IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,819

FRANK GRIFFIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

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

* *

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

OTHER AUTHORITIES

INTRODUCTION

The appellant was the defendant in the trial court. The appellee, the State of Florida, was the prosecution. The parties will be referred to as they stood in the trial court. The symbol "R" will represent references to the record on appeal. The symbol "T" will represent references to the transcript of the proceedings.

STATEMENT OF THE CASE

The appellee, the State of Florida, accepts the defendant's Statement of the Case as being substantially true and correct.

STATEMENT OF THE FACTS

On March 5, 1982 an indictment was returned against Frank Griffin charging that on April 2, 1981 he killed Raul Nieves with premeditation or in an attempt to perpetrate an armed robbery. The second count of the indictment was for the armed robbery of Raul Nieves. (T. 11-12a). The defendant's arraignment was set for February 19, 1982. The defendant, although in jail, was not available. (T. 4). The defendant was again set for arraignment on February 25, 1982. The defendant's attorney stated that the defendant had

a contagious disease and requested a postponement until March 4, 1982. (T. 9). On March 5, 1982 the defendant was arraigned. (T. 17). At that time, the court entered a not guilty plea. The court set a trial date of April 19, 1982. Defense counsel stated that this was totally inappropriate and asked for a later trial date. (T. 22). The court then set a trial date of May 17, 1982. (T. 23). On May 17, 1982 the trial was continued until June 21, 1982 on the court's own motion. (T. 32-34). On June 21, 1982, H.T. Smith, the defendant's attorney on another robbery charge, and Charles Mays, the defendant's attorney for this crime, appeared before the court. (T. 46-47). The co-defendant, Johnny Stokes, asked that the cases be set over for further plea negotiations. (T. 48). On July 20, 1982 the court reset the trial date again, although no specific trial date was mentioned. (T. 64). The jacket of the court file reflects that on this date the defendant stipulated to a sixty day extension of the speedy trial rule to October 1, 1982. (R. 3).

On September 7, 1982, a Motion to Suppress filed by the defendant was heard. (T. 66). The record reflects that the defendant had taken the deposition of the co-defendant, Johnny Stokes, shortly before. (T. 68). Detective Harvey Wasserman testified that he first met the defendant on May 19, 1981. (T. 75). No one had been arrested as yet for the murder of Raul Nieves. (T. 76). The eventual co-defendant,

Gerald Nichols, had given a statement implicating the defendant in the robbery-murder. (T. 76). The defendant's fingerprint was also found in the U-Totem Store where the crime occurred. (T. 90). The defendant was in the Dade County Jail on an unrelated charge. (T. 191). Wasserman went with Detective Ron Ilhardt to the jail. (T. 77). When first brought down to Wasserman and Ilhardt, the defendant was belligerent. (T. 93). When the defendant was told the detectives were not there to question him for the robbery for which he was in jail, the defendant agreed to accompany them. (T. 98). The defendant was cooperative at this point. (T. 81). The defendant was taken to the police car and advised of his constitutional rights. (T. 78). The defendant verbally waived his rights. (T. 79). The defendant was taken to the U-Totem Store where the crime occurred. (T. 81). The defendant denied ever being there previously. (T. 82). At the police station the defendant refused to sign a waiver of rights form. (T. 84). The defendant again verbally waived his rights. (T. 85). The defendant subsequently stated he no longer wanted to talk and that he wanted an attorney. The detectives ceased questioning and returned the defendant to the county jail. (T. 108). According to Detective Wasserman, the defendant was arrested for this crime in February, 1982. (T. 108).

Detective Ronald Ilhardt testified that he met the defendant on May 19, 1981 at the Dade County Jail. (T. 168).

Gerald Nichols had made allegations implicating the defendant in this crime. (T. 168). The detectives did not know as yet that Nichols himself was involved. (T. 172). Nichols statement was unsubstantiated at that point, although the defendant's fingerprints had been found at the crime scene. (T. 172). At first, the defendant was loud and said he didn't want to talk to the police. (T. 170). When it was explained that they were not going to question him about the crime for which he was in jail, the defendant agreed to go with them. (T. 170). The defendant was signed out of the jail. (T. 169). The defendant was never told that he was under arrest for this crime. (T. 171). In the car, the defendant was Mirandized and agreed to talk. (T. 173, 175). Ilhardt told the defendant that Nichols had implicated both he and Johnny Stokes in this crime. (T. 175). The defendant denied ever being at the store. (T. 178). At the police station, the defendant refused to sign the written waiver of rights form, but verbally waived his rights. (T. 178-179). The defendant again denied knowledge of the crime. The defendant was not arrested or told that he was under arrest. (T. 181). Ilhardt had no intent to arrest the defendant but merely wanted to verify Nichols statement. (T. 181). On February 14, 1982, Ilhardt took a statement from the co-defendant, Johnny Stokes, wherein the defendant was implicated in the robbery-murder. (T. 191-200).

Johnny Stokes testified that in February, 1982 he saw Detectives Wasserman and Ilhardt at the Dade County Jail. (T. 121). They took him to the police station. (T. 122). After hearing Nichols statement, Stokes gave a taped statement implicating the defendant. (T. 123-124).

The defendant testified that on May 19, 1981 he met Detective Wasserman and Ilhardt. (T. 137). The defendant stated that Ilhardt handcuffed him and placed him under arrest for first degree murder. (T. 138). He claimed he was not read his rights and was threatened by the detectives. (T. 140). The defendant denied any involvement in the crime. (T. 141, 150).

The court granted the defendant's Motion to Suppress, finding that the defendant did not knowingly and voluntarily waive his Miranda rights. (T. 215). The court also held that the defendant was not coerced or threatened. (T. 217-218). The court denied the defendant's Motion for Discharge which alleged that the defendant was arrested on May 19, 1981. (T. 164-165). The court also held that the defendant's stipulation to extend the speedy trial time waived any objections he had on that basis. (T. 165).

At trial, in the process of voir dire, three jurors stated they could not recommend the death penalty under any

circumstances. The jurors were excused. (T. 236-240). That portion of the voir dire is set out verbatim in the pertinent argument portion of this brief.

The first witness, Jorge Auer, testified that on April 2, 1981, he worked for the Holsum Bakers of Miami. (T. 478-479). He went to the U-Totem Store in question to deliver bread about 3:30 a.m. (T. 480). The victim, Nieves, was sitting behind the store counter when he arrived. (T. 481). Auer delivered his bread and went out to his truck. He then reentered the store to use the bathroom. (T. 481). After using the bathroom, Auer left. As he was leaving, he saw Nieves standing, looking down one of the store aisles. (T. 482). From the outside of the store, Auer saw that Nieves was looking at two black males. He could not further describe or identify the two black men. (T. 482). Auer noticed that there were no cars in the store's parking lot and became suspicious. (T. 484). He went to a nearby Exxon gas station and asked the attendant to call the police. (T. 485). He then went to a Pantry Pride in the area and asked the night manager to call the police. (T. 486). He returned to the Exxon station where he was informed that they had heard two shots. (T. 486).

Rene Alvarez lived diagonally across the street from the U-Totem, roughly 100 yards away. (T. 510). Alvarez had

gone to sleep at about 4:00 a.m. but heard two shots at about 4:20 a.m. (T. 512, 517). Alvarez looked out the window and saw two people leaving the U-Totem Store in a hurry. They entered a four-door beige car and left. (T. 512-513). The car had been parked under a tree next to the U-Totem. The car was not visible from the U-Totem. (T. 513-514).

Sergeant Robert Evans was dispatched to the scene at 4:10 a.m. with a code 29, an armed robbery in progress. (T. 523). In the U-Totem Store, the cash register was disturbed. The victim was lying dead on the floor behind the counter. (T. 526). Two spent shell casings from a .9 millimeter or .380 caliber pistol were lying on the floor in front of the cashier. (T. 528).

Guillermo Pinzon was a friend of the victim. (T. 530-531). He identified the victim's body at the medical examiner's office. (T. 531). Pinzon identified a photograph of the victim's face which he was shown at the medical examiner's office to identify the victim. (T. 533).

Dr. Gary Keith Ludwig was a pathologist with the Dade County Medical Examiner's Office. (T. 538). He performed an autopsy of the victim on April 2, 1981. (T. 541). There were two gunshot wounds; one in the upper left chest and

one in the upper abdomen. (T. 544, 546). Photographs of the entry and exit wounds were entered into evidence and Dr. Ludwig testified with the use of these photos. (T. 545-557). Ludwig determined that the gun was at a 45 degree angle in relation to the victim when he was shot. (T. 553). He could not tell which bullet was fired first (T. 553), although he could tell that the fatal bullet was the shot to Nieves' chest. (T. 557). He stated the wounds were consistent with the victim first being shot in the abdomen, bending over and then being shot in the chest. Ludwig stated that such a hypothesis was only one possibility. (T. 553-554).

Robert Sarnow, a crime scene technician (T. 560), found two shell casings and one projectile at the scene. (T. 575). The projectile was in a peg board behind the cash register. (T. 572). He also lifted thirty-seven latent fingerprints from the crime scene. (T. 586).

Robert Hart, a criminalist specializing in firearms identification (T. 597), testified that the two shell casings were fired from the same .9 millimeter pistol. The bullet found was also a .9 millimeter. (T. 607-608). The bullet was of a full-jacket design which has a very high level of penetration. (T. 609).

Johnny Stokes testified that he knew the defendant for three to four years and that they were both friends with Gerald Nichols. (T. 618-619). On April 2, 1981 at 8:30 or 9:00 p.m., Nichols picked up Stokes in Nichols 1980 brown stationwagen. They then picked up the defendant. (T. 622-623). The three men drove around looking for a place to rob. (T. 624). They decided on the U-Totem Store in question. (T. 625). Nichols parked the car on the left side of the store approximately 100 feet away. (T. 625). The car was not visible from the store. (T. 626). The defendant and Stokes went into the store. The Holsum Bread delivery man was inside talking to the clerk. (T. 627). They waited five minutes, walking up and down the aisles, until the delivery man left. They wanted to rob only the clerk. (T. 627-628).

