IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,691

MARIO LARA,

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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PREFACE

Citations to the record are abbreviated as follows: (R) - Record on Appeal; (T) - Transcript of Proceedings.

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's Statement of the Case and Facts.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR DISCHARGE WHERE THE DEFENDANT WAS NOT ARRESTED IN NEW JERSEY FOR THE HOMICIDE CHARGES AND THE SPEEDY TRIAL TIME DID NOT COMMENCE UNTIL HE WAS ARRESTED FOR THE HOMICIDE CHARGES ON NOVEMBER 17, 1981.

The defendant claims the trial court erred in denying his motion for discharge pursuant to the speedy trial rule. He argues that his speedy trial time commenced running on the instant homicide indictment either when he was arrested in New Jersey by New Jersey police on July 21, 1981, or when he was arrested by Miami police in New Jersey on July 22, 1981. Both arrests, according to the defendant, were for the double homicides that occurred in Miami on July 16, 1981.

In essence, what the defendant now seeks is for this Court to reweigh the evidence and to overturn the trial court's findings. After hearing two days of testimony, reviewing the

exhibits, and reviewing the case files of the defendant's two other cases pending before the same court,[1] the trial judge specifically found that the defendant was not arrested on the homicide charges until November 17, 1981, after the indictment was filed on November 17, 1981, charging him with the double homicides. (R: 1, 174; T: 459-460) The trial judge further found that the defendant's apprehension in New Jersey by the New Jersey police on July 21, 1981, and his subsequent arrest in New Jersey by Miami police after the extradition waiver hearing on July 23, 1981, were both pursuant to two outstanding Florida fugitive arrest warrants issued for the defendant's two prior unrelated cases of robbery and involuntary sexual battery and were not for any crime connected to the homicides. (T: 518; R. 176, 178). The court held the New Jersey arrests did not commence the running of speedy trial on the homicide charges and the defendant's speedy trial rights were not violated. (T: 518-519).[2]

It is well-settled that the reviewing court may not reweigh evidence, and that so long as there is sufficient competent evidence to support the trial court's findings, the trial court's ruling will not be overturned on appeal. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd 454 U.S. 963 (1982). In the present case, the trial court's detailed findings (R: 173-178) are fully

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[1]These documents from the defendant's other cases are included in the State's motion to supplement the record on appeal filed in this Court along with this brief.

[2]The defendant's claim on appeal is predicated solely on the provisions of the speedy trial rule and not on due process grounds.

support by the record. The record shows the homicides occurred on July 16, 1981. Prior to that date, on October 2, 1980, the defendant had been arrested and charged in Miami for the robbery of Raquel Carranza (Case No. 80-18874), and on March 16, 1981, the defendant had been arrested and charged with the involuntary sexual battery of Odalys Cardozo (Case No. 81-5788). (R: 174; State's Supplemental Record). The defendant failed to appear in court on those two charges on July 17, 1981, and the trial court issued two alias capias warrants for the arrest of the defendant. (State's Supplemental Record; T: 376-377, 466-467).[3]

On July 21, 1981, the Miami police learned the defendant was in Union City, New Jersey. (T: 376-377). They called Detective Karabatsos at the Union City police department, informed him that the defendant was a fugitive from Florida with two outstanding arrest warrants against him on pending charges, and requested the Union City police to arrest the defendant on those outstanding warrants. (T: 445). At Detective Karabatsos's request, the Miami police then sent a teletype to the Union City police department specifying the outstanding Florida warrants for robbery and involuntary sexual battery and the criminal case number 81-5788 from the sexual battery charge. (R: 87; T: 411-446). Although the teletype also stated that the defendant was wanted for questioniong with reference to a homicide, the record clearly

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[3]Both these previous cases were assigned to the same judge, Judge Smith, as the present homicide case and Judge Smith herself issued the two fugitive arrest warrants for the defendant's failure to appear on July 17, 1981. (State's Supplemental Record; T: 467, 469). The record shows that these arrest warrants were entirely independent of any police investigation into the homicides.

shows the Miami officers never told Detective Karabatsos, or any other New Jersey police officer, to arrest the defendant for the homicides or that an outstanding warrant was for a homicide charge. (T: 445, 447).[4]

After receiving this teletype, Detective Karabatsos, Sergeant Wolpert and several other New Jersey officers arrested the defendant hiding in an apartment in Union City. (T: 399, 417, 448). The testimony clearly establishes that the New Jersey police made a warrantless arrest of the defendant solely as a fugitive on the outstanding Florida warrants, and that they did not arrest him for any Florida charges related to the homicide incident. (T: 400-401, 419, 421, 424-426, 448-450).[5]

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[4]In fact, the record shows and the trial judge specifically found that the Miami police never even told the New Jersey police any facts about the homicides. (T: 448, 477, 495; R: 175). Also, the record shows that all communication between Miami and New Jersey was conducted exclusively with Detective Karabatsos and that Sergeant Wolpert's knowledge of the matter was based solely on information received from Detective Karabatsos. (T: 409-410, 419-420).

[5]In fact, the record shows that the trial judge correctly found that in July 1981, no Florida arrest warrant was outstanding for the arrest of the defendant for the homicides and that the defendant had not even been charged with the homicides at that time. (T: 472; R: 174) The indictment charging him with the homicides was filed in open court on November 17, 1981, and he was arrested on November 17, 1981.

Furthermore, at the time of his arrest in New Jersey, the defendant was not told he was being arrested for homicide. Sergeant Wolpert, who personally arrested the defendant, testified that he told him he was under arrest as a fugitive based on outstanding Florida warrants. (T: 400-401). The record shows and the trial judge found that neither Sergeant Wolpert nor any other New Jersey officer told the defendant he was being arrested for a Florida crime related to the homicide. (R: 176; R: 400-402, 449). The trial judge specifically rejected the defendant's testimony as not credible that a New Jersey police officer told him in Spanish that he was being arrested at that time for the two homicides. (R: 176; T: 440-442).

After the defendant's arrest, Sergeant Wolpert prepared a fugitive complaint and arrest report in order to obtain a fugitive warrant pursuant to New Jersey law. (R: 77, 86, 88; T: 404-406, 419, 429).[6] On July 23, 1981, the defendant appeared before a New Jersey judge on the fugitive complaint and he waived extradition. (R: 81-83; T: 384).[7] The record shows that New Jersey then relinquished its custody of the defendant and Miami police officers Napoli and Guzman took the defendant into Florida custody on the outstanding capias warrants, not for any Florida charge related to the double homicides. (R: 84; T: 384, 387, 397, 472).[8] The defendant was then transported back to Miami. (T: 385).

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[6]Although in the police report and complaint Sergeant Wolpert described the Florida warrants as including the crime of "suspected homicide," (R: 77, 86, 88), he testified that he only intended to list the charges on the Florida warrants. (T: 429-430). Both New Jersey police officers testified that the defendant was not arrested for anything other than being a fugitive on the two outstanding warrants. (T: 425-426, 448-450).

[7]Although the New Jersey judge informed the defendant that he had been arrested in New Jersey on a fugitive warrant from Florida charging him with rape, robbery and "homicide" (R: 81), the record shows and Judge Smith properly found that the New Jersey judge was merely reading from the complaint and had no independent knowledge of the matter. (R: 81-82, 177).

[8]The record also establishes that although the Miami police arrived in Union City the previous day, on July 22, 1981, the defendant remained in the custody of the New Jersey police until his formal transfer to the Miami officers during the court hearing on July 23, 1981. (T: 384-385, 472). The Miami officers testified they travelled to New Jersey to apprehend the defendant on the two outstanding fugitive warrants and not to arrest him for the homicides. (T: 378-379, 469-470). They further testified that earlier on July 22, 1981, they did not arrest the defendant for any reason, nor did they ever inform him that he was under arrest for homicide. (T: 383, 385-386, 471). All they did was visit the defendant in jail and informed him that they were also investigating the double homicide. (T: 383, 392).

Thus, the record fully supports the trial court's findings, and the defendant's effort to have this Court reweigh the testimony and hold that the defendant's arrest in New Jersey was for the homicides is without basis. Moreover, as the following legal analysis shows, the trial court's ruling that the events did not trigger the speedy trial rule is also correct.

Rule 3.191(a), Fla.R.Crim.P. provides that a defendant shall be brought to trial on a felony within 180 days from the time he is taken into custody as defined under subsection (a)(4). Subsection (a)(4) provides that a defendant is taken into custody when he is arrested as a result of the conduct or criminal episode which gave rise to the crime charged. Thus, in the present case, the defendant's speedy trial period commenced running when he was arrested on November 17, 1981, as a result of his conduct pertaining to the homicide charges.

The defendant's first claim that his arrest in New Jersey by the New Jersey police constitutes an arrest or taking into custody for the purposes of the speedy trial rule is without merit for two reasons. First, the record shows that the arrest by the New Jersey officers was exclusively for the outstanding Florida warrants for robbery and involuntary sexual battery. Since the record demonstrates that the warrants were for criminal episodes independent of and unrelated to the homicides, the fugitive arrest by New Jersey officers did not trigger the speedy trial provisions on the double homicide. State v. Stanley, 399 So.2d 371 (Fla. 3d DCA 1981); State v. Van Winkle, 407 So.2d 1059 (Fla. 5th DCA 1981); State v. Bennett, 382 So.2d 811 (Fla. 2d DCA 1980).

Second, the speedy trial time period simply does not commence when a fugitive from Florida is arrested by police officers of another state. It is well-established extradition law that a person arrested in an asylum state (here New Jersey) by officers of that state, as a fugitive from a demanding state (here Florida) is not in custody of the demanding state until the fugitive is surrendered to the demanding officials at some point during the extradition process. The Uniform Criminal Extradition Act, 18 U.S.C. §3182; LaSasso v. MacLeod, 56 A.2d 430 (N.J. 1948). In State v. Andrews, 376 So.2d 9 (Fla. 1979), this Court rejected the argument advanced by the Third District Court of Appeal in State v. Andrews, 369 So.2d 610 (Fla. 3d DCA 1979), that "custody" for the purposes of speedy trial meant "taken into custody by any law enforcement agency of any sovereign," and held that Rule 3.191 "requires that a defendant be taken into state custody in order to start the speedy trial times expressed in the rule." Thus, Rule 3.191 simply did not attach in the present case until the New Jersey court surrendered the defendant to the Miami police and the Miami police took the defendant into their custody and arrested him. Therefore, the trial judge here was correct when she ruled that the arrest of the defendant by the New Jersey police is irrelevant for purposes of triggering Rule 3.191. (R: 178)[9]

The defendant's second claim that the Miami police independently took the defendant into custody on the instant homicide

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[9]This conclusion is supported by the recent United States Supreme Court case on speedy trial, United States v. MacDonald, United States ___, 102 S.Ct. 1497, 1503, n. 11 (1982), and by Illinois cases. See People v. Perez, 427 N.E.2d 229 (Ill. 1981); People v. Gilland, 267 N.E.2d 140 (Ill. 1971).

charges in July 1981, when they travelled to New Jersey to bring the defendant back to Miami is also without merit. The record demonstrates the Miami police only arrested the defendant in New Jersey on the two outstanding alias capias warrants. Since the arrest on those warrants was for different crimes arising out of wholly different and unrelated criminal episodes than the homicide incident, that arrest did not activate Rule 3.191 on the homicide charges. State v. Stanley, 399 So.2d 371 (Fla. 3d DCA 1981); State v. Breedlove, 400 So.2d 468 (Fla. 4th DCA 1981); Giglio v. Kaplan, 392 So.2d 1004 (Fla. 4th DCA 1981); State v. Beasley, 392 So.2d 980 (Fla. 4th DCA 1981); See also Thomas v. State, 374 So.2d 508, 512 (Fla. 1979).

