IN THE SUPREME COURT OF FLORIDA

JOHN EARL BUSH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 62,947

ANSWER BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

RUSSELL S. BOHN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee was the prosecution in the Criminal Division of the Circuit Court of the Twentieth Judicial Circuit of Florida, in and for Lee County. In the brief, the parties will be referred to as they appear before this court.

The following symbols will be used:

"R" Record on Appeal;

"SR-1" First Supplemental Record, containing depositions;

"SR-2" Second Supplemental Record, containing the written findings of fact on the sentence of death.

All emphasis in this brief is supplied by appellee, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case. Appellee also accepts his statement of the facts to the extent that it is accurate, non-argumentative and relevant to the points raised on appeal, with the following additions and/or corrections:

Danielle Symons, who was delivering the Palm Beach Post on the morning of April 27, 1983,passed by the Little General store between 2:30 and 3:00 a.m. (R 358-359) where she saw a car with one black man inside it and two other black men inside the store with another person (R 346-349). She identified a photograph of appellant's car (R 350), and at a photo lineup approximately two weeks later identified a photograph of appellant as being one of the men in the store, but noted that the hair length was different (R 351, 358-359, 366-367). Detective Lieutenant Miles Heckendorn testified that appellant's head and facial hair differed between the time of booking and the time of the lineup (R 369). Karen Agati, the store manager on April 27, 1982, had been with the victim from shortly after 2:00 a.m. until approximately 2:20 a.m. (R 415,419). The victim was replacing another employee that night (R 418). After the robbery, Agati determined that $134 plus some change was missing (R 420). Ronald K. Wright, Broward County forensic pathologist, autopsied the victim on April 28, 1983 (R 455-458). She had a defense

would-type cut on the ring finger of her left hand, a stab wound in her abdomen, a superficial abrasion above the stab wound, and a gunshot wound in the back of her head. The victim's bladder had released, which was consistent to a medical certainty with her being in fear prior to death (R 462, 470-471).

Charlotte Grey could not identify anyone in the live lineup (R 491), but did pick out one photograph from 20 which were shown her (R 493). She was not certain of her identification of that photo, but was pretty sure although she would not stake her life on it (R 494). Detective Sergeant John Forte explained that when he said in the deposition that Charlotte Grey had not identified anyone he meant that her identification of the photograph was not positive (R 507L). Martin County crime scene investigator Thomas Madigan testified that the body was found 13.1 miles from the Little General store (R 578).

Four taped statements given by appellant were played during the trial (R 685-735; 749-757; 767-786; 809-848). [The version of events presented in appellant's statement of the facts is derived from those statements, and presents the facts in the light most favorable to him.] At the beginning of the tape of the second statement, Detective Charles Jones asked appellant if he was giving the statement freely and voluntarily, if he had been read his rights (referring to the rights reading in the morning of that same day), if he understood his rights, and if having those rights in mind he was willing to voluntarily tell what happened. Appellant responded yes to each of those questions (R 749). Near the end of the statement, Jones again asked him if the statement was freely and voluntarily made and appellant again said that it was (R 757).

During closing argument, the prosecutors reviewed the progression of appellant's statements, contested the exculpatory portions of those statements, maintained that appellant and his co-defendants were "out stalking to rob," that appellant was the ringleader, that he participated in the senseless execution of the victim, and that the murder was premeditated (R 980-982, 993).

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ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN FAILING TO GRANT A MISTRIAL OR TO CONDUCT A RICHARDSON INQUIRY DURING THE TESTIMONY OF DETECTIVE JOHN FORTE.

Appellant alleges that the trial judge should have granted a mistrial or conducted an inquiry pursuant to the rule in Richardson v. State, 246 So.2d 771(Fla. 1971) when Detective John Forte testified that witness Charlotte Grey identified appellant's photograph during a photo lineup. Appellee maintains that the record of this case clearly shows that neither a mistrial nor a discovery inquiry was necessary.

Charlotte Grey was a clerk at the Little Saints convenience store on Indiantown Road who testified that on April 26, 1982 at approximately 10:40 p.m. two black men came into her store, bought a bag of potato chips and left. She did not see their car, but one of the men looked over the counter into the cash register in a manner which indicated that he was attempting to see how much money was in the drawer (R 481-484). Grey helped Detective Miles Heckendorn prepare an ~~identi~~-kit composite of one of the men (R 487), but on cross examination she acknowledged that they were not able to make a composite drawing which satisfied her (R 489-491). She also acknowledged that she was unable to identify anyone in a live lineup (R 491), but on redirect examination testified that

when shown twenty photographs by Detective John Forte after the live lineup, she pointed to one of the photographs as appearing to be familiar to her (R 493). On recross examination, she again acknowledged her deposition testimony that while she was "pretty sure" about her identification of the photograph, she would not stake her life on it (R 494).

Detective Forte also testified on direct examination that Ms. Grey was unable to identify anyone in the live lineup which included appellant (R 507A-507B). However, because of differences in the suspects' appearance at the time of the live lineup and April 26, 1982, on May 12, 1982 Grey was shown photographs of all four suspects which were among twenty photographs and picked out the photograph of appellant (R 507B-507E). [On voir dire examination, it was explained that Grey was shown four sets containing five photographs each (R 507E-507F).] On cross examination, Forte acknowledged his deposition testimony that Grey was not able to make any identification of any of the defendants in the photo lineup (R 507J). However, on redirect he explained the discrepancy in his answers at trial and in deposition. At trial he was asked whether Grey picked out any photograph, and responded that she did. However, in deposition he had been asked if she had identified any of the photographs and responded that she had not because she did not positively identify any of them (R 507L-507O).