The defendant and Stokes approached the victim. Stokes asked for cigarettes. (T. 628-629). The victim turned around to get the cigarettes, at which time the defendant took out his gun. (T. 629-631). The gun was a Smith and Wesson .9 millimeter automatic. (T. 633). The defendant asked for money. (T. 631). The clerk retrieved $60.00 from the cash register and gave it to Stokes. (T. 631-632). Stokes tried to pull a gold chain from the victim's neck. It wouldn't break. The victim took it off himself and gave it to Stokes. (T. 632). Stokes said: "Let's go" and went to leave. As he went to leave he heard a shot. He turned and

saw the victim falling. The defendant fired a second shot at the victim who then fell to the floor. The defendant and Stokes ran out of the store. (T. 632-634). The victim was behind the counter. Stokes and the defendant were by the store's door when the shots were fired. (T. 635).

Stokes and the defendant ran into Nichols car. (T. 627). Stokes asked the defendant why he shot the clerk. The defendant replied: "I shot the cracker. The cracker is bleeding like a hog." (T. 638). The defendant did not appear at all upset when he made the statement. (T. 639). Stokes again asked why the defendant shot the man but received no answer. (T. 639). Stokes never saw the victim with a weapon. The victim never threatened them and was cooperative. (T. 639). According to Stokes, the victim was in shock from the time he saw the defendant with the gun. (T. 631). To Stokes' knowledge, the defendant was never in the store previously. (T. 635-636).

Ivan Almeida, a fingerprint identification technician, testified last. (T. 687). He identified the latent fingerprint from the store as being that of the defendant. (T. 698-699). He could not state when it was made. (T. 701). The State and the defense rested.

The court went over the jury instructions, including the instruction concerning first degree murder as well as

premeditated murder versus felony-murder. The defendant did not object. (T. 708-709).

In his closing, the state attorney reviewed the indictment and defined premeditation as well as felony murder. (T. 756-758). During his closing, the prosecutor stated that the defense counsel would get to rebut his closing. He asked the jury to "weigh his testimony." (T. 783). The defendant did not object.

The court charged the jury, including premeditated murder and felony-murder. (T. 793). The court specifically defined premeditation. (T. 793). The defendant did not raise an objection. (T. 813). The jury returned a verdict of guilt to first degree murder and armed robbery. (T. 820). The court adjudicated the defendant guilty on both counts. (T. 824).

The penalty phase was heard on September 16, 1982. (T. 827). Over defense objection, the court stated it would instruct the jury on only those aggravating and mitigating factors supported by the evidence. (T. 831). The defendant asked as a special mitigating circumstance that the court instruct the jury on the sentences given to the two co-defendants. (T. 853). The court agreed to give this instruction. (T. 874). Evidence of Stokes' plea agreement was read to the jury. (T. 883-884).

During his closing, the prosecutor stated that defense counsel would ask the jury to consider Stokes' lighter sentence in mitigation. (T. 900). He told the jury to consider, among other things, that Stokes testified and told the truth, the first step in rehabilitation. (T. 900). The prosecutor also stated that defense counsel would ask for sympathy. He stated that they should show the defendant the same sympathy he showed to the victim, Nieves. (T. 903-904). He then stated that sympathy had no place in the jurors' deliberations. (T. 904). Defense counsel in closing in fact argued Stokes' sentence to the jury and made an appeal to their sympathies. (T. 917-921). The court then instructed the jury. (T. 922-924). The jury recommended the death penalty 12-0. (T. 939). The court sentenced the defendant to death, finding four aggravating factors and no mitigating factors. (T. 950-954). As to the armed robbery count, the court sentenced the defendant to life imprisonment. (T. 955).

On October 15, 1982, the defendant moved for a new trial. He introduced the testimony of Andreau Burns and David Lunden, both inmates and friends of the defendant. (T. 965, 975-978, 1005, 1010, 1016). Both men testified that they had met Stokes in jail and that Stokes told them, individually, that he was lying about the defendant's involvement in this crime. (T. 967-968, 1007). Burns and

Lunden knew each other, but both claimed never to have spoken about the defendant's case. (T. 987, 1011-1012). The court denied the motion for mistrial.

The appeal follows:

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON PREMEDITATED MURDER?

II

WHETHER THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT FOR BOTH THE MURDER OF RAUL NIEVES AND FOR THE ARMED ROBBERY CHARGE?

III

WHETHER THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE IN THE PENALTY PHASE THE ARMED ROBBERY WHICH OCCURRED CONCOMITANT WITH THE MURDER?

IV

a) WHETHER THE TRIAL COURT PROPERLY EXCLUDED PROSPECTIVE JURORS WHO STATED THEY COULD NOT RECOMMEND THE DEATH PENALTY UNDER ANY CIRCUMSTANCES?

b) WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY ON ONLY THOSE AGGRAVATING AND MITIGATING CIRCUMSTANCES SUPPORTED BY THE EVIDENCE?

c) WHETHER THE REMARKS OF THE PROSECUTOR IN CLOSING ARGUMENT DURING THE PENALTY PHASE WERE REVERSIBLE ERROR?

POINTS ON APPEAL
CONTINUED

d) WHETHER THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURORS AND MADE IMPROPER FINDINGS REGARDING THE AGGRAVATING CIRCUMSTANCES?

e) WHETHER THE TRIAL COURT VINDICTIVELY SENTENCED THE DEFENDANT TO THE DEATH PENALTY IN LIGHT OF THE PLEA OFFER OF A LIFE SENTENCE, OFFERED IMMEDIATELY PRIOR TO TRIAL?

V

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR DISCHARGE ON THE BASIS OF AN EARLIER ARREST AND ON THE BASIS OF A FAILURE TO PROPERLY EXTEND THE SPEEDY TRIAL TIME RULE?

VI

WHETHER THE COMMENTS BY THE PROSECUTOR DURING BOTH PHASES OF THE TRIAL WERE COMMENTS ON THE DEFENDANT'S SILENCE?

VII

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE THE PHOTOGRAPH OF THE DECEDENT'S FACE, WHICH WAS USED IN IDENTIFYING THE DECEDENT?

VIII

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL?

ARGUMENT

I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE CHARGE OF PREMEDITATED MURDER.

The defendant's first argument is that the jury was not instructed on premeditation as an element of first degree murder. He admits that he failed to raise an objection but asserts that the error was fundamental. Therefore he concludes, the failure to instruct on premeditation is reversible notwithstanding the absence of an objection.

The State's position is that the jury was in fact instructed on premeditation. If the exact language of the standard jury instruction was not used, neither was it required. The court's instruction in fact covered all the necessary elements defining premeditation. Lastly, the facts clearly supported the verdict and adjudication for premeditated murder.

The jury was fully instructed on the necessity of finding premeditation and on the definition of premeditation. In his closing argument, the prosecutor read the indictment to the jury. The indictment alleged that the defendant killed Raul Nieves from a premeditated designed. (T. 756). Later in his closing, the prosecutor defined both

premeditation and felony murder. (T. 757-759). Concerning premeditation, he stated:

> "First degree murder can be proven two ways. The classic way is alleged by premeditation as it is stateed in the indictment. That is where the defendant killed intentionally with aforethought, but he pulls that trigger. He intends to kill that person that he is pointing the gun at and pulls the trigger for the purpose of killing him. That is premeditated murder. When your honor instructs you on the law, she will tell you there is no time frame necessary to be proven before you find the defendant acted as a premeditation.
>
> The willful intent to kill as long as you, the jury, based upon the evidence determine that at the time he pulled the trigger he intended to kill Raul Nieves. Let's look at the evidence in the case to see if there is premeditation."
>
> (T. 757).

Finally, the court instructed the jury on both premeditated murder and felony murder. The court defined premeditation therein as well as felony murder. (T. 792-794).

> "I will now instruct you on the circumstances that must be proved before Frank Griffin may be found guilty of first degree murder or any lesser included crimes within that definition.
>
> First degree murder: Before you can find the defendant guilty of first degree premeditated murder, the State must prove the following three elements beyond a reasonable doubt:

One. Raul Nieves is dead.

Two. The death was caused by the criminal act or agency of the defendant.

Three. There was premeditated killing of Raul Nieves.

Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the information of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convinced you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

Before you can find the defendant guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt:

One. Raul Nieves is dead.

Two. The death occurred as a consequence of and while the defendant was engaged in the commission of a robbery or the death occurred as a consequence of and while the defendant, or an accomplice, was escaping from the immeditate scene of a robbery.

Three. The defendant was the person who actually killed the victim,

> or the victim was killed by a person other than the defendant who was involved in the commission or attempt to commit a robbery but the defendant was present and did knowingly aid, abet, counsel, hire or otherwise procure the commission of a robbery.
>
> In order to convict of first degree felony murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill. The crime of robbery will be defined shortly in these instructions.
>
> (T. 792-794).

The court's instruction is verbatim from the Standard Jury Instruction (1981) (p. 63-64).

Premeditation has been defined as a fully formed purpose to kill which existed in the mind of th perpetrator for a sufficient length of time to permit reflection. No particular period of time is required. The required intent can be formed a moment before the act. Sireci v. State, 399 So.2d 946 (Fla. 1981). The court's instruction to the jury covered all the elements necessary for the jury to decide premeditation. This may have been obvious to the defendant thereby prompting him not to raise any objection. Assuming arguendo that the trial court varied from the Standard Jury Instruction, the instruction given was more than sufficient. The trial court does not have to instruct the jury exactly as recommended in the Standard Jury Instruction. State v.

Bryan, 287 So.2d 73 (Fla. 1973). The defendant is not entitled to a new trial on this basis.

The defendant alleges that the evidence does not show premeditation. It is the state's position that the facts strongly demonstrate premeditation. Premeditation can be inferred from the nature of the weapon used. Sireci v. State, supra. Robert Hart, a criminalist specializing in firearms identification (T. 597), testified that the weapon used was .9 millimeter Smith and Wesson automatic pistol. (T. 607-609). He stated that a . 9 millimeter is a fairly powerful cartridge. The particular bullet used was of a full jacket design which characteristically has a "very high level of penetration." Hart stated that this type cartridge has been known in many cases to go completely through a human body unless it strikes a bone. It is also capable of going through walls, vehicles, and sheet metel. (T. 609). Premeditation can therefore be inferred from the particularly lethal weapon used by the defendant in the homicide.