Furthermore, even though the Miami officers who went to New Jersey to act as agents of Florida for extradition purposes intended to and actually did question the defendant about the homicides, because they never intended to arrest him for the homicides and because the defendant was in lawful custody on the unrelated fugitive charge, their questioning did not constitute an arrest for or a taking into custody on the homicide incident for the purposes of Rule 3.191. Thomas v. State, 405 So.2d 1015 (Fla. 1st DCA 1981); State v. Breedlove, 400 So.2d 468 (Fla. 4th DCA 1981); Snow v. State, 399 So.2d 466 (Fla. 2d DCA 1981); Giglio v. Kaplan, 392 So.2d 1004 (Fla. 4th DCA 1981); State ex rel. Dean v. Booth, 349 So.2d 806 (Fla. 2d DCA 1977); Snead v. State, 346 So.2d 546 (Fla. 1st DCA 1976). Moreover, the issue whether the Miami police had probable cause to arrest him for the homicide at that time is not relevant to triggering the speedy

trial rule. State v. Beasley, 392 So.2d 980 (Fla. 4th DCA 1981); State v. Robbins, 359 So.2d 39 (Fla. 2d DCA 1978).[10] For these reasons, the trial court correctly denied the motion for discharge.

II

THE TRIAL COURT CORRECTLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE WHERE RIZZO CONSENTED TO THE ENTRY OF THE POLICE INTO THE DOWNSTAIRS APARTMENT AND WHERE EXIGENT CIRCUMSTANCES EXISTED JUSTIFYING THE PROMPT WARRANTLESS SEARCH OF BOTH THE DOWNSTAIRS AND UPSTAIRS MURDER SCENE.

The defendant contends the trial court erred in denying his motion to suppress physical evidence found at the scene of the homicide. The trial court denied the defendant's motion on two grounds: (1) Rizzo consented to the entry of the police into and the search of the downstairs apartment, and (2) exigent circumstances existed justifying the investigation of the homicide scene in both the downstairs and upstairs apartments. (T: 641, 649-650). The State submits the trial court correctly denied the defendant's motion on both grounds.

The defendant first agues that Rizzo's consent was invalid because the only evidence of his consent consisted of hearsay

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[10] In fact, the Miami police testified that although the defendant was a suspect in the homicides when they went to New Jersey, they did not intend to arrest him for the homicides because they still had considerable investigation to complete before charging anyone. (T: 490-496). State v. N.B., 360 So.2d 162 (Fla. 1st DCA 1978), relied upon by the defendant, is factually distinguishable on this basis. Indeed, Thomas v. State, 374 So.2d 508 (Fla. 1979), also relied upon by the defendant, actually supports the State's position in this regard. Also, the language in Thomas that the defendant quotes in his brief is inapplicable because it concerns a different factual situation of multiple charges arising out of one criminal episode. See State v. Beasley, 392 So.2d 980 (Fla. 4th DCA 1981).

statements. This argument has been directly disposed of by the decision of the United States Supreme Court in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), wherein the court, noting that the exclusionary rules of evidence are not normally applicable at suppression hearings, held that hearsay evidence may be admitted at suppression hearings on the issue of third party consent to warrantless searches. Florida law is in conformity with Matlock. State v. Brown, 408 So.2d 846, 848 (Fla. 2d DCA 1982); cf. Zuppardi v. State, 367 So.2d 601, 605 (Fla. 1978). Furthermore, such hearsay evidence is admissible even though the third party who consented to the warrantless entry or search is unavailable for cross-examination at the suppression hearing. State v. Brown, supra at 848. Such hearsay statements are admissible when they are trustworthy, and trustworthiness may be shown by evidence which establishes or corroborates the third person's credibility and the truthfulness of the statements themselves. State v. Brown, supra at 848; United States v. Matlock, supra, 415 U.S. at 176, 94 S.Ct. at 995.

In the present case, Officer Diazlay testified he was the first police officer to respond to the homicide scene. (T: 597). Officer Diazlay testified he met the complainant, Francisco Rizzo, at the scene, and that Rizzo had a key with him that Rizzo used to open the front door of the downstairs apartment for the officer. (T: 598). Officer Diazlay further testified Rizzo then led him to the kitchen where the body of Fumero was located. (T: 598). Rizzo remained with Diazlay at the scene until the homicide detail arrived, and was present when the house was searched.

(T: 600-601). Officer Napoli also testified that Rizzo was allowed to remove some of his clothing from the apartment prior to the police sealing the residence. (T: 617).

Thus, Rizzo's hearsay statements that he was the complaining witness who found the body and that he lived in the house with his girlfriend were corroborated by the two officers' own direct observations. (T: 600-601, 617). See United States v. Matlock, 415 U.S. 164, 176-177, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). Furthermore, the trial court was satisfied that the statements made by Rizzo had in fact been made, and there is nothing in the record to raise any doubt as to this fact or to the truthfulness of the statements themselves. (T: 649). Since Officer Diazlay testified in detail as to what Rizzo told him and was cross-examined by defense counsel, it would be inappropriate to assume that he committed perjury in relating his conversation with Rizzo. State v. Brown, 408 So.2d 846, 848 (Fla. 2d DCA 1982); McCrary v. Illinois, 386 U.S. 300, 313, 87 S.Ct. 1056, 1063, 18 L.Ed.2d 62 (1967).

Thus, the trial court properly considered the hearsay statements in ruling on the motion to suppress. Since the evidence at trial further established that Rizzo was living in the house with Fumero and the defendant, and was not a mere house guest,[11]

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[11]Although the defendant claimed Rizzo and Fumero were his house guests, the record shows otherwise. At trial, Margarita Martinez, Olga Elviro's girlfriend, testified that Rizzo lived with the defendant in the downstairs apartment. (T: 1559), 1581-1582). Tomas Barcelo, who lived in the upstairs room where Elviro was murdered, testified that the defendant and Rizzo lived in the downstairs house, and that the victim, Fumero, had moved in with Rizzo four or five days prior to the murder. (T: 1678, 1681) According to Barcelo, the defendant convinced Rizzo to ask Fumero to move in with them so he could encourage her to not

there was ample evidence to find that Rizzo had the authority to and did in fact consent in giving the police access to the downstairs homicide scene.[12]

The defendant next argues that no exigent circumstances existed to justify the warrantless searches of both the downstairs and upstairs apartments because the police had no reasonable basis to believe that the victim needed aid or that the killer was still on the premises.

In Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), the United States Supreme Court held that the well accepted exigent circumstances exception to the warrant requirement of the fourth amendment, along with its attendant limitations, applied to murder scene searches. The court held that when police come upon the scene of a homicide, they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. 437 U.S. at 392-393, 98 S.Ct. at 2413-2414. Florida law is in accord. Zeigler v. State, 402 So.2d 365, 371 (Fla. 1981), cert. denied, 455 U.S. 1035 (1982); Wooten v. State, 398 So.2d 963 (Fla. 1st DCA 1981);

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serve as a witness against him in his upcoming rape trial. (T: 1683-1685).

The defendant's statement in his brief that independent evidence verified Rizzo was using Arsenio's keys and had no house keys of his own is unfounded. The alleged independent evidence--Arsenio's statement to the police--is not in evidence and Arsenio did not testify at trial.

[12]The defendant does not contest the voluntariness of the consent. Neither does the defendant contest Rizzo's authority to consent. The defendant's sole claim on appeal is that the only proof of Rizzo's consent was established by impermissible hearsay statements.

Grant v. State, 374 So.2d 630 (Fla. 3d DCA 1979). During the course of these legitimate emergency activities, the police may seize any evidence that is in plain view. Mincey v. Arizona, supra, 437 U.S. at 392-393, 98 S.Ct. at 2413-2414; Zeigler v. State, supra at 371-372.

The present case falls squarely within the established murder scene exigent circumstances exception. The record shows that the police responded to the homicide scene, found a victim lying in a pool of blood in the downstairs kitchen and, soon thereafter, another victim upstairs who had been bound, and gagged and stabbed with a knife.[13] Under the foregoing case law, it was constitutionally permissible for the police to respond to the emergency situation and to enter both the downstairs and upstairs apartments without a warrant as they could reasonably believe that persons within were in immediate need and that the killer might still be on the premises. Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert.den. 455 U.S. 1035 (1982); Wooten v. State, 398 So.2d 963 (Fla. 1st DCA 1981). The officers were also justified in making a prompt search of both homicide scenes to see if there were other victims or if the killer were hiding within. Grant v. State, 374 So.2d 630 (Fla. 3d DCA 1979); Wooten v. State, supra at 967.

While inside the house for this legitimate purpose, the officers observed in plain view what appeared to be both murder

[13]The immediate search of the downstairs scene was hampered by lack of light, since it was 3:00 a.m. and and the house was not well-lit until the Fire Department brought their equipment. (T: 611). It was during this time that an elderly woman who lived upstairs notified Sergeant Napoli that another body was lying in the upstairs room. (T: 611).

weapons, a .38 revolver and a bloody knife, as well as spent projectiles and casings, a handwritten note and a set of keys.[14] These items were properly seized as suspected evidence, since investigation of both homicide scenes was permissible for the purpose of gathering evidence which might shed some light on the particular homicides. Wooten v. State, 398 So.2d 963, 967 (Fla. 1st DCA 1981); Grant v. State, 374 So.2d 630 (Fla. 3d DCA 1979). Thus, the trial court correctly denied the defendant's motion to suppress those items of evidence.[15]

III

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS WHERE THE DEFENDANT WAS READ HIS RIGHTS TO COUNSEL, UNDERSTOOD HIS RIGHTS, AND KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL AND WILLINGLY ANSWERED QUESTIONS.

