the procedure of weighing aggravating circumstances and mitigating circumstances is not a mere counting process between the number of aggravating circumstances as compared to the number of mitigating circumstances. Rather your recommendation should be a reasoned judgment whether this factual situation requires the imposition of death or whether life imprisonment will be sufficient punishment. (R. 420).
>
> (2) I instruct you that a jury recommendation under our system of laws is entitled to great weight.

> Therefore your recommendation of the appropriate sentence in this case must be the product of careful, conscientious deliberations.
>
> (R.420, 421).

The court refused to give these instructions since they were covered by the standard jury instructions, which were given. (T.2544, 2619-2623).[18] In accordance with Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982) and common sense, the trial court's opinion that the standard jury instructions conveyed to the jury the appropriate weighing process of the aggravating and mitigating circumstances was correct.

The requested instruction that the jury recommendation be the product of careful, conscientious deliberations, was surely covered by the following instructions:

> The fact that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.
>
> (T.2623).

[18]The jury was told four times that their recommendation should be based on a weighing of the aggravating and mitigating circumstances.

If the court had erred in its instructions to the jury, the defendant would still not be entitled to a new sentence hearing since the evidence of guilt was overwhelming and the finding of three aggravating factors and no mitigating is unchallenged. See Driggers v. State, 90 Fla. 324, 105 So. 841 (1925).

C. The Trial Court's Finding of Five Aggravating Circumstances

Among the five aggravating circumstances found by the trial court were (1) the capital felony was committed while the defendant was under a sentence of imprisonment, and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The defendant challenges these findings, which the State submits are supportable.

The finding that the defendant was under a sentence of incarceration when he committed murder in 1978 is supported by the record of his judgment and sentence to life imprisonment for first degree murder, which was entered on August 10, 1967. (R.409, 410). Morgan v. State, 415 So.2d 6 (Fla. 1982). Even if it could be said that the defendant was paroled[19] from his life sentence prior to his commission of

[19]There was evidence that the defendant was an escapee. (T.1542).

murder in this case, the application of this aggravating circumstance would still be appropriate. Griffin v. State, 414 So.2d 1025 (Fla. 1982).

With regard to the finding that the defendant committed murder in a cold calculated, and premeditated manner without any pretense of moral or legal justification, the evidence established that the defendant decided to kill the deceased because he was begging him not hurt his girlfriend, who the defendant wanted to rape; and he effected the execution-style killing by placing a pillow between the murder weapon and the deceased, afterwhich he raped the decedent's girlfriend. (T.1273-1276, 1541, 1542, 1650, 1651, 1656-1658). Indeed, even defense counsel referred to the murder as a cold blooded execution. (T.1365). This evidence supported a finding that Section 921.141(5)(i) was applicable to this case. Lightbourne v. State, __So.2d__ (Fla. 1983)(Case No. 60, 871, opinion filed September 15, 1983); Mason v. State, _So.2d__ (Fla. 1983)(Case No. 60,703, opinion filed September 8, 1983).

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Finally, the State submits that even if both the aggravating factors is issue were not supported by the evidence, the death sentence should still be affirmed becaue there are three unchallenged aggravating circumstance and no mitigating. Harris v. State, __So.2d__ (Fla. 1983)(Case No. 61,

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opinion filed September 8, 1983); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Shriner v. State, 386 So.2d 525 (Fla. 1980).

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to BENEDICT P. KUEHNE, Esquire, Bierman, Sonnett, Beiley, Shohat and Sale, P.A. Suite 500, 200 S.E. First Street, Miami, Florida 33131, on this 26th day of October, 1983.

Paul Mendelsen

PAUL MENDELSON
Assistant Attorney General

/vbm