Other facts also demonstrate premeditation. The defendant and his co-defendant, Johnny Stokes, entered the U-Totem Store and saw a bread delivery man inside speaking to the victim. (T. 627). They waited five minutes until the delivery man left before robbing the clerk. Obviously, they

did not want any other witnesses. They then approached the victim. The defendant subsequently drew his gun. (T. 631). Prior to shooting the clerk, there was sufficient time to ask the clerk for money, for the clerk to retrieve the money, for the co-defendant, Stokes, to unsuccessfully attempt to grab a gold chain from the victim's neck, for the victim to take the chain from his neck and for the victim to hand the chain to Stokes. (T. 631-632). The defendant had his gun out this entire time. There was therefore sufficient time for the defendant to form premeditated intent to kill the clerk. It is significant to note that the victim cooperated the entire time, never threatened the defendant or co-defendant and never had a weapon. (T. 639). Lastly, the defendant fired two shots. This clearly shows his intent was not merely to wound the clerk but to kill him. After the first shot, the clerk was falling. He was obviously of no danger to the defendant. Notwithstanding, the defendant fired a second shot.

In summary, the evidence of premeditation is strong. The defendant used a particularly lethal weapon. He evidenced a desire not to have witnesses to his crime. That is why he killed the clerk. The defendant had sufficient time to form a premeditated intent to kill. That intent was clearly shown when he fired two shots into the victim.

II

THE DEFENDANT COMMITTED THE CRIME OF PREMEDITATED MURDER SEPARATE, APART AND DISTINCT FROM THE CRIME OF ARMED ROBBERY. THE COURT THEREFORE COULD PROPERLY SENTENCE THE DEFENDANT FOR PREMEDITATED MURDER AND ARMED ROBBERY AS THE MURDER CONVICTION WAS NOT RELIANT UPON THE ARMED ROBBERY.

The defendant claims he cannot be convicted and sentenced for both first degree murder and armed robbery. His claim is based on the premise that the first degree murder conviction is a conviction of felony murder, not premeditated murder. The defendant asserts that the evidence is insufficent for the jury to have found he committed premeditated murder. Basing his claim upon State v. Hegstrom, 401 So.2d 1343 (Fla. 1981) and its progeny, the defendant states he cannot be convicted or sentenced for both felony-murder and the underlying felony.

The State's reply in summary is that the defendant relies upon an improper factual premise. The evidence was more than sufficient to prove premeditated murder. In this case, the crime of premeditated murder was committed separate and apart from the crime of armed robbery, even though the two were part of one continuous act. Where there is evidence sufficient for the jury to find guilt of premeditated murder, the court is entitled to convict and sentence

the defendant for first degree murder, based on premeditation, and for the felony committed during the same occurrence.

The defendant's argument is based upon an improper factual premise. Contrary to his assertion, the evidence was sufficient to prove premeditated murder. As the Court stated in Buford v. State, 403 So.2d 943, 949 (Fla. 1981):

> "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of the facts which the other does not. Brown v. Ohio. Murder in the first degree through premeditation requires proof of a fact not required in sexual battery: premeditated design to kill."

In this case, the crime of premeditated murder requires proof of a fact not required of armed robbery: premeditated design to kill. Breedlove v. State, 413 So.2d 1 (Fla. 1982); Slater v. State, 316 So.2d 539 (Fla. 1975); also see State v. Pinder, 375 So.2d 836 (Fla. 1979).

Premeditated murder requires premeditation and a killing. Armed robbery requires neither. Therefore, the offenses are separate and distinct. The defendant attempts to link the two by stating that the armed robbery resulted

in the murder. This is just another way of stating that the two crimes occurred during one continuous act. Notwithstanding the single continuous act, two crimes were committed because the armed robbery did not require a premeditated killing.

In this case, the evidence demonstrating premeditation also demonstrates how distinct the murder was from the armed robbery. The acts committed by the defendant evidencing premeditation were not required for him to commit armed robbery. Initially it must be stated that any injury to the victim was not part of the armed robbery, but singularly part of the premeditated murder. The armed robbery was completed before the victim was shot. The defendants were leaving when the victim was shot. (T. 632-633). The defendant had time during the robbery to form the required intent. The clerk never threatened the defendant or had a weapon. (T. 639). The evidence was that the victim cooperated in every way. (T. 631-632). The defendant used a particularly lethal pistol, a .9 millimeter automatic, and the bullet used, a full jacket design, was intended for high levels of penetration. (T. 609). The defendant fired two shots evidencing a clear intent to kill, not merely to wound. Lastly, the defendant killed a witness. This was not part of the armed robbery even if the robbery was what caused the defendant to believe he had to kill the witness.

The defendant argues that we don't know which shot killed the victim. He hypothesizes that the first shot did. He then claims that there is no evidence of what occurred prior to the first shot being fired because Stokes' head was turned away at that point. Without evidence of what occurred just prior to the first shot being fired, the defendant hypothesizes, there may have been cause for the defendant to shoot Nieves.

Initially, the defenant's argument is in opposition to the facts. The medical examiner testified that the evidence from the wounds was consistent with the second shot being the lethal shot, although he could not actually say with certainty which bullet was fired first. (T. 553-554). The defendant goes in opposition to the record when he hypothesizes that the fatal bullet was fired first and not second. The only certain fact is that the medical examiner could not tell whether the fatal bullet was fired first or second and neither can we. To base an argument upon an improperly drawn fact is to make what amounts to an improper argument.

Secondly, it is beyond common sense to say that of two shots fired in rapid succession, if the first shot is lethal then there is no premeditation but if the second shot is lethal there is premeditation. This type of argument takes

the applicable legal principles to unreasonable ends. The essence of premeditation is intent. The fact that the defendant fired two shots is itself an indication that the defendant intended to kill. An analysis of whether the fatal bullet was fired first or second is superfluous in light of the fact that the shots were fired in rapid succession.

Lastly, Johnny Stokes provided evidence of what occurred prior to the first shot. Stokes and the defendant were leaving the store after having completed the robbery. They were near the door when the defendant fired. (T. 635). The victim was behind the counter. (T. 635). The victim never struggled or threatened the defendant. The victim did not have a gun. He had cooperated all along. (T. 639). There was no evidence that the defendant panicked. The evidence was that he was not upset. Immediately after the shooting, while in the get-away car, the defendant said "I shot the cracker. The cracker is bleeding like a hog." The defendant did not appear at all upset when he made this statement. (T. 638-639). The record therefore refutes the defendant's argument that there may have been something which caused the defendant to shoot the clerk, other than the fact that he wanted to kill the witness. The truth is the defendant had no reason to kill the clerk. The testimony from Johnny Stokes demonstrates this as well as demonstrating what occurred immediately before the first shot was fired.

In summary, the evidence of premeditation was strong. The court was correct in convicting the defendant of first degree murder based upon premeditation. The court was also correct in convicting and sentencing the defendant for the armed robbery as that crime was not a basis for the murder conviction. Squires v. State, ___So.2d____ (9 FLW 98, Fla.S.Ct. Case No. 61,931, opinion filed March 15, 1984).

III

THE COURT PROPERLY ALLOWED THE JURY TO CONSIDER THE UNDERLYING FELONY AS AN AGGRAVATING CIRCUMSTANCE IN THIS CASE.

The defendant claims the court improperly allowed the jury to consider an underlying felony as an aggravating circumstance in a felony-murder case. Specifically, he claims the court improperly allowed the jury to consider the armed robbery as an aggravating circumstance where the murder conviction required the armed robbery as the underlying felony. Alternatively, he claims that if the felony does not merge into the felony-murder, then it was still improperly considered because the armed robbery conviction was rendered contemporaneously with the murder conviction. He states it cannot be a prior conviction.

The State's reply is that the murder conviction was based on premeditation, not felony-murder. Therefore, the armed robbery conviction did not merge into the felony-murder conviction. Even if the conviction was for felony-murder, this court has held that it is proper to consider the underlying felony as an aggravating circumstance. Lastly, this court has held that contemporaneous convictions can be used as aggravating circumstances so long as the convictions were entered prior to the sentencing phase in the death penalty case.

The State has argued that the defendant in this case was convicted and sentenced on the basis of premeditated murder. The evidence strongly supports the jury's finding of guilt on the basis of premeditation as well as felony-murder. A conviction based upon premeditation does not require an underlying felony. The defendant's argument that the underlying felony of armed robbery merged into the felony murder conviction fails because there was no felony-murder conviction at all. The conviction was based upon premeditated murder.

In Quince v. State, 414 So.2d 185 (Fla. 1982) the defendant pled guilty to felony-murder and burglary. A sexual battery charge was the underlying felony in the felony-murder conviction. The sentencing court used the sexual battery crime as an aggravating circumstance. The court stated:

> "He next asserts that the underlying felony of sexual battery may not be used in aggravation. Florida's death penalty statute clearly allows the use of the underlying felony in aggravation, and that statute is constitutional. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)."
>
> Quince v. State, Id. at 187-188.

Therefore, the felony of armed robbery was a proper aggravating circumstance because it did not merge into a felony-murder conviction; the conviction was based upon premeditated murder. Secondly, even if the conviction was based upon felony-murder, the law allows the use of the underlying felony as an aggravating circumstance.

The defendant claims that contemporaneous convictions cannot be used as aggravating factors. This Court stated in King v. State, 390 So.2d 315, 320 (Fla. 1980):

> "Appellant next contends that the trial court erred in designating the attempted murder of the prison counselor as an aggravating circumstance, asserting that the stabbing cannot be considered a previous conviction for a violent felony because that conviction was returned jointly with the instant first-degree murder conviction. We disagree. The conviction for the attempted murder was a fact at the time the jury considered its recommendation to the trial judge and at the time the trial judge imposed the death sentence. Although the facts are not identical, an analogous result was reached in Elledge v. State, 346 So.2d 998 (Fla. 1977), wherein the sentencing judge properly considered as an aggravating circumstance a murder committed later in time than the subject murder, but for which a conviction already had been obtained in a separate proceeding. The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance. Prior convictions in existence at the time of

> sentencing is a normal factor considered in all sentencing and is generally recognized as appropriate in sentencing guidelines."
>
> Also see Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982).