The defendant contends the trial court erred in denying his motion to suppress statements he made at the Union City police station after his arrest. The defendant claims that since waiver cannot be presumed from silence, there is insufficient evidence that he waived his right to counsel before answering questions.

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[14]The revolver was found on top of a stereo unit in the living room; the knife was found on a dresser top in the living room; the spent projectiles were found in the kitchen; the casings were found in the kitchen and dining room area; and the handwritten note on a cabinet top next to the dining room table. (T: 609-610). The set of keys, later determined to be Margarita Martinez's keys, was found on a dresser top in the upstairs room. (T: 615). A carbine rifle found in a downstairs dresser drawer was suppressed at trial. (T: 649-650).

[15]The ruling of a trial court on a motion to suppress is clothed with a presumption of correctness and should not be overturned if the record reveals evidence to support its findings. Shapiro v. State, 390 So.2d 344 (Fla. 1980), cert. denied, 101 S.Ct. 1519 (1981).

It is well settled that an express written or oral statement waiving of the right to counsel is not required to establish a valid waiver. North Carolina v. Butler, 441 U.S. 369, 372-376, 99 S.Ct. 1755, 1757-1758, 60 L.Ed.2d 286 (1979). In Butler, the United States Supreme Court stated that the question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived his rights. 441 U.S. at 373, 99 S.Ct. at 1757. Although it is often said that mere silence is not enough to find a valid waiver, the Supreme Court in Butler explained that silence coupled with an understanding of his rights and a course of conduct indicating waiver may establish that the defendant has waived his rights. Thus, in some cases "waiver can be clearly inferred from the actions and words of the person interrogated." 441 U.S. at 373; 99 S.ct. at 1757.

Florida law likewise provides that waiver of counsel need not be accompanied by specific written or oral statements by the defendant, but may be established by the totality of the attendant circumstances. In State v. Craig, 237 So.2d 737, 741 (Fla. 1970), the Florida Supreme Court stated that any clear and unambiguous conduct by a person who has been advised of his rights which indicates his willingness to answer questions without a lawyer is sufficient to show waiver. The court further stated that a defendant's verbal acknowledgment of understanding and willingness to talk, followed by conduct which is consistent only with a waiver of his right to have a lawyer present, after the defendant has been advised of his rights, constitutes an effective waiver of his right to counsel. Id., at 741. See

also Miller v. State, 403 So.2d 1017, 1019 (Fla. 5th DCA 1981); Fowler v. State, 263 So.2d 202 (Fla. 1972); Thompson v. State, 235 So.2d 354 (Fla. 3d DCA 1970); Sheppard v. State, 322 So.2d 628, 629 (Fla. 3d DCA 1975).

In the present case, the record conclusively establishes that the defendant knowingly and voluntarily waived his right to counsel prior to making any statements. Officer Nilsa Garcia, a Union City police officer fluent in Spanish, testified she read the defendant in Spanish his rights from the Spanish version of the standard Miranda rights form. (T: 675; R: 158). Specifically, she informed him that he had the right to consult an attorney and the right for his attorney to be present and to accompany him while he was being interrogated. (T: 678). She also informed the defendant that if he was not able to contact an attorney, he could, if he wanted, have one assigned to represent him before any questions were asked. (T: 678-679). She also informed him that he had the right to stop answering questions or giving statements at any moment he desired, without having to give an explanation, and that he had the right to demand the presence of an attorney during the questioning, and furthermore, had the right to stop speaking until the attorney was present. (T: 678-679).

Officer Garcia testified she then asked the defendant if he understood the rights and he nodded yes. (T: 679) She handed the defendant the Spanish rights form to sign; he looked at the form and then signed it. (T: 676, 679). Officer Garcia stated the defendant never asked her any questions regarding the rights, that he was very calm and appeared to understand the rights and

what was happening. (T: 679-680). She then asked him a few questions which he answered without hesitation.[16] According to Officer Garcia, at no time did the defendant invoke his right to an attorney, request an attorney, or state that he did not wish to speak and wished to remain silent. (T: 660-661, 694).[17]

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[16]Officer Garcia first asked him whether he knew the lady, Victoria Mature, who owned the apartment where he was arrested, and he responded that he just met her and was merely using her phone to call Florida. Garcia then asked him what he did with the gun after he killed the woman, and he stated he took it to his apartment and left it on the table. She also asked him where his clothes were, and he answered he did not bring any from Florida because he left in a hurry. (T: 682).

At the hearing on the motion to suppress, however, the defendant contrarily testified that Officer Garcia never asked him these questions and that he never made any such statements. (T: 703-704). The defendant also contradicted himself by first stating he did not actually request an attorney, but later stating that he did request an attorney. (T: 702). The trial judge specifically found Officer Garcia's testimony credible and specifically rejected the defendant's testimony that he requested an attorney and made no statements to the police. (T: 910).

It is well settled that in a motion to suppress, the trial judge is the trier of both fact and law, and his conclusions come to the appellate court clothed with a presumption of correctness. DeCastro v. State, 359 So.2d 551, 552 (Fla. 3d DCA 1978); State v. Nova, 361 So.2d 411, 412 (Fla. 1978).

[17]Approximately an hour and a half after Officer Garcia stopped questioning the defendant, he told Officer Garcia he had a lawyer in Miami on another charge. (T: 693, 695) The defendant did not request to see or to speak to his lawyer, but merely volunteered the information. (T: 695) Florida law provides that merely informing the police that he is represented by counsel is not an assertion of the right to counsel and is not even sufficient to require interrogation to cease. Thompson v. State, 235 So.2d 354 (Fla. 3d DCA 1979); see also Stone v. State, 378 So.2d 765, 769 (Fla. 1979). cert. den. 449 U.S. 986 (1980). Furthermore, even if it were considered a request for counsel, since the defendant admits he was not questioned and made no statements after informing Garcia of his other attorney, there would still be no violation of his constitutional rights. (T: 693-695, 699).

Most importantly, the defendant admitted at the suppression hearing that Officer Garcia handed him the rights form and that he read the rights and signed the form. (T: 701-702) He also admitted that he understood each right, including the right to remain silent, the right to have an attorney present, and the right to appointed counsel. (T: 701-702) He further acknowledged he never asked Garcia any questions about the rights because he did in fact understand them. (T: 701-703).

Under the totality of the circumstances, it is clear that Officer Garcia properly conveyed to the defendant his rights to counsel, California v. Prysock, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981); State v. Delgado-Armenta, ____So.2d___, 8 FLW 679 (Fla. 3d DCA, March 1, 1983), that the defendant understood his rights, knowingly and voluntarily waived his right to counsel, and willingly answered questions. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); State v. Craig, 237 So.2d 737 (Fla. 1970).[18]

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[18]The defendant's claim that the Union City police report indicates the defendant requested counsel is contradicted by the record. The trial judge specifically found Officer Garcia's testimony to be credible and Officer Garcia testified the defendant never requested counsel. (T: 660-661, 694, 910). Officer Garcia also testified that she was present when Victoria Mature, the young woman who allowed the defendant into the apartment to use her telephone, told the police officers that she would not talk until she had an attorney present.(T: 695-696). Furthermore, the police report in question was prepared by Lt. Wolpert who testified that he prepared the report several hours after the incident with information provided him by Officer Garcia and Detective Karabatsos. (ST: 30) The report was not intended to be detailed and was not necessarily in chronological order. (ST: 33-37). Although Lt. Wolpert did not testify at the suppression hearing, the trial judge referred to his deposition in reaching her decision. (T: 908).

IV

THE TRIAL COURT DID NOT ABUSE HER DISCRETION IN DENYING DEFENDANT'S MOTION FOR 30 PEREMPTORY CHALLENGES WHERE DEFENDANT RECEIVED THE 10 CHALLENGES PERMITTED BY LAW AND THE RECORD AFFIRMATIVELY SHOWS NO PREJUDICE.

The defendant next contends the trial judge abused her discretion in denying his motion for 30 peremptory challenges. Rule 3.350(a), Fla.R.Crim.P., provides that in a death case, the defendant and the state shall each be allowed 10 peremptory challenges. Rule 3.350(e) further provides that when an indictment contains two or more counts, the defendant shall be allowed the number of peremptory challenges which would be permissible in a single case, here 10. However, subsection (e) also provides that "in the interest of justice the judge may use his judicial discretion in extenuating circumstances to grant additional challenges. . .when it appears that there is a possibility that the State or the defendant may be prejudiced."

In the present case, the defendant moved for 30 peremptory challenges based on the fact that he was charged by a 3 count indictment, that the charges were very serious, and there was pretrial publicity. (R: 152) The trial judge correctly gave the defendant the 10 peremptory challenges he was entitled to under

Rule 3.350(a). (T: 725) Jacobs v. State, 396 So.2d 713, 717 (Fla. 1981).

The record shows the trial judge did not abuse her discretion in denying the defendant's request for 20 additional challenges. During voir dire, the trial judge and counsel for both parties carefully and extensively examined each prospective juror regarding potential bias and prejudice resulting from pretrial publicity. Of the 11 prospective jurors who stated they had heard about the case, all but 4 were excused for cause. The remaining 4 each stated they had not formed an opinion as to the defendant's guilt or innocence, that they would be able to set aside whatever they may have read and would be able to follow the law and make an objective decision based solely on the evidence from trial. (T: 742-744, 746, 806, 812, 932, 1009).

Thus, the record affirmatively shows that no extenuating circumstances existed and there was no evidence of prejudice to the defendant which warranted a grant of additional peremptory challenges. The trial judge carefully excused jurors for cause in order to obtain an impartial panel and the 4 jurors not excused for cause clearly stated they would follow the law and decide the case on the evidence at trial. The defendant has failed to show an abuse of discretion. See Jacobs v. State, 396 So.2d 713, 717 (Fla. 1981); Knight v. State, 338 So.2d 201, 203 (Fla. 1976).[19]

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[19]The 4 prospective jurors remaining who had heard about the crime from newspaper articles were Boubakis, Worm, Deas and Young. Boubakis and Young were excused by the defense and Worm and Deas sat on the jury panel. The record indicates that both Boubakis and Young may have been excused by the defendant because

V

THE TRIAL COURT DID NOT ERR IN EXCUSING FOR CAUSE TWO PROSPECTIVE JURORS WHO STATED THEY WOULD VOTE AGAINST IMPOSING THE DEATH PENALTY AND WHOSE ATTITUDES PREVENTED AN IMPARTIAL DETERMINATION AS TO GUILT.

The defendant claims the trial court violated the provisions of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct 1770, 20 L.Ed. 2d 776 (1968), in excluding for cause two prospective jurors, Ms. Watkins and Ms. Alexander.