During the argument on the motion for mistrial which followed, defense counsel maintained that Forte's testimony should be stricken (R 508-509), but the prosecutor responded that the defense had deposed Charlotte Grey and knew that she had picked out a photograph, just as she testified at trial (R 509). Of course, defense counsel had used that deposition in recross examination of Grey to clarify that she had not made a positive identification (R 494). Thus, appellee maintains that the trial judge's denial of the mistrial motion was entirely correct. Grey had testified both at trial and in deposition that she had picked out a photograph, and to the extent that there were possible inconsistencies between Detective Forte's deposition and trial testimony, that was a matter for the jury to consider (R 510).

Appellant argues on appeal that not only should a mistrial have been granted, but in the alternative the trial judge should have conducted a Richardson inquiry. The latter argument is without merit for two reasons. First, there was no discovery violation. The defense had been provided with the names of the witnesses, and had deposed both Grey and Forte. Thus, there was no withholding of any names or statements of witnesses. See Fla.R.Crim.P. 3.220(a)(1). Second, there was never any objection based on an alleged violation of the discovery rules, since defense counsel apparently realized that this was not a discovery issue. See Lucas v. State, 376 So.2d 1149, 1151-1152 (Fla. 1979); Grimett v. State, 383 So.2d 698, 699-700 (Fla. 4th DCA 1980).

Furthermore, there was no basis upon which to grant the mistrial motion. The granting or denial of a mistrial is a matter within the trial court's discretion, and especially in the midst of a criminal trial a motion for mistrial should not be granted unless there is an absolute legal necessity to stop the trial and discharge the jury. Dunn v. State, 341 So.2d 806, 807 (Fla. 3rd DCA 1977). No such necessity appeared in this case. First, it was no surprise to the defense that Charlotte Grey had picked out appellant's photograph, since she had so stated in her deposition and during her trial testimony which preceded Forte's testimony. Second, since the defense was fully armed with depositions of both witnesses, they were able to clarify Grey's testimony to show that she had not in fact positively identified appellant, and they were able to impeach Forte's testimony to the extent that they maintained it was inconsistent with his deposition. This is the precise purpose which pre-trial depositions are meant to serve. When testimonial discrepancies appear, as they so frequently do during trials, the witness' trial and deposition testimony can be laid side-by-side for the jury to consider.

Of course, appellee maintains that Forte's testimony at trial was not inconsistent with his deposition testimony, based upon his clarification during redirect examination, as has been reviewed above. Also, the defense knew that Charlotte Grey would testify that she did pick out appellant's photograph. Both of these factors distinquish this case from Neimeyer v. State, 378

So.2d 818 (Fla. 2nd DCA 1979), cited by appellant, where the information that the victim in that case had suffered spinal cord damage was completely new and different from what had appeared in the autopsy report and deposition of the assistant medical examiner, and where the defense's expert witness based his testimony on the autopsy report without a personal examination of the victim's body. Furthermore, in Neimeyer the defense attorney moved to exclude the new testimony based on the discovery rules. The instant case involved at most an alleged inconsistency in one witness' testimony, not totally new and different information which surprised and undercut the defense. Thus, there was no violation of the discovery rules, no objection on that ground, and no need for a Richardson inquiry.

Finally, appellant somewhat creatively alleges prejudice to him in both the guilt and penalty phases of the trial, contending that Charlotte Grey's testimony impermissibly interjected collateral crime evidence into the trial. Of course, while defense counsel did objectto her testimony that one of the men looked into her cash register (R 484-485), no objection was posed pursuant to the rule of Williams v. State, 117 So.2d 473 (Fla. 1960). The absence of an objection on that ground precludes the argument on appeal. Reis v. State, 248 So.2d 666, 669-670. Further there would have been no basis for such an objection since Grey did not testify that any crime was attempted or committed. Defense counsel's

objection was to the relevancy and materiality of her testimony, and was properly overruled on that ground. In a trial involving the robbery of a convenience store such testimony involving another convenience store so near to the one which was robbed (R 482) close to the time when the victim came on duty (R 484, 417) can hardly be deemed irrelevant or immaterial. To the extent that it suggested an intention on the part of appellant and his companions to commit a robbery, it was right on the mark with what appellant had himself told the police in his second statement where he stated that he and his companions were cruising in his car, all intending to commit a robbery (R 755). Thus, appellant's arguments under this point establish neither a trial by ambush, improper evidence, nor any error, much less reversible error.

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING APPELLANT'S CONFESSIONS.

(1) Defendant's confessions were not the result of improper influence by the state.

Appellant provided four taped statements to the police, all of which were played for the jury. He first alleges that the statements should not have been admitted because of the exchange quoted in his brief which occurred during the first interrogation, maintaining that the voluntariness of the statements made in the three subsequent interrogations was vitiated by the implied suggestion during the first interrogation that the appellant would benefit if he confessed. Appellee maintains that when the first interrogation is properly analyzed under the applicable rules, there was no improper influence excercised upon appellant.

The determination of whether a confession was voluntary requires an assessment of human motivation and behavior in which one factor, by itself, is seldom determinative. The trial judge's determination of voluntariness must be based on the totality of the circumstances, and comes to this court clothed with a presumption of correctness. All evidence and reasonable inferences derived therefrom must be interpreted in a manner most favorable to sustaining the trial court's ruling. See Bova v. State, 392 So.2d 950, 952 (Fla. 4th DCA 1980), result approved, 410 So.2d 1343 (Fla. 1982). The basic test of admissibility of confessions as voluntary is that the defendant's will must not have been overborne, but the confession must be the product of a rationale

intellect and free will. See Townsend v. Sain, 372 U.S. 293, 307 (1963).