This Court stated in Lucas v. State, 376 So.2d 1149, 1152-1153 (Fla. 1979):

> "Prior to sentencing in this case, appellant was convicted of the attempted murder of Ricky Byrd and Terri Rice. It is true that the two felony convictions were entered contemporaneously with the conviction of murder in the first degree, but both were entered 'previous' to sentencing and were therefore appropriately considered by the trial judge as an aggravating circumstance."
>
> See Jones v. State, 411 So.2d 165 (Fla. 1982).

Even a crime committed shortly after the crime for which a death sentence is being considered can be an aggravating factor so long as the conviction was entered before the sentencing phase in the death penalty case. Daugherty v. State, 419 So.2d 1067 (Fla. 1982).

In this case, the defendant was adjudicated guilty of the armed robbery on September 10, 1982. (T. 644, 824). The penalty phase of the murder conviction did not begin until September 16, 1982. (T. 827). Therefore, the defendant was

in fact convicted of a violent felony, armed robbery, prior to sentencing. The State would add that the defendant's reliance upon Meeks v. State, 339 So.2d 186 (Fla. 1976) is misplaced in light of later cases decided by this Court, in particular King v. State, supra, wherein this Court receded on this point from Meeks v. State, supra.

IV

A) THE COURT PROPERLY EXCLUDED JURORS WHO STATED THAT THEY COULD NOT RECOMMEND THE DEATH PENALTY UNDER ANY CIRCUMSTANCES.

The defendant claims that prospective jurors were improperly excluded who were not clearly unable to recommend the death penalty. He specifically points to the voir dire testimony of Mr. Grier and Mr. Atkins. In his brief, the defendant states that Ms. Tsiomakidis was not improperly excused. The voir dire of Grier and Atkins is as follows:

> MS. TSIOMAKIDIS: Yes.
>
> THE COURT: Now, let's assume we are at the second phase of the trial and let's assume the defendant has been found guilty of first degree murder. Is your personal feeling opposed to capital punishment such that you would never under any circumstances be able to recommend the imposition of the death penalty or are there certain circumstances under which you would recommend?
>
> MS. TSIOMAKIDIS: I would not.
>
> THE COURT: You would not under any circumstances?
>
> MS. TSIOMAKIDIS: No.
>
> THE COURT: Now, in my questions that we have gone through, is there anyone in the first row who has anything further to say?
>
> Does this bring up any questions to any of you?

Anyone else in the second row that has any questions about those matters?

Yes, sir?

MR. GRIER: I'm just undecided. I just heard what you said to the young lady and I'm just undecided whether I would go for that second phase.

THE COURT: You understood all the questions that I asked?

MR. GRIER: Yes.

THE COURT: Do I understand, Mr. Grier, that you personally are opposed to the death penalty?

MR. GRIER: Yes.

THE COURT: And because of your own beliefs, you don't think that you could recommend the imposition of the death penalty?

MR. GRIER: No.

THE COURT: Under any circumstances?

MR. GRIER: No.

THE COURT: Is there anybody else on the panel who shares these views or have anything else to say about this subject?

Yes, sir?

MR. ATKINS: I feel like the gentleman.

THE COURT: Like Mr. Grier?

MR. ATKINS: Yes.

THE COURT: Would you state in your own words what your belief is? I

don't want to put words in your mouth.

MR. ATKINS: I don't think that I could vote for capital punishment or the death penalty.

THE COURT: You understand, Mr. Atkins, that the jury does not make the final decision as to what penalty should be imposed in the case, that it is up to the Judge to make that decision?

The jury does make a recommendation.

Are you saying that you would not be able to recommend the death penalty under any circumstances?

MR. ATKINS: No.

THE COURT: You cannot?

MR. ATKINS: No.

MR. KAHN: We can't hear.

THE COURT: He indicated that he cannot."

(T. 239-241).

The law is clear that it is proper to exclude prospective jurors who state that they could never vote to impose the death penalty. The Court stated in Downs v. State, 386 So.2d 788, 791 (Fla. 1980):

"The jurors in the present case who were excluded stated that they could not, under any circumstances, vote to impose the death penalty after a verdict of guilty was returned. By stating that they were unwilling to consider all the penalties provided by law, they

> evidenced their inability to follow the law and were properly excluded by the trial court."

Also see Johnson v. State, 438 So.2d 774 (Fla. 1983); Scott v. State, 411 So.2d 866 (Fla. 1982); Witt v. State, 342 So.2d 497 (Fla. 1977). In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (Fla. 1968); Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578 (1970), and Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138 (1969) prospective jurors were excluded who only voiced general objections to the death penalty. These veniremen did not state they would automatically vote against a recommendation of the death penalty, which is a proper basis for exclusion. It is significant to note that the competency of a challenged juror is a mixed question of law and fact to be determined by the trial judge in his discretion. Manifest error must be demonstrated before the judge's decision will be disturbed. Christopher v. State, 407 So.2d 198 (Fla. 1981).

It is clear that both Grier and Atkins could not under any circumstances recommend the imposition of the death penalty. The defendant's claim that the court "led" Grier to this position is without foundation. The court asked the questions and Mr. Grier answered clearly. He could not under any circumstances recommend death. The court did not pressure, force or lead Mr. Grier at all. To the contrary,

the court acted properly in clarifying a prospective jurors view. If Grier initially had some doubts about his position, upon being questioned further, those doubts in his own mind were quickly dispelled. Grier was unquestionably not going to be able to recommend imposition of the death penalty under any circumstances. Grier and Atkins were properly excluded from the jury.

B) IT WAS NOT ERROR FOR THE COURT TO INSTRUCT THE JURY ON ONLY THOSE AGGRAVATING AND MITIGATING FACTORS SUPPORTED BY THE EVIDENCE.

The purpose of the sentencing statute is to guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976). The sentencing authorities discretion must be guided and channelled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976).

In this case, the court allowed the defendant to present any and all evidence of mitigating factors. The court allowed evidence and an instruction on a non-statutory mitigating factor: the sentences of the co-defendants. By instructing the jury on only those aggravating and mitigating factors supported by any evidence, the court focused the jury's attention on those factors actually at issue. Not only did this procedure act as a positive feature by focusing the jury's attention on the issues, it avoided negative features as well.

In this case, none of the statutory mitigating factors were supported by the evidence. By asking the jury to consider them, the court would only have been highlighting the lack of these statutory mitigating factors. A lack of these mitigating factors would then have improperly become a consideration in the minds of the jurors. Instead, the jury was properly instructed that any aspect of the defendant's character or record and any other circumstance of the case which mitigated against the death penalty was to be considered. (T. 924). Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978). This instruction focused the jurors attention on any mitigating factors presented while avoiding the negative aspect of the jury's having to find that the other mitigating factors were absent.

It is significant to note that the defendant was allowed to present all the mitigating evidence he wanted. He is not claiming that the court failed to give a mitigating factor to the jury for which there was evidence presented. His claim is that failure to read all the statutory mitigating factors to the jury is reversible error per se. The State's position based on the foregoing argument is that the court acted properly. But see Cooper v. State, 336 So.2d 1133 (Fla. 1976).

The procedure used by the court also comports with due process. See Jurek v. Texas, supra. 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.

Lastly, the Standard Florida Jury Instruction 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 edition), pages 78-80. The record shows the trial judge expressly complied with the clear directive of the Standard Jury Instruction.

In summary, the defendant received no harm by the court's procedure. If anything, the defendant received the benefit of the jury's not having to find an absence of

mitigating factors. The trial court acted properly in focusing the jury's attention on the evidence, not the lack of it, and on the issues upon which it had to make its recommendations. The State would also add that the trial judge is the sentencing authority. There has been no claim that she failed to consider a mitigating factor for which evidence was presented. Therefore, again, the defendant did not suffer injury on this basis. See Riley v. State, 413 So.2d 1173 (Fla. 1982).

C) THE STATE ATTORNEY DID NOT MAKE ANY COMMENT WHICH WOULD WARRANT A NEW TRIAL.

The State commented that the jury should show the same sympathy for the defendant which he, the defendant, showed to the victim. The defendant's objection was sustained. (T. 904). The defendant moved for a mistrial on the basis of an inflammatory comment, which was denied. The defendant never moved for a curative instruction. (T. 905).

The law is that:

> Wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert.denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert.denied, 372 U.S. 904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969) modified, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). A new trial should be grantaed when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." (cites omitted). Each case must be considered on its own merits, however and within the

> circumstances surrounding the complained of remarks. (Cites omitted)
>
> Breedlove v. State, supra at p. 8.

This Court also has stated:

> "A mistrial is a device used to halt the proceedings when the error is so prejudicial and fundamental that the expenditure of further time and expense would be wasteful, if not futile. Johnsen v. State, 332 So.2d 69 (Fla. 1976). Even if the comment is objectionable on some obvious ground, the proper procedure is to request an instruction from the court that the jury disregard the remarks. A motion for mistrial is addressed to the sound discretion of the trial judg and the power to declare a mistrial and discharge the jury should be exercised with great care and should be done only in cases of absolute necessity.(Cites omitted)"
>
> Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982).

In this case, the court acted correctly in denying the motion for mistrial. The defendant failed to request a curative instruction, which he should have done if he felt the comment to be highly prejudicial, as he claims now. In light of the comment and the defendant's failure to request a curative instruction, the court did not abuse its discretion in denying the motion for mistrial.

There is also a strong basis for stating that the comment was proper. The evience was that the victim presented no threat to the defendant. After the robbery was concluded, while the defendant was by the door of the store, he shot the victim twice. Shortly thereafter he stated: "I shot the cracker. The cracker is bleeding like a hog." (T. 638). Therefore, the evidence was that the defendant had no sympathy whatsoever for the victim. In a penalty phase, unlike the guilt or innocence phase, this lack of sympathy becomes an issue. A jury will naturally look with some degree of sympathy upon a convicted man. The fact that the defendant without cause or sympathy shot the defendant was a fair subject for comment at that point in the trial. It was not a request that the defendant be found guilty because someone was killed. The defendant's guilt was already determined. It was a request that the jury be no more sympathetic in determining the penalty than the defendant was himself. Because the evidence was that the defendant was not sympathethic, it was a proper comment supported by the evidence.