Witherspoon bans the exclusion for cause of prospective juros who voice general objections to the death penalty or conscientious or religious scruples against the infliction of the death penalty. 391 U.S. at 522, 88 S.Ct. at 1776. This ban, however, does not prevent the prosecution from excluding for cause prospective jurors who state unequivocally that they would automatically vote against the imposition of the death penalty without regard to the evidence that might be developed at the trial of the case or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 391 U.S. at 522, n. 21, 88 S.Ct. at 1776, n. 21.

In Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the United States Supreme Court confirmed the general

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of their strong pro-death penalty views, rather than pre-trial publicity. (T: 742-744, 791, 1009, 1015).

Witherspoon rule as follows:[20]

> ". . .a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (emphasis supplied) Id. 448 U.S. at 45, 88 S.Ct. at 2526.

Unfortunately, neither Witherspoon nor Adams provide the trial court with a formula or requisite colloquy for the proper excusal of prospective jurors on Witherspoon grounds. The question of competency of a challenged juror is one of mixed law and fact to be determined by the trial judge in his discretion, as the trial judge is in the best position to evaluate the prospective juror's demeanor and answers to the questions. Barfield v. Harris, 540 F.Supp. 451, 465 (E.D. N.C. 1982); Douglas v. Wainwright, 521 F.Supp. 790, 796-800 (M.D. Fla. 1981); Mason v. Balkcom, 487 F.Supp. 554, 560 (M.D. Ga. 1980) rev'd other grounds 669 F.2d 222 (5th Cir. 1982). The trial court's determination will not be disturbed on appeal unless error is manifest. Piccott v. State, 116 So.2d 626 (Fla. 1954); Singer v. State, 109 So.2d 7 (Fla. 1959); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979).

Furthermore, in determining whether the two prospective

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[20]The State submits the underscored "substantially impair" standard in Adams signals a retreat by the Supreme Court from the rigid dictates of Witherspoon, and allows the trial judge, who has the unique opportunity of evaluating demeanor and sincerity in context of the entire voir dire examination, to assess the prospective juror's ability to perform his duty and follow the law.

jurors were properly excused for cause, this Court must look at the whole voir dire examination, Maggard v. State, 399 So.2d 973, 976 (Fla. 1981); Paramore v. State, 229 So.2d 855, 858 (Fla. 1969), and in scrutinizing a cold record, must not "treat the words of prospective jurors as free floating icebergs unrelated to the voir dire examination as a whole." Darden v. Wainwright, 699 F.2d 1031, 1038 (11th Cir. 1983)(Rehearing en banc granted). It is within this framework that the defendant's claim must be considered.

A review of the entire voir dire examination of the two prospective jurors shows that both made it clear they would vote against imposing the death penalty in this case and that their attitude toward the death penalty would prevent them from making an impartial decision as to guilt, thus substantially impairing, indeed preventing, the proper performance of their duties as jurors.[21]

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[21]Ms. Watkins stated that although she had no philosophical, moral or conscientious objections to the death penalty, she did not think she could make that decision. (T: 861) The prosecutor then explained the jury only makes a recommendation to the judge as to the penalty, but that the judge may ignore it and sentence as she sees fit. Ms. Watkins reiterated her position by stating "I could try, but I would find it very difficult" to make that decision. (T: 861) She was then asked whether she was opposed to the death penalty, and she replied no, that she was in favor of it under certain circumstances. (T 861). The prosecutor then asked:

> MR. KAHN: [prosecutor] Is the problem that you as a juror, could never recommend the death penalty for somebody?
>
> JUROR WATKINS: Emotionally, I would feel that I was too--yes, I don't feel that I could make--
>
> MR. KAHN: That recommendation?

Given the answers of both prospective jurors, it is evident that neither one was improperly excused for cause. Ms. Watkins directly stated that she did not feel that she could recommend

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JUROR WATKINS: That recommendation.

(Emphasis supplied)(T: 862)

The next question was whether the emotional barriers she had to imposing the death penalty would influence her voting on guilt or innocence. Ms. Watkins stated "possibly." (T: 862) The prosecutor then asked whether, if she voted for first degree murder in the first phase, there were any circumstances under which she could vote for and recommend the death penalty in the second phase, and she responded: "I don't know." (T: 862) She then explained it would weigh "very heavy" on her to the point that it might influence her deliberations on guilt. (T: 863).

Ms. Watkins was questioned later by the court as to whether she would try to avoid having to make a recommendation as to the death penalty by voting against a conviction of first degree murder, even though she believed that the state had proved the defendant's guilt beyond a reasonable doubt. (T: 868) She replied: "I think that would be possible." (T: 869). Defense counsel then questioned Ms. Watkins and asked her if she could ignore the death penalty during the guilt or innocence phase of the trial. (T: 872). She responded: "I would try. Whether I could possibly or not, I cannot tell you." (T: 872) The trial court again questioned her as to whether she would be able to find the defendant guilty of first degree murder if the death penalty was a possible penalty, and she answered: "I don't know." (T: 887).

In the voir dire of the second juror, Ms. Alexander, she stated that she did have philosophical opposition to capital punishment and was opposed to the death penalty in some circumstances. (T: 953) The prosecutor explained that the law provides for capital punishment only in certain circumstances and asked her whether her opposition was so strong that it would interfere with her deliberations as a juror. (T: 953-954) She replied: "very possible." (T: 954). Although Ms. Alexander then stated that her views would not necessarily preclude her from voting guilty on first degree murder during the first phase knowing that the death penalty was possible, she followed these statements by saying: "I personally would not like to face this gentleman, knowing that the outcome of his life may possibly be on my conscience, that I could have possibly made a mistake. I did not see him commit a crime." (T: 955) The prosecutor then asked whether if she felt the State had proven its case beyond a reasonable doubt, that would prevent her from recommending the death penalty under any set of circumstances. (T: 955) She responded

the death penalty for someone. She also stated that the emotional barriers she had to capital punishment might influence her deliberations on guilt, and that it was possible she would try to avoid having to make a recommendation as to the death penalty by voting against a conviction of first degree murder, even though she believed the state had proved the defendant's guilt beyond a reasonable doubt. Ms. Alexander stated that although she did not know, it was very possible her opposition to the death penalty was so strong it would interfere with her deliberations on guilt or innocence. Her answers also make it clear that she could not vote for the death penalty unless she herself had seen the defendant commit the crime. Thus, both prospective jurors made it clear that their views on capital punishment would substantially impair the performance of their duties as jurors to determine guilt or innocence, and that neither could consider imposing the death penalty in this case.

Florida courts have upheld the exclusion for cause of a prospective juror when it has been shown that he would vote against the death penalty regardless of the facts presented or the instructions given. Brown v. State, 381 So.2d 690, 694 (Fla.

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that she did not conscienciously feel that she would vote for the death penalty unless she actually saw the crime herself. (T: 956). The prosecutor rephrased the question and asked her whether if she voted for first degree murder, would she then vote for the death penalty under any given set of circumstances, and she replied that she did not know, that until she was actually put in that predicament, she could not say what the outcome would be. (T: 957) She was then asked whether the death penalty would actually interfere in her deliberations of guilt or innocence, and she replied: "I don't know. It may not, but I don't know." (T: 958).

(Fla. 1980); Jackson v. State, 366 So.2d 752, 755 (Fla. 1978).[22] Florida courts have also upheld the exclusion for cause of a prospective juror whose precise statements indicated somewhat less than absolute certainty that his attitude toward capital punishment would prevent him from imposing the death penalty or from making an impartial decision as to the defendant's guilt. Gafford v. State, 387 So.2d 333, 335, n. 2 (Fla. 1980)("I don't believe I could do it," "I guess I know I would not," "I really don't know"); Williams v. State, 228 So.2d 377, 380-381 (Fla. 1969), sentence vacated other grounds, 408 U.S. 941 (1972)("I wouldn't know"); Brown v. State, 381 So.2d 690, 694 (Fla. 1980) ("I don't think so"); Jackson v. State, 366 So.2d 752, 755, n. 2 (Fl. 1978)("I think so;" "I'm pretty sure"); Paramore v. State, 229 So.2d 855, 858 (Fla. 1969)("It would be a little hard;" "was afraid"). Here, the statements from Ms. Watkins and Ms. Alexander certainly demonstrated at least as substantial a basis for concluding that they would not impose the death penalty and would be prevented from impartially deciding guilt as did the juror's statements in the foregoing cases.[23]

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[22]Ms. Alexander stated she could not sentence the defendant to death unless she actually saw him commit the crime. In Williams v. Maggio, 679 F.2d 381, 386 (5th Cir. 1982), the court held that to be excluded in a capital case, a prospective juror need not aver that he would refuse to consider the death penalty in every case; rather, he must be excluded if he indicates that he is unwilling to consider the death penalty in that particular case.

[23]See also Barfield v. Harris, 540 F.2d 451, 465 (E.D.N.C. 1982)("believes" or "thinks" or "feels"); Mason v. Balkcom, 487 F.Supp. 554, 560 (M.D. Ga. 1980) rev'd other grounds 669 F.2d 222 (5th Cir. 1982)("I reckon so") Darden v. Wainwright, 513 F.Supp. 947, 962 (M.D. Fla. 1981), aff'd 699 F.2d 1031, 1040, n. 19 (11th Cir. 1983)(rehearing en banc granted)("I believe I would"); McCorquodale v. Balkcom, 525 F.Supp. 408, 424 (N.D. Ga. 1981)("I don't think I could do it, I really don't").

The fact that both prospective jurors gave other answers which might be viewed in isolation as tending to indicate an ability to consider the question of guilt does not change the appropriate conclusion. In considering the entire voir dire, it is apparent they could not have been impartial. The precise words used by the prospective jurors are not dispositive. Rather, this Court must assess the "bottom line," instead of searching the voir dire for signs of equivocation. Barfield v. Harris, 540 F.Supp. 451, 465 (E.D.N.C. 1982). Furthermore, even though prospective jurors may indicate some equivocation, it is precisely that indecision that prevents the State from determining whether the prospective juror is willing to consider all of the penalties or whether his attitude prevents him from making an impartial decision as to guilt. Williams v. State, 228 So.2d 377, 381 (Fla. 1969), vac'd other grounds, 408 U.S. 941 (1972). Moreover, this Court should give great deference to the trial court's conclusion, since the trial judge was actively involved in the voir dire and had the opportunity to evaluate the juror's demeanor and answers to the questions, and apparently was satisfied their opinions were unequivocal. See Barfield v. Harris, supra at 466; McCorquodale v. Balkcom, supra at 425.

Thus, it is evident that the attitudes of the two prospective jurors would prevent or substantially impair the performance of their duties as jurors. The trial judge correctly followed the standards set forth in Witherspoon and Adams and properly excused Ms. Watkins and Ms. Alexander for cause.