This court has explained that while a police interrogator must neither abuse a suspect nor seek to obtain a statement by coercion or inducement, the interrogator's job is to gain as much information about the alleged crime as possible without violating the suspect's constitutional rights. Stevens v. State, 419 So.2d 1058, 1063 (Fla. 1982). Appellee submits that during the contested interrogation in the instant case, the police did just that, with no violation of appellant's rights. Specifically, the police stressed the fact that they knew that appellant did not "pull the trigger" and confronted him with the fact that they already had considerable knowledge of the circumstances of the crime and would certainly obtain more. However, they neither promised appellant anything nor threatened him, and it has been recognized that a confession is not rendered inadmissible because the police tell the accused that it would be easier on him if he told the truth. See Paramore v. State, 229 So.2d 855, 858 (Fla. 1969).

The police acknowledgement that appellant did not pull the trigger is essentially the same as what the third district termed "minimizing statements" in LaRocca v. State, 401 So.2d 866, 868 (Fla. 3rd DCA 1981), where the questioner's statements suggested that because the defendant did not fire the first shot what he did was not "that big of deal." The court in LaRocca found that under the totality of the circumstances the statements did not break the defendant's will and produce the confession. The police here

also advised appellant that one of the persons involved was going to talk, and it might as well be him (R 713), but in United States v. Ballard, 586 F.2d 1060, 1063 (5th Cir. 1978) the court stated that encouraging a suspect to tell the truthand suggesting that his cohorts might leave him "holding the bag" does not, as a matter of law, overcome a confessor's will. Finally, appellee submits that appellant's argument in this case is similar to that which was rejected in Barnason v. State, 370 So.2d 680, 681 (Fla. 3rd DCA 1979), where it was claimed that the defendant's statement was the product of psychological coersion. The district court in Barnason explained that the officer employed the "agitation and stroking" technique of questioning in which the interrogator alternatively plays on the suspect's weaknesses and seeks to reassure him. Id. at n.3. The third district opined that to hold that method of interrogation, which did not involve "any of the forbidden elements of force, promise or threat," to have impermissibly broken the defendant's will would "render inadmissible every statement by a defendant while under police questioning, as the product of a degree of coercion which is inherent in every such situation. In common with every other court which has considered such a claim, we reject this view." Id. Appellant's argument should be rejected here as well. The questioning by the officers was indeed skillful; it should not be deemed unconstitutional because it was successful.

Furthermore, the questioning of appellant in the instant case was mild compared with other cases wherein, under the totality of the circumstances, statements have been held to be admissible. See, e.g., Burch v. State, 343 So.2d 831, 832-833 (Fla. 1977) and cases cited therein. Nevertheless, appellant reaches back in time to the case of Bram v. United States, 168 U.S. 532 (1897). However, time and the United States Supreme Court have rendered Bram inapposite to the issue presented here. In Bram, the other suspect in the murder which occurred on board a ship had said that he saw Bram commit the murder. Bram's denial that the suspect could have seen him was presented at trial as an implicit admission of guilt. The United States Supreme Court determined that, under the circumstances, Bram must have felt that if he remained silent it would be considered an admission of guilt so that the confession was not made voluntarily. The Court's conclusion was buttressed by the circumstances under which Bram was questioned. The Court stated:

> Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped or had been stripped of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent.

Id. at 563-564. Thus, the defendant in the Bram case spoke in

circumstances which negated the notion that he was free to remain silent; indeed, "the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt...." Id. at 562. The Bram case was later cited and quoted by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, 461-462 (1966) as one of the cases whose analysis and result gave rise to the prophylactic procedure announced in Miranda. Unless the Miranda warnings have no meaning, where as here they have been properly administered (which will be more fully discussed, infra), then a suspect such as appellant can no longer claim to stand in the same shoes as Bram, unaware of his right to remain silent. Under the "totality of the circumstances," including the Miranda warnings, this case is not Bram; nor does it in any way even approach the outrageous circumstances which obtained in the case of Harrison v. State, 152 Fla..86, 12 So.2d 307 (1943).

(2) Appellant's second statement was not obtained in violation of his Miranda rights.

Appellant argues that he was not properly apprised of his Miranda rights before he gave his second statement to the police. Appellee maintains that an examination of the record will show that there is no merit to this argument.

Appellant's first taped statement to the police was made on May 4, 1982 at 8:40 a.m. (R 685). Before that statement, appellant was fully advised of his rights and executed a waiver thereof (R 679-681, 686-688). During that statement appellant

claimed that on April 26, 1982 at 11:30 p.m. he left his girlfriend's home to visit Robert Lee Wilson in West Palm Beach (R 690). He maintained that at 2:00 a.m. on April 27, 1982 he was still in West Palm Beach (R 699), and later during the statement he offered to take the officers to the house where he claimed to be visiting at that time in order to verify his alibi (R 708). Near the conclusion of the statement, which ended at 10:04 a.m. (R 735), the officers requested appellant to accompany them to West Palm Beach to check out his alibi (R 728-729). Martin County Sheriff Detective Charles Jones testified during the proffer that appellant was not under arrest after the first statement was given, and that when it was completed appellant and Detective Lloyd Jones went to lunch. Later in the afternoon, at approximately 3:00 p.m., while back at the sheriff's office, appellant again agreed to go to West Palm Beach. Appellant, Detective Charles Jones and Deputy James McClain went to West Palm Beach and waited outside the roominghouse where Robert Wilson lived. When he did not appear, they left to get something to eat, and returned. After waiting a while longer, appellant told them that they did not have to wait for Mr. Wilson any longer because Wilson had no knowledge of what had occurred and appellant proceeded to tell them that he was in fact involved in the crime (R 738-739).