Additionally, the State Attorney knew that the defendant would appeal to the sympathy of the jury. In fact the defendant did. The defendant ended his argument by asking the jurors to look to their consciences, souls and hearts. (T. 921). In anticipation of this appeal, the

prosecutor made his comments. Comments made by prosecutors to refute arguments made by defense counsel are proper as fair reply. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Lynn v. State, 395 So.2d 621 (Fla. 1st DCA 1981). Although the prosecutor's comment came before the defendant's closing argument, it was the prosecutor's only opportunity to address an issue the defendant was obviously going to raise, sympathy for the defendant. Knowing this, the state attorney's comment, based on the evidence, was fair reply.

Breniser v. State, 267 So.2d 23 (Fla. 4th DCA 1972), relied upon by the defendant, is not applicable. In Breniser v. State, Id, the prosecutor begged for a verdict of guilt on the basis that the victim's family no longer had a father to be with them at Christmas. The comment had no basis in the record and had nothing to do with any issue at trial. Additionally, it was a request for a determination of guilt, not penalty, based upon nothing but sympathy, not evidence. In this case, there was no appeal to the victims family. The comments went to an issue before the jury, their own sympathies for the defendant. The comment was based on the evidence and the comment was a fair reply to the defendant's appeal to the jury's sympathies. Lastly, the comment was not a request for a finding of guilt based on something other than the facts. Guilt had already been determined. The comment was made during the penalty phase.

As stated, in that phase, sympathy for the defendant obviously was an issue, as well as the defendant's lack of remorse for what he had done. Unlike Breniser v. State, supra, the prosecutor's comments were proper on that basis.

D) THE COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCES.

The defendant initially complains that the court improperly held that it was an aggravating circumstance that the crime was committed for the purpose of avoiding or preventing arrest. The court stated:

> "3) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. The evidence leads one to conclude that the Defendant murdered the victim, not because he resisted the robbery, but because the victim was an eyewitness, the only eyewitness to the robbery, other than the accomplice, Johnny Stokes. Raul Nieves was murdered so that Frank Griffin would not be apprehended and brought to justice for the armed robbery."
>
> (T. 950-951).

The law is that:

> "The language of the applicable provision encompasses the murder of a witness to a crime as well as law enforcement personnel. . .We caution, however, that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.
>
> Riley v. State, 366 So.2d 19, 22 (Fla. 1978).

In Menendez v. State, 368 So.2d 1278 (Fla. 1979) the Court cited to the Riley v. State, supra, and stated:

> "In Riley v. State, 366 So.2d 19 (Fla. 1978), we held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses."
>
> Menendez v. State, Id, at 1282.

The State carried this burden by proving that the only purpose for killing Nieves was the elimination of a witnes. It is clear from the testimony that the defendant was attempting to avoid detection. The getaway car was parked to the side of the store where it was not visible from the store. (T. 514, 625-626). The car was parked in an area where it was made to appear that it was not in the store's parking lot. (T. 484-485). The defendants then waited for a delivery man to leave before robbing the store. (T. 628). During the robbery, the victim cooperated. He never threatened the defendant. (T. 639). After completing the robbery and as he was leaving, the defendant shot the only witness twice. (T. 632-633, 635). They then ran out of the store to the waiting getaway car. (T. 637). The only motive for killing the sole eyewitness was to eliminate him from identifying the robbers. Contrary to the defendant's assertions, the record reveals that nothing unusual occurred before the first shot. The victim was behind the store

counter (T. 635), did not have a gun, did not threaten the defendants, and in fact cooperated with them. (T. 639). The defendant was not in danger from the clerk. The defendant was by the door about to leave. (T. 635). The evidence clearly shows that the only motive for killing Nieves was to eliminate a witness. The court properly held this to be an aggravating circumstance.

The defendant next argues that the crime was not cold, calculated and premeditated. The court stated:

> "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. Killing a witness and killing for money may always apply a degree of cold, calculated and premeditated behavior. And to that degree, this aggravating circumstance may overlap with the others mentioned. However, I believe this aggravating circumstance inclu des further requirement in order to be applicable; and that is, that the killer act without any pretense of moral or legal justification. Not only must the killing be calculated, the killer must act without a sense of conscience or without some arguable excuse for his act. After hearing all the evidence, in this case, I am left with a profound sense that Frank Griffin killed Raul Nieves in a random, offhand and senseless manner, and without a thought that Raul Nieves was a human being like you are, Mr. Griffin, thinking of him only as a cracker bleeding like a hog, as was recounted by Johnny Stokes.
>
> (T. 951-952).

The law as stated in Cannady v. State, 427 So.2d 723, 730 (Fla. 1983) is:

> "As we stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den. 416 U.S. 943 (94 S.Ct. 1951, 40 L.Ed.2d 295). . .(1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the penalty phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor--"cold, calculated. . .and without any pretense of moral legal justification." Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), cert. den. ___U.S. ___, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982)."

The evidence shows the defendant fired two shots into the victim. A factor to be considered. Magill v. State, 386 So.2d 1188 (Fla. 1980). The defendant had no reason to kill the victim who cooperated and never threatened the defendant. The defendant showed a total lack of remorse lending greater weight to the fact that the defendant killed with a total lack of moral or legal justification.

Even assuming the defendant is correct in his points raised herein, the State still has two aggravating circumstances. As stated previously, the defendant was properly

convicted of two prior violent felonies. This was an aggravating circumstance as was the fact that the murder was committed in the course of a robbery. The court found there were no mitigating circusmtances. The record and law support this finding. Bassett v. State, __So.2d___,(9 FLW 90, Fla. S.Ct. Case No. 58,803, opinion filed March 8, 1984). The sentence is therefore still valid notwithstandting the defendant's argument. Francois v. State, 407 so.2d 885 (Fla. 1981); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Shriner v. State, 386 So.2d 525 (Fla. 1980). Lastly, the death sentence has been upheld in similar cases. Jones v. State, 411 So.2d 165 (Fla. 1982); Shriner v. State, supra; Meeks v. State, 339 So.2d 186 (Fla. 1976)(the Court receded from the law concerning contemporaneous convictions, King v. State, supra, but did not recede from the result reached).

E) THE DEFENDANT CLAIMS THAT HE WAS PUNISHED FOR GOING TO TRIAL BECAUSE HE REFUSED THE COURT'S PLEA OFFER OF LIFE IMPRISONMENT. HE RELIES UPON FRALEY V. STATE, 426 SO.2D (FLA. 3D DCA 1983).

Fraley v. State, id, is presently set for rehearing en banc by the Third District Court of Appeal. Additionally, this same issue was presented in Hitchcock v. State, 413 So.2d 741 (Fla. 1982) and decided adversely to the defendant.

V

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR DISCHARGE.

The defendant alleges that the speedy trial time ought to be calibrated from May 19, 1981, the date two detectives initially questioned the defendant about this robbery-murder. The police first contacted the defendant in reference to this crime on May 19, 1981. On that date, Detectives Wasserman and Ilhardt went to the Dade County Jail to see the defendant. (T. 75, 77, 137, 168). The defendant was in jail on an unrelated offense. (T. 137). At that point, the only evidence against the defendant was an unsubstantiated statement by the "wheelman" in the robbery-murder, Gerald Nichols, implicating the defendant. (T. 168-169, 171-172), and the defendant's fingerprint found at the store. (T. 90, 172). The police did not yet know Nichols himself was involved in the robbery-murder. (T. 172).

The defendant was brought down to Wasserman and Ilhardt. Initially, the defendant made it clear he did not want to go with the detectives. When the defendant was told they were going to question him about another crime, not the crime for which he was in jail, the defendant quieted and agreed to go with them. (T. 98, 170). The defendant was handcuffed to avoid escape (T. 109, 171), signed out of the

jail (T. 169) and walked to the detectives car, 10 feet from the jail. (T. 172). The defendant was not forcibly removed from the jail and placed in the car. (T. 100). The defendant agreed to go and was cooperative. (T. 81, 170).

In the car, the defendant was read his rights. (T. 78, 173). The defendant verbally waived his rights. (T. 79, 175). The detectives told the defendant that Gerald Nichols told them the defendant and Johnny Stokes were involved in two U-Totem robberies. (T. 175). Detective Ilhardt gave the defendant the store addresses. The defendant said he'd never been at either store. (T. 176).

They subsequently went to the police station. The handcuffs were removed from the defendant. (T. 178-179). He was again Mirandized. (T. 178-179). The defendant refused to sign a written waiver of rights form but verbally agreed to speak to the detectives. (T. 84-85, 179). After questioning, the defendant continued to deny his involvement. (T. 180). The defendant eventually indicated he no longer wanted to speak and that he wanted an attorney. He was returned to the Dade County jail. (T. 108). The defendant was not arrest nor was he ever told that he was under arrest. (T. 181). Neither detective had the intent to arrest the defendant at that point. (T. 181). The intent of the detectives was to verify the as yet unsubstantiated statement by Gerald Nichols. (T. 181).

On February 14, 1982, Ilhardt took a statement from the co-defendant Johnny Stokes. (T. 199-200).[1] After being shown the statement by Gerald Nichols, Stokes agreed to cooperate. (T. 645, 646). He made a statement implicating the defendant. (T. 670). The only part of Nichols statement that Stokes denied was the part stating Stokes had a gun. (T. 676).

Based on these facts, the court granted a Motion to Suppress on the basis that the defendant did not freely and voluntarily waive his Miranda rights. (T. 216). The court also held that the defendant was not threatened or coerced. (T. 217-218). The defendant had raised the issue of his being arrested on May 19, 1981. (T. 164-165). The court denied the Motion for Discharge, therefore implicitly holding that the defendant was not arrested on May 19, 1981. (T. 165).

The law is clear that there are four elements necessary for an arrest:

> 1) The purpose or intention to effect an arrest under real or pretended authority;
>
> 2) An actual or constructive seizure or detention of the person to be arrested;

[1]Apparently, the date of the statement may have been February 4, 1982. The original arraignment was on February 19, 1982. At that time, the representation was that the defendant was arrested on February 4, 1982. (T. 4).