VI

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR CONTINUANCE TO HAVE BARCELO'S SECOND DEPOSITION TRANSCRIBED DID NOT LIMIT THE DEFENDANT'S CROSS-EXAMINATION OF BARCELO AND DID NOT FRUSTRATE THE DEFENDANT'S DEFENSE.

The defendant argues the trial court impermissibly limited his right to cross-examine Tomas Barcelo, the State's key witness, by denying his motion for a continuance in order to have Barcelo's second deposition transcribed for impeachment purposes. It is important to note that the defendant took two depositions of Barcelo; only the second deposition was not transcribed. Barcelo's first deposition was taken by the defendant two weeks prior to trial on July 3, 1982. (T: 1728) This first deposition concerned Barcelo's eyewitness account of Fumero's murder and the events that occurred leading up to the crime. This deposition was transcribed and the defendant used it to impeach Barcelo's testimony during cross-examination. (T: 1728).

Barcelo's second deposition concerned a totally unrelated and irrelevant occurance. After giving his first deposition, Barcelo was kept under surveillance by investigators from the State Attorney's Office to insure his presence at trial. (T: 1629) The day before trial began, Barcelo disappeared. (T: 1629) The investigators learned that Arsenio, the defendant's brother, and several friends had kidnapped Barcelo and hidden him in a house with plans to take him out of town until the trial was over. (T: 1629-1633) Prior to leaving town, however, they took

Barcelo to a local bar for drinks. (T: 1633) After learning of their whereabouts through a confidential informant, the investigators had the Miami police stage a "shake-down" of the bar patrons and Barcelo was "captured" and held until trial. (T: 1634) Barcelo's second deposition was taken by defense counsel shortly thereafter--immediately prior to Barcelo testifying at trial--in order to learn of the events surrounding the kidnapping. (T: 1623, 1667). It was this second deposition that was not transcribed.

The defendant's claim that the trial court's denial of his motion for a continuance limited his right to cross examine Barcelo and frustrated his defense is wholly without merit and is directly refuted by the record. The second deposition did not concern Barcelo's eyewitness testimony regarding the murders or the events surrounding them. His testimony regarding the homicides had already been taken by defense counsel two weeks earlier during the first deposition. Instead, the second deposition was permitted by the court for the limited purpose of allowing the defendant an opportunity to explore the events that occurred during the preceding 24 hours involving Arsenio's kidnapping of Barcelo in order to glean any new information about putative bias or prejudice arising from this turn in events. (T: 1623, 1635) The events surrounding the kidnapping were obviously irrelevant to the issues at trial and were arguably prejudicial to the defendant; for these reasons the State never introduced at trial any evidence concerning Barcelo's abduction. Therefore, unless Barcelo's second deposition contained impeachment material pertaining to bias or prejudice, the contents of the deposition were

simply irrelevant to the issues at trial and could not have been used at all to impeach Barcelo's testimony. Indeed, had defense counsel broached the subject of the kidnapping during cross-examination, he would have opened the door to a damaging rebuttal by the State. (T: 1636).

Thus, absent evidence that the second deposition contained any material pertinent to impeachment, there was simply no need for a continuance to have the deposition transcribed.[25] The defendant extensively cross-examined Barcelo and impeached him with his first deposition concerning the events surrounding the crime. (T: 1727-1754). Not once did defense counsel attempt to impeach Barcelo with information obtained in the second deposition; not once did defense counsel object that he could not effectively impeach Barcelo because he had no transcript.[26] There is simply no evidence whatsoever that the defendant was frustrated in his cross-examination of Barcelo. The defendant extensively explored Barcelo's relationship with the defendant, with Arsenio and with Rizzo in an effort to expose prejudice and bias, and absent some affirmative proffer that the second transcript contained important impeachment material, it cannot be

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[25]The defendant's claim that the State had an obligation under Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), to supply the defendant with Barcelo's second deposition is spurious. The State is under no obligation to provide the defendant with the transcript of a witness's deposition taken by the defendant.

[26]The trial court did provide the defendant with the opportunity to have the court reporter who took the second deposition and her notes available in the event the defendant sought to impeach Barcelo with such testimony. The defendant did not avail himself of the opportunity.

said that the trial court abused its discretion in not granting a continuance to have the deposition transcribed. See Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980), cert. den. 450 U.S. 927 (1981)(denial of motion for continuance will not be reversed unless abuse of discretion affirmatively appears in record); Harkins v. State, 380 So.2d 524, 527 (Fla. 5th DCA 1980)(trial court may properly deny continuance to obtain testimony that would only tend to impeach).

VII

THE TRIAL COURT DID NOT ERR IN RESTRICTING THE DEFENDANT'S CROSS-EXAMINATION OF WITNESS SIEGEL WHERE THE PROFFERED TESTIMONY WAS IRRELEVANT TO THE DEFENDANT'S MOTIVE FOR KILLING FUMERO.

The defendant argues the trial court improperly limited his cross examination of Dennis Siegel, the assistant state attorney who handled the original rape case against the defendant. The prosecutor called Siegel to prove that charges of sexual battery and statutory rape were pending against the defendant at the time he killed Fumero, establishing the witness elimination motive. (T: 1534) On cross-examination, the defendant sought to elicit testimony that the chief of the sexual battery division of the state attorneys office had previously recommended that Siegel not file the rape charges against the defendant. The defendant

claimed such testimony was relevant to cast doubt on his alleged motive for killing Fumero. According to the defendant, if he could show the rape case against him were weak, it would bolster his position that he did not resort to premeditated murder to eliminate the witness. (Defendant's brief, page 23).

The defendant's claim simply has no merit. The assistant state attorney's opinion as to the strength of the rape case against the defendant is irrelevant to whether the defendant killed Fumero to prevent her from accusing him at that trial. Siegel's testimony was not introduced to show the defendant's probable guilt or innocence of the underlying rape charge, but only to establish that Fumero was a witness to charges then pending against the defendant. The proffered testimony was irrelevant to the defendant's motive or intent and the trial court correctly refused to permit such questioning.

VIII

THE TRIAL COURT DID NOT ERR IN LIMITING THE DEFENDANT'S CROSS-EXAMINATION OF DR. LUDWIG REGARDING DR. MIDDLEMAN'S REPORT WHERE DR. LUDWIG TESTIFIED HE COULD NOT BASE AN OPINION ON DR. MIDDLEMAN'S REPORT.

The defendant argues the trial court erred in refusing to permit him to cross-examine Dr. Gary Ludwig, the medical examiner who testified at trial, with a report prepared by another medical examiner, Dr. Middleman, who did not testify at trial. The defendant contends that Dr. Ludwig should have been allowed to base his opinion as to the time of death on Dr. Middleman's report.

The defendant's claim is nullified by the trial testimony of Dr. Ludwig himself wherein he specifically stated that he could not base an opinion as to time of death on Dr. Middleman's report. (T: 1438) Dr. Ludwig explained that he was not present at the homicide scene, but merely examined both bodies and performed the autopsies after they had been transported to the medical examiner's officer. (T: 1435) Dr. Middleman, on the other hand, did respond to the homicide scene and subsequently prepared the pertinent scene investigation report which ultimately became part of the medical examiner's office files. (T: 1435) The trial judge would not allow Dr. Ludwig to testify as to what was contained in Dr. Middleman's report unless it was established that Dr. Middleman's report provided a basis for Dr. Ludwig's opinion as to time of death. (T: 1437). However, the record shows that not only did Dr. Ludwig not use Dr. Middleman's report as a basis for such an opinion, but Dr. Ludwig carefully explained that he was unable to give any opinion at all as to the time of death because he did not have the opportunity to personally view the bodies at the homicide scene. (T: 1438) He explained there were so many factors that went into determining time of death that personal observation was necessary; he simply could not base his personal opinion on another medical examiner's observations. (T: 1438-1439, 1440).[28]

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[28]Dr. Ludwig was also unable to give an opinion based on his own personal observations of the bodies at the medical examiner's office because they had been removed from the scene too long for him to form a reliable opinion. (T: 1441).

It should be noted that time of death was not a material issue in the case. Furthermore, the testimony at trial

Thus, the trial court correctly limited the defendant's cross-examination of Dr. Ludwig regarding the contents of Dr. Middleman's report.[29]

IX

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE PHOTOGRAPHS OF THE VICTIMS WHERE THE PHOTOGRAPHS WERE RELEVANT TO SHOW PREMEDITATION AND THE CIRCUMSTANCES OF DEATH.

The defendant contends tht the cumulative effect of gruesome photographs of the victims taken at the scene of the crime and at the medical examiner's officer was prejudicial and deprived him of a fair trial.[30] The State submits that even if the

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conclusively established a 3 hour time frame during which the victims died. Both victims were last seen alive between 11:30 p.m. and 12:00 midnight and their bodies were discovered the next morning before 3:30 a.m. (T: 1248, 1701, 1705). Dr. Ludwig testified that even if he were able to give an opinion as to the time of death, it would be an estimate with a range of several hours. (T: 1445-1446, 1448).

[29]At trial, the prosecutor stated he would not object if the defendant wished to introduce the report into evidence in an effort to establish time of death. (T: 1437, 1442). The defendant made no effort to introduce the report and did not include the report in the record on appeal.

[30]The defendant objects to two different sets of photographs. The first set, State's exhibits 17-19 and 34-35, were taken by police technician Kirschenbaum at the scene of the crime and show the position and condition of the two victims within the rooms as they appeared when the police responded to the scene. (T: 1299, 1310, 1344) The second set of photographs, State's exhibits 20-27 and 52-55, were taken by police techician Badali and medical examiner Dr. Gary Ludwig at the medical examiner's office and depict close-ups of the bindings and gag on Olga Elviro, the manner and position in which she was tied, and the stab wounds on her neck and under her breasts. (T: 1332-1337, 1390) Photocopies of all these photographs are included in the record on appeal at pages 187-245.

photographs were to be considered "gruesome,"[31] the trial court did not err in permitting their admission into evidence because they are highly relevant.

The test of admissibility of allegedly gruesome photographs is relevancy to an issue required to be proven in a case. Adams v. State, 412 So.2d 850, 853 (Fla. 1982); Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981); State v. Wright, 265 So.2d 361, 362 (Fla. 1972). Allegedly gruesome photographs are admissible if they properly depict the factual conditions relating to the crime and if they are relevant in that they aid the court and jury in finding the truth. Booker v. State, 397 So.2d 910, 914 (Fla. 1981); Swan v. State, 322 So.2d 485, 487 (Fla. 1975). Relevancy is to be determined without regard to their gruesome or offensive nature. Thus, the mere fact that photographs are gruesome does not bar admissibility if they meet these relevancy guidelines set forth by this Court. Adams v. State, supra at 843; Foster v. State, 369 So.2d 928, 930 (Fla. 1979), cert. denied 444 U.S. 885 (1979).