Appellant's second taped statement was then made in the detectives' vehicle at the corner of Henrietta and Seventh Street in West Palm Beach at 7:35 p.m. (R 749). At the beginning of the tape, Detective Jones asked appellant if he was giving the statement

freely and voluntarily, if he had been read his rights (referring to the rights reading that morning), if he understood his rights, and if having those rights in mind he was willing to voluntarily tell them what happened. Appellant responded yes to each of those questions (R 749). Near the end of the statement, Jones again asked him if the statement was made freely and voluntarily and appellant again said that it was; the statement concluded at 7:44 p.m. (R 757).

Appellant's third taped statement was given after he and the detectives returned from West Palm Beach to the Martin County Sheriff's Detective Bureau (R 759-760). The statement began at 9:20 p.m. on May 4, 1982 (R 767), and before the statement appellant was again fully advised of his rights and signed another form waiving those rights (R 761-763).

Appellant's fourth taped statement was given on May 7, 1982 when he sent a note to Sheriff James Holt telling the sheriff that he wanted to speak with him. The sheriff contacted appellant's attorney who spoke with appellant and advised him not to talk. Nevertheless, appellant chose to speak despite his attorney's contrary advice (R 794-799). Appellant was again fully read his rights and again signed a waiver of those rights (R 802-803). The rights reading and waiver were repeated on the tape, and on the tape appellant acknowledged that he had spoken with his attorney and chose to speak despite the attorney's advice (R 810-811).

Given this scenario, appellee maintains that there is not merit to appellant's contention that his second statement was inadmissible because he was not properly advised of his rights.

The period of time which lapsed between 8:40 a.m. on May 4, 1982 when appellant's rights were fully read to him and when he first waived those rights and 7:35 p.m. that evening when he made his second statement is much less time than the four days which elapsed between the defendant's waiver of his rights and his third statement in Lucas v. State, 335 So.2d 566, 567 (Fla. 1st DCA 1976), where the court held that the extensive warnings given four days earlier were adequate. Furthermore, there is no requirement that an accused be continually reminded of his rights once he has intelligently waived them, as the Fifth Circuit Court of Appeals held in Biddy v. Diamond, 516 F.2d 118, 122 (5th Cir. 1975), cert. denied 425 U.S. 950 (1976), citing numerous cases from other jurisdictions to support that holding. In Biddy, the defendant claimed that her written waiver of her rights on December 15 did not apply to statements given on December 27 and 28, but her argument was rejected especially since before the later questioning she "expressly stated that she remembered her rights as previously explained to her." Id. Obviously, the Biddy case is directly on point with the issue presented here, where appellant also expressly acknowledged his prior rights reading and his understanding thereof at the beginning of his second taped statement (R 749). Michigan v. Mosley, 423 U.S. 96 (1975), cited by appellant, has no application here. That case dealt with the resumption of questioning about a separate crime after the defendant had terminated questioning about a different crime. In the instant case, defendant did not call a halt to the first interrogation, and in fact initiated the second interrogation in West Palm Beach. Further, his reason

for doing so is obvious. During the first interrogation (R 685-735) appellant had been tripped up several times regarding the time sequence of his story, and after the police took him up on his offer to travel to West Palm Beach to verify his alibi, he found that alibi falling apart around him. When he finally began to tell at least a portion of the truth, the record shows that he did so with full knowledge of his rights, and there is no basis for his argument that his second, third and fourth statements were not properly admitted.

POINT III

THE TRIAL COURT DID NOT ERR IN ADMITTING PHOTOGRAPHS OF THE VICTIM.

Appellant argues that the trial judge erred in admitting photographs of the victim which were admitted primarily to inflame the jury. Appellee maintains that the photographs were properly admitted. Specifically, appellant centers his argument around the admission of state exhibits 15 and 21. However, the record will show that the defense objection to exhibit 15 at the time it was admitted (R 444-445) was not nearly as rigorous as the argument raised on appeal. Specifically, no claim was made that this photograph was more gruesome than the others, that another state exhibit could have served the same purpose, nor was exception made to the size of the photograph or to the fact that it was taken at the medical examiner's office rather than at the scene.

Further, before the admission of exhibit 21, the medical examiner had begun to testify about the external examination of the victim, and was asked whether exhibits 20 and 21 which were taken in his presence would aid him in illustrating to the jury what he observed during the medical examination. He testified that they would, and that they were true and accurate representations of what he saw at the time of the examination (F 463). Those exhibits were admitted on that basis, along with a cautionary instruction to the jury (R 464). Thus, appellee maintains that this issue mirrors that which was decided by this court in Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981), where photographs of the victim's neckbones were admitted because they would aid the medical examiner in explaining the injuries of the victim

to the jury. The test of admissibility of photographs in situations such as this is relevancy and not necessity, and such photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted. Welty, supra; Bauldree v. State, 284 So.2d 196, 197 (Fla. 1973).

Appellant's argument that the photographs were not relevant because there was no evidence that it was he who shot the victim is nothing more than a repetition of his own version of the events, which the jury was entitled to reject. Finally, appellant argues that the admission of the photographs was prosecutorial overkill. However, even where allegedly-gruesome photographs have been admitted only to establish the identity of the victim despite a defense offer to stipulate to identity, appellate challenges to the admission of such photographs have failed. An example is Foster v. State, 369 So.2d 928, 930 (Fla. 1979), where this court held that a defendant cannot, by stipulating to the identity of a victim and the cause of death, relieve the state of its burden to prove those elements beyond a reasonable doubt. Thus, appellee respectfully maintains that there was no error in the admission of the photographs in this case.

POINT IV

THE TRIAL COURT DID NOT ERR IN EXCLUDING PROSPECTIVE JUROR REID ON A CHALLENGE FOR CAUSE.