> 3) Communication by the arresting officer to the person whose arrest is sought of an intention or purpose then and there to effect an arrest; and
>
> 4) An understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest him. Melton v. State, 75 So.2d 291 (Fla. 1954); State v. Naughton, 395 So.2d 581 (Fla. 5th DCA 1981).

In this case, the police never intended to arrest the defendant. They were investigating Nichols' statement which made the defendant a suspect. At that point, Nichols had not placed himself at the scene. Substantiation of Nichols' statement was therefore required. Secondly, there was never a communication by the detectives to the defendant of an intent to then and there effect the defendant's arrest. Thirdly, the facts do not support a reasonable understanding on the part of the defendant that the detectives were presently effecting his arrest. This is particularly supported by the fact that the defendant was not fingerprinted, photographed or placed in any type of identification line-up for a possible identification by the delivery man who had been in the store. The defendant's handcuffs were removed in the station house. When the defendant indicated he no longer wanted to speak to the detectives, he was returned to the Dade County jail. The defendant was never, in fact, arrested for the charge on May 19, 1981 and was not in custody for purposes of Rule 3.191, Fla.R.Crim.P.

The defendant is relying upon the actions of the two detectives to infer an arrest. The case law refutes that the police actions were an arrest of the defendant. The arrest for a prior unrelated charge did not activate the speedy trial rule for this murder and armed robbery charge. Thomas v. State, 374 So.2d 508 (Fla. 1979); State v. Breedlove, 400 So.2d 468 (Fla. 4th DCA 1981); State v. Stanley, 399 So.2d 371 (Fla. 3d DCA 1981); Giglio v. Kaplan, 392 So.2d 1004 (Fla. 4th DCA 1981); State v. Beasley, 392 So.2d 980 (Fla. 4th DCA 1981). The detectives' questioning the defendant, even if he was under arrest on an unrelated charge, did not activate the speedy trial rule. Thomas v. State, 405 So.2d 1015 (Fla. 1st DCA 1981); State v. Breedlove, supra; Snow v. State, 399 So.2d 466 (Fla. 2d DCA 1981); Giglio v. Kaplan, supra; Dean v. Booth, 349 So.2d 806 (Fla. 2d DCA 1977); Snead v. State, 346 So.2d 546 (Fla. 1st DCA 1976). The defendant's reliance on custody for Miranda purposes is misplaced. The law is clear that custody in the Miranda context is not the same as custody in the speedy trial context. Snow v. State, supra; Dean v. Booth, supra; State v. Robbins, 359 So.2d 39 (Fla. 2d DCA 1978). Additionally, whether the police did or did not have probable cause to arrest the defendant is not relevant as probable cause for arrest does not commence the speedy trial rule. State v. Robbins, supra; State v. Beasley, supra. Lastly, the fact that the defendant was handcuffed is of no evidentiary value. The defendant was a prisoner in the Dade

County Jail. Any removal of a prisoner would necessitate his being handicuffed. It is significant that once at the police station, the defendant's handcuffs were removed. In summary, the record and case law both demonstrate that the defendant was not arrested or placed in custody for purposes of Rule 3.191, Fla.R.Crim.P., on May 19, 1981.

The fact of other cases are similar and support this statement. In State v. Miller, 437 So.2d 734 (Fla. 1st DCA 1983), the defendant was in jail on an unrelated charges when a police investigator removed him to an interrogation facility. The defendant was Mirandized and signed a written waiver form. He was then questioned about the crime for which he claimed a speedy trial violation. The court held therein that the mere giving of Miranda warnings and being interrrogated were not sufficient to commence the speedy trial time period. The defendant attempts to distinguish this case by claiming the defendant was taken from the jail and refused to sign a written waiver. The State would point out that the defendant willingly left the jail and verbally waived his rights, assuming these factors are even significant.

In Snow v. State, supra, the defendant was an inmate in jail when accused of sexual assault. The defendant was placed in another cell. It was held that moving the defendant did not constitute an arrest. The defendant was

later Mirandized and questioned. Significantly, the defendant was not told whether charges would be filed against him. The court held he was not in custody for purposes of the speedy trial rule. Also see Thomas v. State, 405 So.2d 1015 (Fla. 1st DCA 1981); State v. Breedlove, supra.

In summary, the significant point is that the detectives had no intent to arrest the defendant. They did not convey an intent to presently arrest the defendant and the defendant could not reasonably draw such an inference. The defendant's attempt after the fact to infer an arrest from the police investigation is not supported by the record or by the law. Essentially all the police did was to willingly take the defendant from the jail, where he was properly incarcerated, to the police station. The defendant was Mirandized and quetioned. When he indicated he no longer wanted to be questioned, the detectives returned him to the jail. The case law clearly holds these actions do not amount to an arrest or custody for purposes of the speedy trial rule.

In the second part of his argument, the defendant claims that even if the proper arrest date was February 4, 1982, then the defendant was still not tried within the speedy trial rule requirement, which would have been August 2, 1982. The trial occurred on September 9, 1982. The

defendant claims there was no stipulation or order entered extending the speedy trial rule.

The State's response is that the defendant never filed a Motion for Discharge on this basis. He therefore failed to preserve this point for appellate review. Secondly, the defendant's counsel requested continuances on two occasions. On February 25, 1982 the defendant requested a postponement of his arraignment and on March 5, 1982, the defendant requested an extension of the April 19, 1982 trial date. Thirdly, the defendant was not ready for trial on August 2, 1982. He was still conducting discovery. He had not yet deposed the State's key witness, Johnny Stokes, and still had a Motion to Suppress outstanding. Lastly, on July 20, 1982 the defendant stipulated and announced to the court a sixty day speedy trial extension, until October 1, 1982. Trial was completed before that date.

In terms of this issue, the relevant facts are as follows:

February 19, 1982 - The defendant was set for arraignment. The defendant was not available. According to his counsel he was quarantined. (T. 4).

February 25, 1982: The defendant again was set for arraignment. His attorney stated he was not well and requested a postponement of the arraignment until March 4, 1982.

March 5, 1982: The defendant stood mute. The court entered a not guilty plea. The court told the defendant that trial was being set for April 19, 1982. The defendant's attorney stated that this date was completely inappropriate. The defendant's attorney stated any date after that would be acceptable. The court set a trial date of May 17, 1982. (T. 22-23).

May 17, 1982: The court continued the case on its own motion until June 21, 1982. (T. 34).

June 13, 1982: The court set the defendant's case for trial for June 21, 1982. (T. 38).

June 29, 1982: The defendant filed his Motion to Suppress. (R. 56).

June 30, 1982: The State filed an additional witness, Johnny Stokes. (R. 57). The defendant also set the first depositions, that of Detective Wasserman being for July 6, 1982. (R. 58).

July 6, 1982: The defendant set three depositions to occur on July 12, 1982. (R. 59).

July 8, 1982: The defendant set 11 depositions to be taken on July 14 and July 15, 1982. (R. 60-61).

July 9, 1982: The defendant set one deposition for July 15, 1982. (R. 62).

July 20, 1982: With defense counsel, Charles Mays, present, the court reset the murder case to before the speedy trial rule date of August 2, 1982. No exact date was mentioned. (T. 64). The jacket to the court file indicates that on this date defense counsel stipulated to a sixty day extension of the speedy trial rule. The expiration date of the speedy trial rule now to be October 1, 1982. (R. 3).

July 21, 1982: The defendant filed another Motion to Suppress. (R. 70).

August 17, 1982: The defendant filed a Notice of Hearing of his Motion to Suppress to be heard on August 25, 1982. (R. 63).

September 7, 1982: The defendant stated he was ready on the Motion to Suppress but not for trial. He had recently

taken the deposition of Johnny Stokes and spoken to his client. He determined that he needed more time to investigate. The Motion for Continuance was denied. (T. 68). The State Attorney stated at that time that they had a speedy trial problem but were on an extension. The defendant did not deny this statement. (T. 68). At this time, the defendant made a Motion for Discharge on the basis that he was actually arrest on May 19, 1981, not February 4, 1982. (T. 164). The court stated that it was its understanding all along that the speedy trial time was extended. The court denied the motion based upon all the discussions it had in regard to the speedy trial rule. The court stated that even if the defendant was correct about the May 19, 1981 arrest, his subsequent agreement to extend the speedy trial time to the specific date of October 1, 1982 waived any objection. (T. 165). The defendant stated after the speedy trial time had run, he could not extend it even by stipulation. (T. 165).

September 8, 1982: The defendant filed his Motion for Discharge on the basis that he was actually arrested on May 19, 1981 not February 4, 1982. (R. 68).

The defendant failed to preserve this point for appellate review. On September 7, 1982, at the time of the Motion to Suppress, the defendant raised his Motion for Discharge. (T.164). The sole basis for the motion was that the defendant was arrested on May 19, 1981, not February 4, 1982. He never raised a claim that assuming the February 4, 1982 arrest date was correct, that the speedy trial rule had still run. To the contrary, he argued that because the proper arrest date was May 19, 1981, his stipulation was invalid as the speedy trial rule had run out when he stipulated. (T.165). On September 8, 1982, the defendant filed his written Motion for Discharge. Again, the only basis raised was that the proper arrest date was May 19, 1981, not February 4, 1982. The defendant therefore failed to raise the present issue before the trial court. The omission is significant. The record is sparse on this point because the defendant never addressed the court and allowed the State or the court to create a record. The defendant now looks to this appellate court and complains because the record is too sparse to indicate an extension of the speedy trial rule. The defendant cannot complain for the first time at the appellate level. Rollins v. State, 369 So.2d 950 (Fla. 3d DCA 1978); Montalvo v. State, 323 So.2d 674 (Fla. 3d DCA 1975). Even constitutional issues may be waived by a defendant's failure to timely assert them. Davis v. United States, 409 U.S. 841, 93 S.Ct. 1577 (1973);

Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158 (1955); See also Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708 (1976); Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 169 (1976); Clark v. State, 363 So.2d 331 (Fla. 1978); Castor v. State, 365 So.2d 701 (Fla. 1978); State v. Barber, 301 So.2d 7 (Fla. 1974); State v. Jones, 204 So.2d 515 (Fla. 1967).