In the present case, the photographs are indeed relevant. The defendant was charged with premeditated first degree murder, felony murder, and sexual battery. The nature and manner in which the victims were killed and the cause of death are thus of critical importance in determining premeditation and the

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[31]Actually, with the exception of exhibit 35, none of these photographs should even be considered "gruesome." They do not portray the victims in a particularly repulsive or shocking state, see Zamora v. State, 361 So.2d 776, 783 (Fla. 3d DCA 1978); and do not depict copious amounts of blood or the results of emergency medical procedures exacerbating the impact on the viewer's senses. Compare Rosa v. State, 412 So.2d 891 (Fla. 3d DCA 1982).

existance of the underlying felony. Also, the photographs are directly relevant to show the crime scene, the identity of the victims, the manner in which Olga Elviro was tied and gagged, and the location and characteristics of the wounds which were inflicted upon the two victims, and to corroborate the medical examiner's testimony concerning the rape of Elviro, the manner in which the two victims were murdered and the cause of death. All this is relevant to proving premeditation and the crimes charged.

Florida courts have consistently held that gruesome photographs that are relevant to prove these issues, either independently or corroborative of other evidence or testimony, are properly admissible. See Edwards v. State, 414 So.2d 174 (Fla. 5th DCA 1982); Adams v. State, 412 So.2d 850 (Fla. 1982); Booker v. State, 397 So.2d 910 (Fla. 1981); Foster v. State, 369 So.2d 928 (Fla. 1979), cert. denied, 444 U.S. 885 (1979). Also, gruesome photographs that prove the identity of the victim and illustrate the crime scene and the position of the victim in relation to the physical layout of the room are likewise relevant and admissible Adams v. State, supra at 854; Zamora v. State, 361 So.2d 776, 782 (Fla. 3d DCA 1978).

The admission into evidence of gruesome photographs is within the sound discretion of the trial judge. Rodriguez v. State, 413 So.2d 1303, 1305 (Fla. 3d DCA 1982); Zamora v. State, 361 So.2d 776, 782 (Fla. 3d DCA 1978). In the present case, the

record reveals that the trial judge carefully examined each of the photographs, discarded 6 photographs as duplicitous, and allowed the remaining photographs into evidence as depicting different views of the crime scene and the victim's injuries, thus exercising reasoned judgment in admitting only those photographs which were relevant to the issues to be proved. (T: 1312-1329) Under the circumstances, there was no abuse of discretion and the photographs were properly admitted.[32]

X

THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION IN GIVING THE WITNESS AVAILABILITY INSTRUCTION WHERE THE DEFENDANT MADE WITNESS AVAILABILITY AN ISSUE IN THE CASE.

The defendant argues the trial court erred in giving the jury instruction on witness availability at the request of the State. (T: 1855-1863, 1917, 1996-1997) The defendant argues this

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[32]The defendant's claim that the photographs were irrelevant because he did not dispute the cause of death or the fact that Elviro had been bound and gagged is wholly without merit. Relevancy, not necessity, is the test for the admissibility of gruesome photographs. Straight v. State, 397 So.2d 903, 906 (Fla. 1981); Bauldree v. State, 284 So.2d 196, 197 (Fla. 1973); State v. Wright, 265 So.2d 361, 362 (Fla. 1972). Thus, even though the defendant was willing to stipulate to a number of factual matters which the photographs were relevant to prove, the photographs are still admissible if they are relevant. Straight v. State, supra at 906; Dillen v. State, 202 So.2d 904, 905 (Fla. 2d DCA 1967). As this Court stated in Foster v. State, 369 So.2d 92 , 930 (Fla. 1979), cert. denied 444 U.S. 885 (1979), a defendant cannot, by stipulating as to the identity of the victim and the cause of death, relieve the State of its burden of proof beyond a reasonable doubt. Most importantly, the defendant was not prepared to stipulate to the key issue in the case, premeditation, which was incumbant upon the State to prove to sustain the charge of first degree murder. Edwards v. State, 414 So.2d 1174, 1175 (Fla. 5th DCA 1982); Zamora v. State, 361 So.2d 776, 782 (Fla. 3d DCA 1978).

instruction "neutralized" his defense that Arsenio Lara, Tomas Barcelo or others had committed the murders.

The general rule is that it is within the trial judge's discretion to instruct the jury that there is no rule requiring the parties to call every possible witness and that the jury may not draw an inference as to what their testimony might have been. Hernandez v. State, 369 So.2d 76 (Fla. 3d DCA 1979), cert. denied 378 So.2d 345 (Fla. 1979); United States v. Llamas, 280 F.2d 392 (2d Cir. 1960); Selph v. State, 22 Fla. 537 (Fla. 1886); Brown v. State, 108 So. 842 (Fla. 1926).

In the present case, defense counsel in part established his defense that others may have committed the murders by arguing to the jury that the State failed to call fingerprint experts, medical experts and ballistics experts to corroborate the State's evidence. (T: 1926, 1928, 1932, 1936, 1977-1979, 1986) Defense counsel also argued to the jury that such testimony may in fact have corroborated his defense and not the State's case, intimating that the State purposely did not produce the witnesses for that very reason. (T: 1936-1937, 1977-1979). Thus, the defendant himself made witness availability and potential testimony an issue in the case and the State was entitled to the instruction to prevent the jury from drawing improper inferences and to counter the defense tactic during closing argument of questioning why the State did not bring in material witnesses and evidence to assist the jury in arriving at the truth. See Webb v. State, 347 So.2d 1054, 1057 (Fla. 4th DCA 1977). Moreover, as the defendant was aware, two important witnesses, Francisco Rizzo

and Arsenio Lara, were unavailable, and the State was entitled to the instruction to prevent the jury from drawing improper inferences regarding their supposed testimony.

Contrary to the defendant's claim, the instruction did not instruct the jury to ignore the State's failure of proof, did not relieve the State of its burden or proof, see Hernandez v. State, 396 So.2d 76, 77 (Fla. 3d DCA 1979), cert. den. 378 So.2d 345 (Fla. 1979), and did not impermissibly comment on the defendant's right to produce no evidence. The trial judge did not abuse her discretion in giving the instruction.

XI

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT WERE PROPER REPLY TO ARGUMENT MADE BY DEFENSE COUNSEL AND DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

The defendant next argues that eight comments made by the prosecutor during his closing argument were so prejudicial as to violate his right to a fair trial. He claims that each of these comments impermissibly accused defense counsel of trying to fool the jury and of tailoring his defense to fit the prosecutor's case.

Four of these comments were simply not preserved for appellate review.[33] The record shows that defense counsel made no objection to these four comments, neither did he request curative instructions or move for a mistrial. Thus, the defendant

[33]Defendant's brief, page 33, contains the list of unobjected to comments found on pages 1949, 1951, 1952, 1970 and 1972 of the transcript. The objected to comments are found on pages 1938, 1950, 1970 and 1973 of the transcript.

has waived any challenge to these four comments on appeal. Simpson v. State, 418 So.2d 984, 986 (Fla. 1982); Maggard v. State, 399 So.2d 973 (Fla. 1981); Clark v. State, 363 So.2d 331 (Fla. 1978).

It is well-settled that wide latitude is allowed in the prosecutor's argument to the jury, and that the prosecutor's statements must be examined in the full context in which they were made. Breedlove v. State, 413 So.2d 1, 7-8 (Fla. 1982); Johnsen v. State, 332 So.2d 69 (Fla. 1976); Frierson v. State, 339 So.2d 312 (Fla. 3d DCA 1976). Florida law also provides that the State must have an opportunity for fair comment and reply when defense counsel intitates a matter during his closing argument. Ferguson v. State, 417 So.2d 639, 642 (Fla. 1982); Wilder v. State, 355 So.2d 188, 189 (Fla. 1st DCA 1978); Gains v. State, 417 So.2d 719, 724 (Fla. 1st DCA 1982); Ricks v. State, 242 So.2d 763 (Fla. 3d DCA 1971).

In the present case, defense counsel argued during his initial closing argument that he never contested the fact that the murders had been committed. (T: 1925-1926, 1935) The prosecutor then properly responded to the argument and stated that even though defense counsel may agree or stipulate to the murders, nevertheless the State is still required to prove the facts beyond a reasonable doubt. (T: 1938) Defense counsel also argued that the State did not properly investigate the case and failed to produce certain evidence that might have supported the defendant's defense and weakened the State's case. Specifically, defense counsel claimed that the State failed to produce any

fingerprints linking the defendant to the crime and supporting the testimony of the State's key witness, Barcelo, (T: 1926-1927, 1936-1937), failed to produce any evidence of the mystery man and elderly woman who lived upstairs and who might have murdered Olga Elviro (T: 1928-1930) and of the bite mark and hair samples found on Olga which might have been from someone other than the defendant. (T: 1928, 1932) The prosecutor again properly responded and stated that evidence such as fingerprints would have had little meaning because the defendant could still argue that since he lived in the house, it would be expected to find his fingerprints there. (T: 1950) The prosecutor continued that defense counsel's claims contained mere speculation, not based on facts in evidence, and that it had the effect of a smoke screen, clouding the facts like the cloudy water that results when a squid emits an ink when in danger. (T: 1971).

Thus, the prosecutor's comments were fair comment and reply to the preceeding arguments of defense counsel and, taken in context, were not intended to convey the impression of improper motives or tactics on the part of defense counsel. See Francis v. State, 384 So.2d 967, 969 (Fla. 3d DCA 1980)(prosecutor's response to defense argument that the State did not produce fingerprint evidence and did not bring in police technician to testify was proper reply); Webb v. State, 347 So.2d 1054, 1056 (Fla. 4th DCA 1977)(prosecutor's questioning regarding absence of two eyewitnesses proper to preclude oft used defense tactic of asking why state did not bring in witness). Several decisions from Florida have found comments of this nature, referring to

defense counsel's argument as a smoke screen, were not improper or prejudicial. Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1982); Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977).

Furthermore, considering the overwhelming evidence against defendant, even if the comments were improper, they were harmless and did not violate his right to a fair trial. See Blair v. State, 406 So.2d 1103, 1107 (Fla. 1981); Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982); Cochran v. State, 280 So.2d 287 (Fla. 1st DCA 1973).[34]

XII

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTIONS FOR MISTRIAL WHERE THE PROSECUTOR'S COMMENTS DID NOT IMPERMISSIBLY COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT BUT WERE A PROPER COMMENT ON THE EVIDENCE AT TRIAL.

The defendant contends the trial court erred in denying his motions for mistrial following two statements made by the prosecutor in his closing argument allegedly commenting upon the defendnt's pre-arrest silence.