Appellant argues that the trial judge violated the teachings of Witherspoon v. Illinois, 391 U.S. 510 (1968) when he granted the state's challenge for cause and excluded prospective juror Patricia Reid. However, the lack of an objection in the trial court is fatal to his argument. See Maggard v. State, 399 So.2d 973, 975 (Fla. 1981).

Furthermore, appellant's argument has no merit on its merits. In response to the prosecutor's questions, Mrs. Reid first stated that she did not know if she could handle the responsibility of committing someone to death, and then stated that her feeling about the possibility of a death sentence would cause her to feel uneasy about weighing the evidence of guilt or innocence in the first stage of the trial (R 51-52). Defense counsel asked whether she could set aside her feelings of sympathy and base her decision in the guilt or innocence phase of the trial on the law and the evidence, and she flatly stated "no," adding that she did not think in her heart that she "could live with sending somebody to an electric chair." (R 55-56). In response to further questions by defense counsel regarding whether she could put sympathy out of her mind and base her verdict on the law and the evidence Mrs. Reid responded, "No, I don't think so." (R 56-57). At that point, the state's challenge was sustained without objection. Appellee maintains that Mrs. Reid's answers demonstrate unmistakably that her attitude toward the death penalty would prevent her from making an impartial decision regarding appellant's

guilt. Appellant argues that "it is difficult to ascertain from the questioning" whether Mrs. Reid's answers were due to her feeling about the death penalty or simply due to general feelings of sympathy. This argument simply ignores Mrs. Reid's responses to both attorneys, which were interlaced with references to her inability to "live with sending somebody to an electric chair." Thus, appellee maintains that there was no error in excluding this prospective juror. See Jackson v. State, 366 So.2d 752, 754-755 n.2 (Fla. 1978).

POINT V

THE TRIAL COURT DID NOT ERR IN REFUSING TO REQUIRE THE STATE TO DISCLOSE WHETHER THE PROSECUTION WAS PROCEEDING UNDER THE THEORY OF FELONY MURDER OR PREMEDITATED MURDER.

In his pretrial motion for a statement of particulars (R 1398-1400), appellant requested that the state be required to inform him whether the case would be tried under a theory of felony murder or premeditated murder or both, since the indictment on its face did not reveal the theory under which the state intended to proceed and that such information would enable him to be better prepared to adequately and effectively prepare his defense. In a pretrial hearing, this request was denied (R 1091-1094). Appellant now alleges this as an error because he claims that he "did not, in fact, commit the actual murder."

Appellee will rely upon the prior disposition of this issue by this court in Knight v. State, 338 So.2d 201, 204 (Fla. 1976) and State v. Pinder, 375 So.2d 836, 839 (Fla. 1979). More specifically, in both cases this court quoted the opinion authored by Justice Adkins in Barton v. State, 193 So.2d 618, 624 (Fla. 2nd DCA 1967), where the defendant also argued "that he should have been furnished with a bill of particulars specifying whether the State would proceed on the theory of felony murder or premeditated murder," claiming as does appellant in the instant case that without that information he was placed "at a burdensome disadvantage by being forced to

prepare defenses to each," and that "such a burden upon him constituted a denial of due process." Id. That argument was rejected in the Barton case, and appellee maintains that nothing in this case mandates any different disposition. To this appellee will only add the following statement recently made by this court in O'Callaghan v. State, 429 So.2d 691, 695 (Fla. 1983):

> Appellant, because of our reciprocal discovery rules, had full knowledge of both the charges and the evidence that the state would submit at trial. This is much more information than he would have received in almost any other jurisdiction, federal or state. We conclude that appellant was not prejudiced by the manner in which he was charged in the indictment or by the instructions given to the jury on the crime as charged in the indictment.

POINT VI

THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTION ON THIRD DEGREE MURDER.

Appellant requested an instruction on third degree murder (R 1625), which request was denied during the charge conference (R 934-935). Although this point has been preserved for review, see Thomas v. State, 419 So.2d 634, 636 (Fla. 1982), it presents no basis for reversible error in this case.

An instruction on third degree murder is not required unless there is evidence to support it. See Williams v. State, 427 So.2d 775, 776 (Fla. 2nd DCA 1983). Appellant argues that if the jury accepted his version of the facts, they could have found him guilty of aggravated battery by stabbing the victim, and that since that act facilitated the ultimate death of the victim, the killing occurred in the course of the aggravated battery which would in turn constitute third degree murder under § 782.04(4), Fla. Stat. (1981). Appellee submits that appellant is factually incorrect, and that his reliance on Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982) is misplaced. In Johnson, the victim died as the result of the defendant's repeated hitting and kicking, so that the death in that case was caused by the same act which constituted an aggravated battery. Not so in the instant case, where the stabbing did not cause the death, but (accepting appellant's version of the facts) facilitated the premeditated shooting of the victim which followed, and which was clearly first degree murder. Thus, appellant's version of the facts would not support a charge of third degree murder, but would establish guilt as an aider and abettor to first degree murder. Since the evidence would not

have supported a charge of third degree murder, there was no error in denying the instruction.

Of course, even if there was error in denying the instruction, such error was harmless. Lesser degrees are now treated in the same way as lesser included offenses under the former categories 3 and 4 explained in Brown v. State, 206 So.2d 377 (Fla. 1968). See In Re Standard Jury Instructions in Criminal Cases, Nos. 56,734 & 58,799 (Fla. April 16, 1981). Since appellant was charged with and convicted of first degree murder, the denial of a third degree murder instruction which is two steps removed from the convicted offense is, if error, harmless. See State v. Abreau, 363 So.2d 1063, 1064 (Fla. 1978).

POINT VII

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL.

Appellant presents a laundry list of complaints about the Florida capital sentencing statute in summary fashion, and appellee will respond to each argument in kind.