The defendant requested continuances on two occasions. On February 25, 1982, defendant's attorney requested a postponement of his arraignment, allegedly because the defendant was not well. The defendant has not personally alleged, indicated or proven in any way that this was correct. The record only contains defense counsel's proffer as to why the defendant was not present. Presuming that the denial of the Motion for Discharge is correct, this proffer must be held inadequate to excuse the defendant's absence. The postponement was therefore a continuance attributable to the defendant. Montalvo v. State, supra.

On March 5, 1982, the court announced a trial date of April 19, 1982. The defendant's attorney stated that this date was completely inappropriate. (T.22). He stated that any date after April 19, 1982 would be appropriate. (T.22). This also was a continuance attributable to the defendant.

The law is clear that if a continuance is attributable

to the defendant and is not excused, a motion for discharge is properly denied. The defendant's continuance does not cause him to relinquish all rights to a speedy trial but only to waive the 180 day provision of the speedy trial rule. The defendant's constitutional guarantee to a speedy trial still exists and the defendant can affirmatively demand speedy trial. Butterworth v. Fluellen, 389 So.2d 968 (Fla. 1980); State v. Daniels, 413 So.2d 1256 (Fla. 5th DCA 1982); State v. Register, 380 So.2d 543 (5th DCA 1980).

The defendant in this cause was still conducting discovery at the time he alleges the speedy trial rule was at an end. Where a defendant is still involved in discovery, he is not considered continously available for trial. Rubiera v. Dade County, 305 So.2d 161 (Fla. 1974); Christopher v. State, 369 So.2d 97 (Fla. 2d DCA 1979). In Burns v. State, 433 So.2d 997 (Fla. 2d DCA 1983), the defendant was still taking defense discovery depositions shortly before trial and defense stated his intention to file a motion to suppress prior to trial. The Second District Court of Appeal held this was sufficient to support the trial court's order granting an extension of the speedy trial time.

In this cause, the defendant was told of the state's key witness, Johnny Stokes, on June 30, 1982. As of August 2, 1982, he had not been deposed. He was deposed by the

defendant sometime in September of 1982. The defendant set fifteen discovery depositions for the dates of July 12, 1982 through July 15, 1982. On July 21, 1982, the defendant filed another Motion to Suppress. That motion was still outstanding as of August 2, 1982. The motion was noticed for hearing on August 17, 1982. It is clear therefore that as of August 2, 1982, the defendant was not ready for trial. His Motion to Suppress was still outstanding and he had not even deposed the state's key witness. He had just recently deposed his witnesses for discovery. This evidence makes clear the defendant's unavailability for trial.

Lastly, on July 20, 1982, the defendant presented himself for trial at which time the trial date was reset. The file jacket indicates that on that date, defendant stipulated to a 60 day extension until October 1, 1982. At no time has the defendant denied he entered into this stipulation. Even his argument on appeal actually attacks the stipulation on the basis that it was not recorded in the file, not on the basis that the stipulation was never entered into. On the record, the prosecutor stated that there was an extension. The defendant raised no objection to that statement. (T.68). Later in the same hearing, the court stated that it was its understanding that the speedy trial time had been extended. The defendant argued that the proper arrest date was May 19, 1981. The court

replied that even assuming that was correct, defendant's subsequent agreement to extend the speedy trial rule waived any objection. Significantly, the defendant did not reply that he never entered into a stipulation. The defendant replied that his stipulation was invalid as it was entered into after the speedy trial time had run, assuming that period began on May 19, 1981. It is therefore clear that the defendant entered into a stipulation on July 20, 1982 to extend the speedy trial time and that the court knew about this stipulation. Rule 3.191(d)(2), Florida Rules of Criminal Procedure, makes it clear that a stipulation need not be in writing. It need only be announced to the court. The committee notes following the rule also state that except for stipulations, all extensions require an order of the court. This rule change is in direct opposition to the prior rule, which required a writing. Whitehead v. State, 309 So.2d 584 (Fla. 2d DCA 1975). The rule in effect at the time of the offense and the trial, did not and does not require a writing. An announcement to the court is sufficient. In this case, the court stated that discussions had occurred all along on the speedy trial issue and that it knew of an agreed extension. The presumption of regularity must therefore be that the stipulation was in fact announced to the court.

In summary, the correct arrest date was February 4, 1982, not May 19, 1981. That being true, the defendant

failed to preserve for review his argument that there was no proper extension in the record. Assuming arguendo, he did preserve this issue, the defendant twice requested continuances, thereby waiving his right to a speedy trial within 180 days. Additionally, the defendant was not ready for trial on August 4, 1982 and therefore not available for trial within the purview of the speedy trial rule. Lastly, he stipulated to an extension until October 1, 1982 and announced this stipulation to the court. The trial occurred within this period of extension. The court was therefore correct in denying the defendant's motion for discharge.

VI

THE PROSECUTOR DID NOT MAKE COMMENTS WHICH REQUIRE REVERSAL OF THIS CASE.

The defendant claims that the prosecutor in his closing argument made a comment upon the defendant's right to silence. The comment is as follows:

> Now, by law I don't have an opportunity to address you again. The defense attorney comes up and can rebut anything I brought out in my closing argument.
>
> I will ask you to listen to his arguments closely and objectively as you have been throughout the trial. Weigh his testimony and the evidence and see if it makes sense.

The defendant did not raise an objection.

The State's reply is that the defendant's failure to object, move for a mistrial or even to request a curative instruction waived this point for appellate review. On the merits, the jury could not reasonably infer that the prosecutor was referring to anyone but defense counsel when the comment is placed in context.

The law is clear that where a comment on silence is made by the prosecution, the defense must object and move

for a mistrial. Failure to do so waives the error for appellate review. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Grant v. State, 390 So.2d 341 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978); Kindell v. State, 413 So.2d 1283 (Fla. 3d DCA 1982); Mancebo v. State, 350 So.2d 1099 (Fla. 3d DCA 1977); Johnson v. State, 348 So.2d 646 (Fla. 3d DCA 1977). The defendant failed to preserve this point for appellate review. He cannot raise it for the first time in this Court.

Going to the merits, the defendant is correct in stating that any comment which is fairly susceptible of being interpreted by a jury as referring to the defendant's failure to testify constitutes reversible error. David v. State, 369 So.2d 943 (Fla. 1979). But, whether the comment is susceptible to that interpretation depends upon the entire context in which the comment was made. Bassett v. State, supra; Gosney v. State, 382 So.2d 838 (Fla. 5th DCA 1980). Where the alleged error in commenting on the defendant's silence can only be reached by straining the construction of the prosecutor's argument, there is no error. Clark v. State, 378 So.2d 1315 (Fla. 3d DCA 1980). Reading the prosecutor's comment in context, it is clear he was referring to the defense counsel's closing argument and evidence. Taken in context, it is straining the comment's construction to say that the jury was fairly susceptible to

taking this as a comment on the defendant's silence. See Delgado v. State, 361 So.2d 726 (Fla. 4th DCA 1978).

In summary, the defendant failed to preserve this point for appellate review. Even if he had, the comment was not improper. By only the most strained construction could the comment be taken to be a reference to the defendant's silence at trial.

In the second part on this point on appeal the defendant asserts that the prosecutor improperly argued that the defendant deserved the death penalty whereas the co-defendant, Johnny Stokes, did not because Stokes testified to the truth at trial. The prosecutor stated:

> I believe her Honor will tell you that in your deliberation you may properly consider as a mitigating circumstances; the sentences of Mr. Griffin's co-Defendant, his accomplice, that being Johnny stokes. You may feel that it is unfair for you to recommend the death penalty for the man who pulled the trigger and for the man who killed in cold blood because his lessor accomplice got 25 years in jail. You may feel that way and you may feel that because of their actions they should deserve equal punishment.
>
> But keep in mind that when you consider that as a possible mitigating factor that Johnny Stokes came here and testified to the truth, obviously the truth, because you believed him. You determined him to be telling the truth based

> upon his testimony and all the other evidence in the case.
>
> But he came in here on his own and per an agreement to do 25 years in jail; if you think about, that is not the short of a time -- but he agreed to do 25 years and come in here and tell the truth. That is the first step in any rehabilitation, to admit your own wrongdoing and to come in here and tell the truth.
>
> (T.900-901).

The defendant had previously requested that the sentence of Johnny Stokes be submitted to the jury as a mitigating factor. (T.853). The court agreed. (T.856). In his closing argument in the sentencing phase, the defendant argued Stoke's sentence as a mitigating factor as well as the sentence of Gerald Nichols. (910-914). The court subsequently instructed the jury on the sentences of the co-defendants as a mitigating factor. (T.924).

It is clear that the prosecutor's argument was a proper reply to the defendant's specially requested mitigating factor, the sentence of the co-defendant, Stokes. By requesting this special instruction, the defendant opened the door to any reasonable argument as to why Stokes' sentence should be less severe than the defendants. The prosecutor's reply was totally proper in light of the specially requested mitigating factor and the defendant's closing argument.

Denny v. State, 404 So.2d 824 (Fla. 1st DCA 1981); Alvarez v. State, 401 So.2d 881 (Fla. 3d DCA 1981); Lynn v. State, 395 So.2d 621 (Fla. 1st DCA 1981); Jones v. State, 355 So.2d 198 (Fla. 3d DCA 1978).

The case closest on point is Bassett v. State, supra. In Bassett, during the sentencing phase the defense called the prosecutor as a witness to establish the co-defendant's plea bargain for a life sentence. In a type of self cross-examination, the prosecutor then explained to the jury why the defendant should receive the death penalty even though the co-defendant received only a life sentence. The prosecutor testified:

> I felt--early in the prosecution I felt that it was a death penalty case, but I was going to give them the benefit of the doubt at that point if they wanted to admit their guilt, plead guilty--plead guilty--it would be some type of indication of a rehabilitation on their part.
>
> Bassett v. State, ___So.2d___ (9 FLW at 92).

In its majority opinion, this Court held the comments to be proper. The same is true of the case sub judice. The comments were proper reply to an issue raised and argued by the defense.

Lastly, on this point, the defendant claimed the court

erred in the penalty phase by allowing into the evidence defendant's fingerprint with the word "refused" written on the signature line.