The State first submits this claim was not preserved for appellate review. Although the defendant did move for a mistrial after each remark, the motion for mistrial was a general motion and failed to set forth any grounds in support of the motion. Motions for mistrial must be made with sufficient specificity to

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[34]The fact that the jury found the defendant guilty of the lesser included offense of second degree murder against Olga Elviro indicates that the comments did not so "poison the mind of the jurors or prejudice them so that a fair and impartial verdict could not be rendered," or were not so "inflammatory that they might have influenced the jury to reach a more severe verdict of guilt than it would otherwise." Blair v. State, 406 So.2d 1103, 1107 (Fla. 1981).

apprise the trial court of potential error and to preserve the point for appellate review. Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982). In the present case, the defendant's general motion for mistrial failed to properly apprise the court of the basis for the potential error so that the trial court could determine the propriety of the comments and possible cure of any error. For this reason, the defendant has failed to preserve the issue for review by this Court. See also Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979); Hufham v. State, 400 So.2d 133 (Fla. 5th DCA 1981); Williams v. State, 414 So.2d 509 (Fla. 1982).

Even if the issue were properly preserved, however, the defendant's claim had no merit. The fifth amendment privilege is against compelled self incrimination and is not applicable when the defendant is under no official compulsion either to speak or to remain silent. Thus, the fact that the defendant has a constitutional right to remain silent when questioned by the police has no bearing on his voluntary decision to remain silent prior to having any contact with the police and his voluntary decision to not come forward to report criminal behavior. See Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 2132, 65 L.Ed.2d 86 (1980)(J. Stewart, concurring opinion); Williams v. State, 400 So.2d 471, 472 (Fla. 5th DCA 1981); Lebowitz v. Wainwright, 670 F.2d 974 (11th Cir. 1982). So long as the evidence is relevant, evidence of prearrest silence may be used not only for impeachment but also in rebuttal even when the defendant elects not to take the stand. Jenkins v. Anderson, supra, 447 U.S.

244, n. 7, 100 S.Ct. at 2132, n. 7; See Lebowitz v. Wainwright, supra at 979-981.

In the present case, the prosecutor's remarks were quite relevant for rebuttal and did not violate the defendant's constitutional right to remain silent. When examined in context, State v. Jones, 204 So.2d 515 (Fla. 1967), it is clear that the comments were not actually directed to the defendant's failure to come forward to the police to report a crime, but were a direct rebuttal to the defendant's claim that either Arsenio Lara, Barcelo or Rizzo had committed the murders. In this respect the prosecutor pointed out that Arsenio Lara and Rizzo remained at the scene of the crime and cooperated with the police, yet the defendant quickly fled to Union City, New Jersey. (T: 1946, 1967) This reference to flight was an entirely permissible comment on the uncontradicted evidence at trial which established that the defendant disappeared immediately after the murders, failed to show up for his court hearing on two unrelated charges the next day, July 17, 1981, and was apprehended five days later hiding in a corner in an apartment in Union City, New Jersey.[35] Cf. State v. Young, 217 So.2d 567, 571 (Fla. 1968); Smith v. State, 377 So.2d 1149, 1150 (Fla. 1979).

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[35]The jury was properly instructed that a defendant's attempt to escape or evade a threatened prosecution by flight may be taken as one of the series of circumstances from which guilt may be inferred. (T: 2013); Batey v. State, 355 So.2d 1271 (Fla. 1st DCA 1978); Williams v. State, 268 So.2d 566 (Fla. 3d DCA 1972); Hargrett v. State, 255 So.2d 298 (Fla. 3d DCA 1971).

Thus, the prosecutor's comments did not impermissibly comment on the defendant's right to remain silent. They were proper reply to the defendant's claim that others committed the murders and they properly addressed the permissible inference of consciousness of guilt from flight. See Nelson v. State, 416 So.2d 899 (Fla. 2d DCA 1982); Cridland v. State, 338 So.2d 30 (Fla. 3d DCA 1976); Lebowitz v. Wainwright, 670 F.2d 974, 980 (11th Cir. 1982). The trial judge did not abuse her discretion in denying the defendant's motions for mistrial.

XIII

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON ONLY THE RELEVANT AGGRAVATING AND MITIGATING FACTORS WHERE THERE WAS SIMPLY NO EVIDENCE TO SUPPORT THE NON-INSTRUCTED MITIGATING FACTORS.

The defendant next argues the trial court erred in charging the jury on only the three aggravating and two statutory mitigating factors the court thought were relevant.

The standard Florida jury instructions for penalty proceedings in capital cases specifically direct the trial judge to give only those aggravating circumstances and only those mitigating circumstances for which evidence has been presented. Florida Standard Jury Instructions in Criminal Cases (1981 Ed.), pgs. 78-80. The record shows the trial judge expressly complied with the clear directive of the standard jury instructions. In so doing she stated that to give all nine aggravating circumstances and all seven statutory mitigating circumstances, when there was absolutely no evidence to support six of the aggravating and five

of the statutory mitigating circumstances, would unnecessarily confuse the jury and perhaps even mislead them in rendering their advisory opinion of sentence. (T: 2062, 2067).[36]

The State submits it was not error for the trial court to instruct the jury as she did. Due process requires that particular aggravating and mitigating factors be given to the jury only when some evidence has been presented with respect to these factors from which a jury could rationally base its determination. The defendant is not denied due process when the trial judge does not instruct the jury on those aggravating and mitigating circumstances for which there is no evidentiary basis for a jury to consider. See Hopper v. Evans, __U.S.___, 102 S.Ct. 2049 (1982)(due process requires that a lesser included offense instruction be given in a capital case only when the evidence warrants such an instruction).

Furthermore, even assuming the trial court erred in not charging the jury as to all aggravating and mitigating circumstances, the error is harmless for several reasons. First, the defendant surely cannot claim a violation of his rights by the trial court not instructing the jury as to the remaining six aggravating factors, since the failure to so instruct inures to his benefit. Second, the failure to charge the jury with the

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[36]The record in the present case conclusively demonstrates there is no evidence from which the jury could reasonably or rationally find the mitigating factors not instructed by the trial judge. In fact, during the sentencing phase of the trial the defendant did not offer any evidence as to the remaining mitigating factors: victim was participant; defendant was accomplice, and defendant acted under extreme duress.

remaining five statutory mitigating factors was overcome by the giving of the proper non-statutory mitigating instruction pursuant to Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), that the jury may consider as a mitigating factor any aspect of the defendant's character or record or any circumstance of the offense as a basis for a sentence of less than death. (T: 2124) Third, the trial judge clearly recognized her duty to consider all evidence in mitigation and, in sentencing the defendant to death, she specifically determined that the evidence supported only three aggravating factors and no mitigating factors. (R: 258; R: 2156, 2158). As discussed in argument XVI of this brief, the evidence in the record fully supports the trial judge's determination. Thus, the trial court did not err in charging the jury on aggravating and mitigating circumstances.[37]

XIV

THE TRIAL COURT DID NOT ERR IN NOT INSTRUCTING THE JURY ON THE MITIGATING FACTORS OF AGE AND LACK OF SIGNIFICANT CRIMINAL HISTORY WHERE THERE WAS NO EVIDENCE TO SUPPORT THESE FACTORS.

The defendant asserts the trial court erred in failing to

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[37]The cases cited by the defendant do not address the issue directly and lend little support for his position. Cooper v. State, 336 So.2d 1133 (Fla. 1976) and Ford v. Strickland, 696 F.2d 804, 815 (11th Cir. 1983) merely held it was not error for the trial judge to instruct on all aggravating and mitigating factors even though the evidence was insufficient to support some of the aggravating factors. It was only in dicta that the courts remarked it seemed appropriate to instruct on all charges in order to preserve the jury's function under the statutory scheme. It should be noted that those cases all involved the former version of the standard jury instructions which required the trial judge to instruct the jury on all factors. Florida Standard Jury Instructions in Criminal Cases (1976 Ed.) pgs. 76-78.

charge the jury on the two mitigating factors of age and lack of significant criminal history. The State's response to this claim is contained in its arguments in points XIII and XV of this brief. In sum, since the Standard Florida Jury Instructions for penalty proceedings in capital cases specifically direct the trial judge to give only those mitigating circumstances for which evidence has been presented, the trial judge did not err in not instructing the jury as to these two factors because there was no evidence to support them. (See argument XV following).[38]

XV

THE TRIAL COURT CORRECTLY REFUSED TO GIVE THE JURY CERTAIN INSTRUCTIONS REQUESTED BY THE DEFENDANT WHERE THERE WAS NO BASIS FOR THE INSTRUCTIONS.

The defendant argues the trial court erroneously refused to give the jury a number of instructions he requested. The trial judge refused to give these instructions because (1) they were not standard instructions for death penalty cases, and (2) she found their basic content was already contained in the standard instructions that were given. (T: 2065-2067).

The defendant first claims the jury should have been

[38]With respect to the defendant's contention that the trial court improperly ruled that the State would be allowed to rebut any claim by the defendant that he had no significant prior criminal activity by calling the witness in the prior rape case against the defendant, the State submits the defendant's contention is spurious. In essence, the defendant sought to represent to the jury that he had no significant history of prior criminal activity, that he was truly a law-abiding person, when in fact he had already been charged with a involuntary sexual battery of a 13 year old girl, Fumero's sister. Proof of this pending charge was certainly relevant to rebut the defendant's attempt to paint a misleading or false picture of his recent past and the trial court correctly ruled it was admissible. See Morgan v. State, 415 So.2d 6, 12 (Fla. 1982).

instructed that the same aspect of the crimes could be considered only as to one aggravating circumstance and not to more than one. This prohibition against "doubling up," however, applies only to the consideration of aggravating factors by the trial court in determining the sentence and does not apply to the weighing of aggravating factors by the jury. Furthermore, the "cold, calculated and premeditated manner" is a separate analytical concept from the commission of the crime to "disrupt or hinder. . .the enforcement of law," and both can be validly considered to constitute two separate circumstances.[39]

Second, the defendant claims the jury should have been charged that the totality of aggravating factors had to outweigh the totality of mitigating factors beyond a reasonable doubt before the death sentence could be recommended. The defendant's argument has been disposed of in the negative by the decision in Ford v. Strickland, 696 F.2d 804, 817 (11th Cir. 1983), wherein the court held it was not a denial of due process to not require the State to prove that aggravating factors outweigh mitigating factors beyond a reasonable doubt.[40]

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[39]It is important to note the defendant never claims that the trial judge erred in doubling up these two aggravating circumstances in sentencing the defendant to death.