First, appellant's complaint that the capital sentencing scheme fails to provide adequate notice of aggravating circumstances upon which the state intends to rely has been rejected by this court. See Tafero v. State, 403 So.2d 355, 361 (Fla. 1981). Second, appellant complains that the statute fails to provide any standard of proof for determining that aggravating circumstances outweigh mitigating circumstances. This argument was rejected by the Eleventh Circuit Court of Appeals in Ford v. Strickland, 696 F.2d 804, 817-818 (11th Cir. 1983). Moreover, in Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235, 247-251 (1983), the United States Supreme Court determined that the absence of a legislative or court-imposed standard to govern the jury in weighing aggravating circumstances did not render the Georgia statute invalid as applied in that case, and appellee maintains that the same conclusion applies in this case based on the reasoning espoused in Zant.

Third, appellant claims that aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. Appellee finds that charge itself to be vague, and in any event to be without merit since

this court has recognized and carried out its duty to make a proportionality determination and decide how a given case compares with other cases. See, e.g., Williams v. State, ___ So.2d ___ , Case No. 61,549 (Fla. opinion filed June 23, 1983) [8 FLW 211]. Fourth, execution by electrocution is not cruel and unusual punishment. See Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978). Fifth, while appellant alleges that because the Florida statute does not require a unanimous jury or a "substantial" majority of the jury in order to reach an advisory verdict, the statute denies the right to a jury and due process of law. However, in Proffitt v. Florida, 428 U.S. 242, 252 (1976), the United States Supreme Court pointed out that jury sentencing is not constitutionally required. Finally, appellant alleges that the statute is constitutionally infirm because this court does not automatically review all first degree murder cases, but reviews only those first degree murder cases which result in a death sentence, and not those which result in a term of life imprisonment. Appellant's claim of arbitrariness on this basis was rejected by the United States Supreme Court in Proffitt v. Florida, supra, at 259 n.16.

POINT VIII

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY DURING THE PENALTY PHASE.

Appellant attempts to challenge the instructions to the jury during the penalty phase in this case based upon the reversal in Rose v. State, 425 So.2d 521, 524-525 (Fla. 1982), where this court held that it was error to deliver an "Allen charge" during the penalty phase of the trial. Of course, appellee maintains that this point has not been preserved for review since there was no objection to the instructions as they were delivered by the trial judge. See Thomas v. State, 419 So.2d 634, 636 (Fla. 1982); Williams v. State, 395 So.2d 1236, 1237 (Fla. 4th DCA 1981).

Even if preserved, the issue posed here presents no error. Rose is entirely distinguishable from the instant case, since no "Allen charge" was delivered during the penalty phase of this trial. Furthermore, as this court pointed out in Rose, "if seven jurors do not vote to recommend death, then the recommendation is life imprisonment." Id. at 525. Here, the judge instructed the jury that "if by six or more votes the jury determines that John Earl Bush should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the court that it impose a sentence of life imprisonment upon John Earl Bush without possibility of parole for twenty-five years." (R 1290). Thus, the instruction given to the jury here said precisely what this court said in Rose. See Hitchcock v. State, 432 So.2d 42, 44 n.3 (Fla. 1983).

POINT IX

THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO INSTRUCT THE JURY IN THE SENTENCING PHASE THAT APPELLANT COULD NOT BE SENTENCED TO DEATH UNLESS IT WAS FOUND THAT HE KILLED OR ATTEMPTED TO KILL THE VICTIM OR INTENDED OR CONTEMPLATED THAT LIFE WOULD BE TAKEN.

Appellant argues that the trial judge should have instructed the jury during the sentencing phase that he could not be sentenced to death unless he killed or attempted to kill the victim, or intended or contemplated that life would be taken, pursuant to the holding of the case of Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982). It should be noted that Enmund was decided on July 2, 1982. 73 L.Ed.2d at 1140. The sentencing proceeding in the instant case took place on November 22, 1982 (R 1124). Thus, if defense counsel felt that Enmund applied to the instant case, he should have requested an appropriate instruction. However, none was requested, thus precluding this issue from review on appeal. See Fla.R.Crim.P. 3.390(d); Castor v. State, 365 So.2d 701, 703-704(Fla. 1978);Williams v. State, 395 So.2d 1236, 1237 (Fla. 4th DCA 1981).

Furthermore, defense counsel had every reason not to request such an instruction, for the Enmund rule has no application in this case. The evidence showed that appellant owned and drove the car, owned the gun, and admitted stabbing the victim (R 548, 767-768, 771, 812). It can hardly be argued

that the evidence in this case would justify an instruction that appellant neither killed nor attempted to kill the victim nor intended or contemplated that life would be taken. His was not the kind of passive participation which inculpated defendant Enmund, who this court stated was only "constructively present aiding and abetting the commission of the crime...." See Enmund v. State, 399 So.2d 1362, 1370 (Fla. 1981). Thus, appellant's complaint here has not been preserved for appeal, presents no error much less fundamental error, and is without merit. See Hall v. State, 420 So.2d 872, 874 (Fla. 1982).

POINT X

THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD NOT DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW.