During the guilty/innocence of the trial, it became apparent that the State had misfiled the defendant's standard fingerprint card. This card was needed to compare to the latent fingerprint lifted at the U-Totem Store. (T.685-686). The court allowed the defendant's standard fingerprint to be taken again. (T.686). The police identification technician, Ivan Almeida, then testified that the latent fingerprint lifted at the crime scene was made by the same person he'd taken the standard fingerprint of, the defendant. (T.698-699). In the process, the State admitted into evidence the standard fingerprint card it had just taken. (T.695-697). The defendant objected but never stated any reason for the objection, as was noted by the court. (T.696). In chambers, prior to its being admitted, the defendant had objected to the defendant's being fingerprinted, but then as at trial, absolutely no basis was given for the objection. (T.686). Certainly, there was never any mention by counsel of the word "refused" written on the card when it was admitted into evidence.

During the penalty phase, the jury sent a note to the court requesting the prosecutions evidence, particularly the

fingerprint sheet, as well as any other evidence they could see. (T. 928). The defendant then objected to the standard fingerprint card going to the jury because the word "refused" was written in the signature block for the person to be fingerprinted. (T. 932). The State objected to whiting it out on the basis that when a defendant is ordered to be fingerprinted and refuses, that is admissible in court. Secondly, the State argued that the exhibit was already in evidence without an objection on this basis, or any other basis for that matter. The court overruled the defendant's objection. (T. 932-933).

The State's response in summary is that a failure to contemporaneously object to the admission of the fingerprint card waived this point for appellate review. The defendant's general objection was insufficient to preserve the very specific point he now raises. On the merits, the defendant's refusal to submit to the fingerprint example is admissible evidence. Lastly, the word "refused" on the fingerprint card was of no prejudicial value in light of the fact that the objection was raised in the penalty phase, not the guilt/innocence phase.

The law is clear that where a defendant fails to make a contemporaneous objection to the admission of particular evidence, he has failed to preserve the point for appellate

review. See Moore v. State, 418 So.2d 435 (Fla. 3d DCA 1982); Pinder v. State, 396 So.2d 272 (Fla. 3d DCA 1981); German v. State, 379 So.2d 1013 (Fla. 4th DCA 1980); Westfall v. State, 365 So.2d 171 (Fla. 1st DCA 1978); Laws v. State, 356 So.2d 7 (Fla. 4th DCA 1977). The general objection made by the defendant at the time his fingerprint was made was not sufficient to preserve the objection presently raised. Snead v. State, 415 So.2d 887 (Fla. 5th DCA 1982); see Ferguson v. State, 417 So.2d 639 (Fla. 1982). The specific objection by the defendant, raised after the guilt/innocence phase of the trial had been completed, came too late to preserve this point for review. Owens v. State, 349 So.2d 197 (Fla. 1st DCA 1977). This is particularly significant to this point. The defendant alleges he did not write the word "refused". The State Attorney apparently thought he had. (T. 932). It is unknown who wrote in "refused" or for that matter what exactly was refused. The word refused could have been written by the defendant or written at his direction to indicate his refusal to being fingerprinted. Alternativaely, the word "refused" could refer only to a refusal to sign the card. Because the defendant failed to object when the card was introduced into evidence, there is no record allowing for proper review. The defendant therefore cannot ask this court to review this point.

Going to the merits, the defendant was ordered to submit to a scientific test, being fingerprinted. On appeal, he does not argue with the propriety of the order but claims that he was not ordered to sign his name to the fingerprint card. Therefore, he claims that admitting his refusal to sign was improper. Initially, the State asserts that as a practical matter the taking of the fingerprint and the requirement of the card being signed are all part of one process. Dividing the process, as the defendant does, is creating a distinction that in fact does not exist. The court's order requiring the defendant to submit to being fingerprinted must be construed to include all processes normally attendant to that procedure. Additionally, the law is that evidence of a refusal to take a scientific test is admissible against the defendant. In this case, that would include a refusal to either be fingerprinted or to sign the fingerprint card. Clark v. State, 379 So.2d 97 (Fla. 1979); Lowery v. State, 402 So.2d 1287 (Fla. 5th DCA 1981); State v. Duke, 378 So.2d 96 (Fla. 2d DCA 1979); Lusk v. State, 367 So.2d 1088 (Fla. 3d DCA 1979).

Lastly, the word "refused" on the fingerprint card was of no evidentiary value. It was not a comment on the defendant's silence as he now argues. The law is clear that scientific tests and refusals to give handwriting or voice examplars are not testimonial in nature. They are not

protected by the defendant's right to silence. That is why a refusal to give a physical examplar is admissible; it is not a comment on silence. Secondly, the only possible prejudicial effect would be to show the defendant was not cooperating. The remote inference therefrom being that the defendant has knowledge of his guilt. In the penalty phase of his trial, the defendant's guilt was already determined. The word "refused" had no evidentiary value whatsoever on the issue before the court and the jury, the penalty the defendant deserved. As it was of no evidentiary value, it cannot be said to have been reversibly prejudicial.

VII

THE COURT DID NOT ERR IN ADMITTING THE PHOTO OF THE VICTIM, INCLUDING HIS FACE.

The defendant complains that the photograph of the victim, including his face, was improperly admitted into evidence as it was overly gruesome. (R. 71). At trial Guillermo Pinzon testified that he was a close friend of the victim. (T. 531). He was shown the photograph in question at the medical examiner's office. He told the medical examiner the photo was that of his friend, the victim, Raul Nieves. (T. 533). The photo of the victim's face was then admitted into evidence as Exhibit 1. (T. 533). Dr. Gary Keith Ludwig, a pathologist in the Medical Examiner's Office, then testified. He used each of the remaining photos admitted into evidence to describe the wounds, angle of entry and cause of death. (T. 537-558). This testimony became relevant in terms of premeditation.

The law is that gruesome photographs are admissible into evidence so long as the photographs are relevant to an issue at trial. Adams v. State, 412 So.2d 850 (Fla. 1982): Booker v. State, 397 So.2d 910 (Fla. 1981). The test of admissibility is relevancy, not necessity. The defendant cannot by stipulating to a victim's identity relieve the State of its burden of proof of establishing identity beyond

a reasonable doubt. Foster v. State, 369 So.2d 928 (Fla. 1979); Edwards v. State, 414 So.2d 1174 (Fla. 5th DCA 1982); Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). Photographs relevant to the identity of the victim are admissible even if gruesome. Foster v. State, supra; State v. Wright, 265 So.2d 361 (Fla. 1972); Henninger v. State, 251 So.2d 862 (Fla. 1971); Edwards v. State, supra. The photograph of the victim's face was used to identify the victim. It was therefore properly admitted.

Photographs which assisted the medical examiner in explaining the wounds, the angle of entry and cause of death were admissible even if gruesome. Welty v. State, 402 So.2d 1159 (Fla. 1981); Straight v. State, 397 So.2d 903 (Fla. 1981); Edwards v. State, supra; Zamora v. State, supra. Therefore, the other photographic exhibits were also properly admitted into evidence.

It is also significant to note that the admission of photographs into evidence is within the discretion of the trial judge. Edwards v. State, supra; Rodriguez v. State, 413 So.2d 1303 (Fla. 3d DCA 1982); Zamora v. State, supra. The photographs in this case were not an exceptionally gruesome, gory or shocking view of the victim. See Zamora v. State, supra. It was not an abuse of the trial court's discretion to admit the photographs of which the defendant presently complains.

VIII

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL.

The defendant moved for a new trial. The basis for the motion was that Johnny Stokes had lied when he testified at trial. The defendant introduced the testimony of Andreau Burns. Burns had been a cellmate of the defendant's prior to trial. (T. 978). Later, Burns was in the same cell as Stokes. (T. 979). According the Burns, Stokes told him he had to give false testimony. (T. 967). David Lunden, another inmate, testified to essentially the same fact. (T. 1007, 1010, 1016). The court denied the Motion for New Trial. (R. 164A).

The general rule is that a new trial is not to be granted on the grounds of newly discovered evidence unless such evidence has been discovered after trial, due diligence has been exercised to present it at trial, the evidence goes to the merits of the case and not merely to impeach a witness, is not cumulative and is such as would produce a different verdict if introduced at trial. Rule 3.600, Florida Rule of Criminal Procedure; Thomas v. State, 374 So.2d 508 (Fla. 1979); Hudson v. State, 353 So.2d 633 (Fla. 3d DCA 1977). The defendant in this case sought a new trial on the basis of newly discovered evidence. That evidence went only to the witness's credibility. The only

purpose of such evidence was to impeach Stokes in his testimony that the defendant committed the crime. There are a number of cases which hold that new evidence which merely goes to impeach a witness is insufficient as a basis for a new trial. Clark v. State, 379 So.2d 97 (Fla. 1979); Douth v. State, 85 So.2d 550 (Fla. 1956); Owens v. State, 349 So.2d 197 (Fla. 1st DCA 1977); Dames v. State, 314 So.2d 171 (Fla. 3d DCA 1975). Evidence which merely impeaches is not evidence sufficient to support a new trial. See Roth v. State, 368 So.2d 1310 (Fla. 3d DCA 1979). Additionally, the entire cross-examination of Stokes was based upon the same type of impeachment to which Burns and Lunden testified. In that sense, their testimony was merely cumulative. Everything they alleged about Stokes was brought out on cross-examination. Cumulative evidence is not a basis for new trial. Clark v. State, supra.

It should be noted that on review of a denial of a motion for new trial, the standard is that the trial court must have abused its discretion. Jent v. State, 408 So.2d 1024 (Fla. 1981); State v. Riggins, 314 So.2d 238 (Fla. 4th DCA 1975). In the case sub judice, it is clear that the trial court did not abuse its discretion in denying the motion for new trial. The new evidence which the defendant sought to introduce did not go to the merits of the cause but merely impeached the testimony of Johnny Stokes. In and

of itself, the new evidence did not effect the issue of whether the defendant committed this crime. The trial court therefore properly denied the Motion for New Trial.

CONCLUSION

Based on the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the trial court must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to MELVIN S. BLACK, Esquire, Attorney for Appellant, 1002, Executive Plaza, 3050 Biscayne Boulevard, Miami, Florida 33137, on this 4th day of April, 1984.

JACK B. LUDIN
Assistant Attorney General

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