[40]The court stated that due process only protects against a conviction except upon proof beyond a reasonable doubt of ev ry element, and that since proof that aggravating factors outweighed mitigating factors beyond a reasonable doubt was not an element of a capital crime, there was not due process violation. The court also stated that only proof of facts was susceptible to a reasonable doubt standard, but that the relative weight of aggravating and mitigating circumstances was not susceptible to such a standard. Thus, the case relied upon by the defendant, In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), is inapplicable for this reason. Also, the court noted that the

And finally, the defendant claims the trial judge erred in not charging the jury that the mere existence of an aggravating factor does not require the return of a recommendation of death. The State submits the intent of this instruction is subsumed within the standard instruction regarding the weighing of aggravating and mitigating circumstances. Also, this requested instruction contradicts the clear statement of this Court in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) that when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. Accord LeDuc v. State, 365 So.2d 149 (Fla. 1978). Thus, the trial court correctly refused to give the defendant's instructions.

XVI

THE TRIAL COURT PROPERLY CONCLUDED THAT THREE AGGRAVATING AND NO MITIGATING CIRCUMSTANCES EXISTED AND PROPERLY FOLLOWED THE JURY'S RECOMMENDATION AND SENTENCED THE DEFENDANT TO DEATH.

The defendant also claims the trial judge erred in finding three aggravating and no mitigating circumstances in sentencing the defendant to death.

In her sentencing order, the trial judge stated that she considered each of the aggravating and mitigating circumstances listed in §921.141, Florida Statutes, in determining the sentence to impose. (R: 258) She found three aggravating circumstances.

Florida statutory scheme of weighing aggravating and mitigating factors has been declared constitutional by the United States Supreme Court in Proffitt v. Florida, 418 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

The first aggravating factor was §921.141(5)(b), the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to some person in that the defendant had been convicted of second degree murder and sexual battery of Olga Elviro, both crimes of violence, at the time the jury made its sentencing recommendation and at the time the court imposed the death penalty. (R: 258) The record supports the trial court's finding. (R: 254-257) Even though the two convictions were entered contemporaneously with the conviction of the present first degree murder, the convictions for those two crimes was a fact at the time the jury made its sentencing recommendation and at the time the court imposed the death penalty and were therefore appropriately considered by the trial judge as an aggravating factor. Elledge v. State, 408 So. 2d 1021 (Fla. 1981); King v. State, 390 So.2d 315 (Fla. 1980); Lucas v. State, 408 So.2d 1149 (Fla. 1949).

The second aggravating circumstance was §921.141(5)(g), the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (R: 259) The record supports the trial judge's findings that the victim, Grisel Fumero, was a witness whom the State intended to call in the trial of the defendant for sexual battery against Fumero's sister, Odalys Cardosa, and that the trial in that case was scheduled to begin on July 13, 1981, the week the defendant murdered Fumero. (T: 1536) The record further supports the judge's finding that there was evidence at trial, specifically the testimony of Tomas Barcelo, indicating that the defendant had

conspired with Rizzo to prevent Fumero from being a witness in the earlier sexual battery case, indicating that the defendant wanted to avoid being convicted and sentence for that crime. (T: 1682-1686) The trial court correctly found the defendant committed the crime to hinder the lawful exercise of governmental function or the enforcement of laws. Autone v. State, 382 So.2d 1205 (Fla. 1980). The defendant's claim that the evidence only showed that he killed Fumero in the same fit of emotional rage in which he killed Elviro just "venting generalized rage," is patently disproved by the record.

The third aggravating factor was §921.141(5)(i), the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R: 259) The record supports the trial judge's finding that the eyewitness to Fumero's murder, Tomas Barcelo, testified that the defendant faced Fumero, told her that it was because of her that everything was going wrong, and without the slightest provocation fired at her five or six times at close range. (T: 1711-1713) The record further supports the judge's finding that the defendant then removed the fired casings from the cylinder and began to reload the gun, and that when Barcelo called the defendant a murdered, the defendant simply laughed. (T: 1713, 1715) In addition, the record also shows that after raping and murdering Olga Elviro upstairs, the defendant came downstairs, knocked on the door and allowed in by Fumero. (T: 1704-1706) The defendant walked past Fumero without speaking, through the kitchen and disappeared into the bedroom where his brother, Arsenio, kept a gun hidden under a

pillow. (T: 1705-1710, 1712) Fumero asked the defendant if he wanted her to cook him a steak. (T: 1707). The defendant said nothing, but emerged from the bedroom with his hands behind his back. (T: 1710) He looked at Fumero and said, "It's your fault that I have lost everything." (T. 1711) He then pulled out a gun and proceeded to shoot her point blank. (T: 1711-1712) Fumero said, "Mario, Mario, why are you doing that to me?" (T: 1712) The defendant replied, "Why am I doing that? Son of a bitch," and continued firing until the gun was empty. (T: 1713) He then emptied the cylinder and began to reload the gun, laughing. (T: 1713-1715) Thus, the evidence clearly shows the defendant had formulated a plan to kill Fumero when he came downstairs and went into the bedroom for the gun. Under the circumstances the trial court properly found that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Middleton v. State, 426 So.2d 548 (Fla. 1982); Jent v. State, 408 So.2d 1024 (Fla. 1981); Magill v. State, 386 So.2d 1188 (Fla. 1980).

The trial judge then considered all statutory mitigating factors and any non-statutory mitigating factors and found that no statutory or non-statutory mitigating factors existed. (R: 260) Specifically, the court noted that the only arguable mitigating circumstance was the history of abuse suffered by the defendant as a child as testified to at the sentencing hearing by Dr. Amigo. (R: 260) However, the court found that there was no

evidence that the defendant's actions in murdering Fumero were in any way influenced or affected by any childhood experience, and thus, found it was not a relevant factor in the crime. (R: 260) Furthermore, the trial judge stated that even if applicable, she nevertheless found the mitigating factor to be clearly outweighed by the aggravating circumstances. (R: 260).

In this regard the defendant claims the trial judge ignored the testimony of Dr. Cava, a psychiatrist who examined the defendant before sentencing and who testified at sentencing that the defendant had an explosive personality.[42] However, Dr. Cava spoke in generalities and gave no opinion as to whether the defendant's actions in murdering Fumero were in any way influenced or affected by any of his childhood experiences. Thus, Dr. Cava's testimony does not demonstrate the trial court erred in declining to find the existence of such a mitigating factor. See Middleton v. State, 426 So.2d 548, 553 (Fla. 1982).

The defendant also claims the trial court should have considered the mitigating circumstances of extreme mental or emotional disturbance [§921.141(6)(b)] due to his rage following the killing of Olga Elviro. As pointed out earlier, the record shows the defendant purposefully entered the downstairs house, went into the bedroom, retrieved a gun, faced Fumero and told her it was her fault that he had lost everything, and shot her five or

[42]Dr. Cava also testified that the defendant was very badly abused as a child and that such abuse often results in an abused and damaged personality as an adult. (T: 2137-2141) Dr. Cava further testified that the defendant has a potentially explosive personality and is a potentially aggressive and dangerous person. (T: 2144).

six times, then reloaded the gun, laughing. This hardly can be considered extreme rage or mental or emotional disturbance.

Likewise, §921.141(6)(f), the capacity of the defendant to appreciate the criminality of his conduct, is inapplicable. The defendant's conduct and statements in committing the crime, and his fleeing the scene indicate he was able to reason and understand the nature of his actions. See Cannady v. State, __So.2d__, 8 F.L.W. 90, 93 (Fla., Feb. 24, 1983).

The defendant also claims the trial court should have considered the mitigating circumstance of age, §921.141(6)(g). This claim is wholly without merit, as his age at the time of the trial was 26. (T: 723) Washington v. State, 362 So.2d 658 (Fla. 1978)(26 years old); Magill v. State, 386 So.2d 1188 (Fla. 1980); (18 years old); Peek v. State, 395 So.2d 492 (Fla. 1980)(19 years old); Alvord v. State, 322 So.2d 533 (Fla. 1975)(26 years old).

And finally, the defendant claims the trial court should have considered the absence of significant history of prior criminal activity, §921.141(6)(a). This claim is unfounded. The record demonstrates the defendant was previously convicted of two crimes of violence, second degree murder and sexual battery, at the time the jury made its sentencing recommendation and at the time the court imposed the death penalty. (R: 254-257) The record also shows the defendant was charged with two other pending crimes of violence, robbery of Raquel Carranza and involuntary sexual battery of Odalys Cardozo. (R: 173; State's Supplemental Record) Indeed, the defendant had quite a

significant history of prior criminal activity. See Washington v. State, 362 So.2d 658 (Fla. 1978).

As the foregoing shows, each of the trial judge's findings is well documented in the record. The trial judge found that there were more than sufficient aggravating circumstances proven beyond a reasonable doubt to justify the imposition of the sentence of death. After evaluating all the evidence in the case, the judge stated she felt compelled to follow the advisory sentence of the jury. (R: 260) The imposition of the death penalty was appropriate and the defendant's sentence should be affirmed.

XVII

THE PROSECUTOR'S COMMENT IN ARGUMENT AT THE PENALTY PHASE WAS NOT PRESERVED FOR APPELLATE REVIEW AND WAS NOT FUNDAMENTAL ERROR.

The defendant also contends a comment made by the prosecutor during his argument to the jury at the penalty phase was fundamental error. The State points out this challenge simply has not been preserved for appellate review. Although the defendant objected to the prosecutor's remark, the trial court sustained his objection and the defendant did not request a curative instruction or move for a mistrial. (T: 2111) Simpson v. State, 418 So.2d 986 (Fla. 1982); Clark v. State, 363 So.2d 331 (Fla. 1978).[43]

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[43]Furthermore, the comment was not fundamental error. In fact, the crime was an aggravated crime and the comment, taken in context, was intended to convey the seriousness of the crime and the aggravated circumstances.

XVIII

THE TRIAL JUDGE CORRECTLY DENIED THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE VERDICT.

The defendant's final point is that the trial court erred in denying his motions for judgment of acquittal on the ground that the evidence was insufficient to establish the premeditated murder of Fumero. The defendant also claims the jury verdict was contrary to the weight of the evidence.

His claim that the verdict is contrary to the weight of the evidence is disposed of by the decision of this Court in Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981), aff'd 454 U.S. 963 (1982), wherein this Court held that legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of the appellate tribunal.

Moreover, there is substantial competent evidence to support the jury's verdict of premeditated murder of Fumero. The defendant's conviction and sentence should be affirmed.

CONCLUSION

Based upon the foregoing, the State of Florida submits that no error occurred in the trial court below and that the defendant's conviction and sentence of death should be affirmed.

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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 ADAM H. LAWRENCE, Esq. 200 S.E. 1st Street, Peninsula Federal Bldg., Suite 1008, Miami, Florida 33131, on this 7th day of June, 1983.

Marti Rothenberg

MARTI ROTHENBERG
Assistant Attorney General

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