Before dealing with appellant's challenges to the death sentence, appellee would offer some comments about the written findings submitted in support of the trial judge's sentencing decision. After appellant's initial brief was served, appellee requested that jurisdiction be relinquished to the trial court so that specific written findings of fact concerning aggravating or mitigating circumstances, which did not at that time appear in the record, could be made by the trial judge. This request was made even though the trial judge had dictated his findings into the record at the time of sentencing (R 1299-1308), and despite the fact that in Thompson v. State, 328 So.2d 1, 4 (Fla. 1976), this court had already stated that the dictation of findings, when transcribed, becomes a finding of fact in writing and provides the opportunity for meaningful review as required by the statute. Despite that clear statement by this court, appellee requested the relinquishment so that, if the sentence in this case is affirmed, a complaint in post-conviction relief proceedings or in federal habeas corpus proceedings that the requisite written findings were not made would be precluded. [Such a complaint was recently rejected by this court in a Rule 3.850 appeal in Armstrong v. State, 429 So.2d 287, 288-289 (Fla. 1983).] Pursuant to the requested relinquishment, the trial judge has since submitted, and the record

has been supplemented with, a duplicate copy of the portion of the transcript wherein the judge had recited his findings (SR-2), so that there can be no argument that written findings were not made. As this court explained in Holmes v. State, 374 So.2d 944, 950 (Fla. 1979), there is no prescribed form for the order containing the findings of mitigating and aggravating circumstances, the primary purpose of which is to provide an opportunity for this court to perform a meaningful review to determine that the trial judge "viewed the issue of life or death within the framework of the rules provided by statute." As will be discussed more fully below, the judge's findings in this case demonstrate not only a reasoned judgment, but also a refreshing familiarity with the applicable law.

A

THE TRIAL JUDGE PROPERLY APPLIED THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, AND THE AGGRAVATING CIRCUMSTANCE THAT THE CRIME OCCURRED AS THE RESULT OF A ROBBERY DOES NOT APPLY AN AUTOMATIC AGGRAVATING CIRCUMSTANCE IN THE SENTENCING PHASE.

Appellant does not factually challenge the trial judge's findings on the aggravating circumstances enumerated in § 921.141 (5)(b) and (d), Fla. Stat. (1981), that he had been previously convicted of a felony involving the use or threat of violence to the person, and that the murder was committed while he was engaged in the commission of a kidnapping and while he was in flight after committing a robbery (R 1301-1302). However, he

argues that the judge should not have found that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification pursuant to § 921.141(5)(i), Fla. Stat. (1981). He argues that this aggravating circumstance implies a level of premeditation higher than that necessary to convict him of premeditated murder, and that the finding failed to individualize the facts of the case as to him in determining the application of this aggravating circumstance.

An examination of the trial judge's discussion of this circumstance belies appellant's argument. First, while the state had argued that the murder was especially heinous, atrocious, or cruel, see § 921.141(5)(h), Fla. Stat. (1981) (R 1273), the trial judge thoroughly discussed that circumstance and found it not to apply (R 1302-1303). He then noted that that circumstance and the cold, calculated and premeditated circumstance do not overlap (R 1303). He also noted that the existence of premeditation had already been determined in the murder charge, and that the jury had rejected appellant's contention that he did not take part in the murder. Thus, his analysis centered around the lack of any pretense of any moral or legal justification and the question of calculation,both of which he found to have been proven factually. Appellee submits that the judge's discussion of and distinction between the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances, taken together (R 1302-1304), clearly demonstrates that he had a firm grasp of the necessary legal distinctions. See Middleton v. State, 426 So.2d 548, 552-553 (Fla. 1982).

He understood that something more than the premeditation which will justify a first degree murder conviction is necessary to justify the application of this aggravating circumstance, and the focus of his analysis on cold calculation and lack of justification fits precisely the rule governing the application of this circumstance as explained by this court in Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981). See also Smith v. State, 424 So.2d 726, 733 (Fla. 1982)

As the prosecutor argued to the jury in the sentencing phase, the victim in this case was executed (R 1274). As in Combs v. State, 403 So.2d 418, 421 (Fla. 1981), where the application of this aggravating circumstance was upheld, in the instant case both felony murder and premeditated murder were proven. As this court has stated, this aggravating circumstance ordinarily applies in those murders which, as in the instant case, are characterized as executions, McCray v. State, 416 So.2d 804, 807 (Fla. 1982), and it clearly applies here just as it did in Smith v. State, 424 So.2d 726 (Fla. 1982), another case involving the robbery and abduction of a convenience store clerk who was taken to the woods and shot, which this court characterized as an "ultimate execution-style killing of the victim." Id. at 733.

Nevertheless, appellant employs an Enmund-style argument to contend that the focus should have been on his own level of culpability, and not on that of those who committed the robbery and shot the victim, again arguing that he "did not

kill the victim." As has already been stated, the trial judge observed that while appellant maintained that he did not take part in the murder, that is something which the jury found against him (R 1304).

It must be remembered that a jury may consider a defendant's false exculpatory statements as substantive evidence against him. See Andreasen v. State, ___ So.2d ___, Case No. 81-955 (Fla. 3rd DCA opinion filed June 14, 1983)[8 FLW 1624, 1625]. Here, appellant himself testified at the sentencing hearing (R 1174-1267), and his testimony on direct mirrored the version of events presented in the taped, pre-trial statements which were played during the guilt phase. To hear appellant tell it, he was the victim, not Frances Slater. He admitted that he and the co-defendants were riding in his car (R 1175), and that it was his idea to stop at the Little General store where Frances Slater worked, but only to buy cigarettes (R 1178). Everything else was someone else's doing. It was Alphonso Cave who committed the robbery (R 1178); it was Cave and "Pig" Parker who took the victim to the car (R 1179); "they" pointed appellant's gun at him and made him pick up the moneybag (R 1179); "he" (Cave) told appellant to drive (R 1179); "they" told him where to drive (R 1180); "one of them" told him to stop (R 1180); Cave then gave him the knife and told him to get out of the car, and Parker told appellant to "do what I got to do" (R 1180); Parker (who then had the gun) told appellant to stab the victim (R 1180); after appellant stabbed her and after Parker shot her,

the defendants got back into the car and "they" told appellant to drive to Indiantown (R 1181); later, at Cave's house, appellant took some of the money only because "he" (apparently meaning Cave) still had the gun and poor appellant "had no other choice." (R 1186). Appellant's story was just too good to be true, and it looked even worse after the rigorous cross examination by the prosecutor (R 1187-1267). Especially telling was appellant's acknowledgment that since it was his car which was used, if someone saw the car it would lead the police back to appellant, and not to the others (R 1212).

Thus, there is no basis for appellant's argument that the aggravating circumstance did not apply to him based on his own degree of culpability. However, the trial judge in effect gave appellant the benefit of the doubt during his discussion of the mitigating circumstances enumerated in § 921.141 (6)(d) and (e), Fla. Stat. (1981). As the trial judge stated, even accepting appellant's version of the facts, it could not be found that he was an accomplice whose participation was relatively minor, or that he acted under the substantial domination of another person (R 1304-1306). In conclusion, appellant does not factually challenge two of the three aggravating circumstances which were found to apply, and his challenge to the third must fail.

While appellant does not factually challenge the application of the felony murder aggravating circumstance, he challenges it legally by claiming that it applies an automatic

aggravating circumstance for every felony murder conviction. Appellee will basically rely upon this court's rejection of that argument in Menendez v. State, 419 So.2d 312, 314-315 (Fla. 1982). In addition, appellant's argument that the application of an alleged automatic aggravating circumstance for felony murder allows no statutory guidelines for determining which felony murder cases receive the death sentence and which do not is totally without merit. It ignores the basic structure of the statute which provides that certain mitigating circumstances must be considered, that any other mitigating circumstances which a defendant presents must also be considered, and that the end product of the weighing process must be a reasoned judgment and "not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances...." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Appellant's complaint that there are "no statutory guidelines" is similar to the complained absence of a legislative or court-imposed standard to govern the jury in the weighing process which was rejected by the United States Supreme Court in Zant v. Stephens, supra, and is without merit.

B

THE PROSECUTOR DID NOT ATTEMPT TO INTRUDUCE OTHER AGGRAVATING CIRCUMSTANCES INTO EVIDENCE DURING THE CROSS EXAMINATION OF APPELLANT NOR DID ANY IMPROPER PROSECUTORIAL ARGUMENT AFFECT THE OUTCOME OF THE SENTENCING PROCEEDING.

Appellant lodges several complaints here concerning questioning and argument by the prosecutors during the sentencing

phase. He argues that questions put to him during cross examination and a portion of the state's closing argument concerned the victim of the rape of which he was convicted in 1974 (R 1141), and that this impermissibly attempted to prove an aggravating circumstance and interjected an impermissible non-statutory aggravating circumstance into the proceeding. First, it should be noted that during the contested questioning (R 1212-1214), the only objection raised by defense counsel was that the prosecutor was going into appellant's prior conviction, and later that the questions had already been "asked and answered." He did not complain that the prosecutor was impermissibly attempting to establish an aggravating circumstance via appellant's testimony, allegedly against the rule which appellant cites from State v. Dixon, supra, at 7-8. Since the argument raised on appeal is not the same as the objection raised in the trial court, the point has not been preserved for review. Reis v. State, supra, 248 So.2d 666, 669-670 (Fla. 3rd DCA 1971). The same is true regarding the contested portion of closing argument (R 1277), where there was neither an objection nor a motion for a mistrial made. See Simpson v. State, 418 So.2d 984, 986 (Fla. 1982).

Moreover, aside from the lack of preservation, there is no merit to appellant's complaint. In State v. Dixon, supra, at 7, this court's explained that the state "can cross examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State."

Here, appellant's central contention during his direct testimony during the sentencing phase, as well as in his taped statements played during the guilt phase, was that he was at most an unwilling participant in the murder. The portion of questioning about which he complains here followed his acknowledgment (R 1212) that if anyone saw the car, it would lead the authorities to him, and the point of the questioning which followed was "to get to the truth of the alleged mitigating factors" by demonstrating that appellant was an active, not a passive, participant in the crime since he had every reason to be concerned about being identified by the victim. Significantly, while the same testimony and the same portion of argument would have been relevant to the aggravating circumstance that the murder was committed to avoid arrest, the prosecution never argued that aggravating circumstance to the jury, but instead relied on four others, three of which the trial judge found (R 1272-1273).

Appellant's complaint concerning an appeal to sympathy during the prosecutor's closing argument (R 1280) raises a better issue, but not one which can serve as the basis for reversal of the sentence in this case. It would be disingenuous to argue that the contested portion of the prosecutor's argument was not an appeal to sympathy, or that such arguments are not usually held to be error. See Breniser v. State, 267 So.2d 23, 25 (Fla. 4th DCA 1972). Nevertheless, as the third district explained in Abbott v. State, 334 So.2d 642, 647 (Fla. 3rd DCA 1976),each case involving an alleged impermissible appeal by

the prosecutor to the sympathy of the jury must be considered on its own merits within the circumstances of the case, and the burden is on the defendant to show that the comments of the prosecutor constituted harmful error, since prosecutorial comment may be considered harmless. In a similar case, the fourth district held that the prosecutor's comments did not deprive the defendant of a fair trial, Bolen v. State, 375 So.2d 891, 892 (Fla. 4th DCA 1979), and the same conclusion should apply here. Surely the sixteen lines of transcript about which appellant complains cannot be considered to have done him as much harm as did his own performance during cross examination (R 1187-1267), not to mention during his own direct examination (R 1174-1187) which was so palpably transparent. As the State Attorney so aptly summarized it in closing argument (R 1275-1276), "every time a question came that he didn't want to answer that was damaging to him, he either didn't answer, said I have already answered it or the convenient thing of I don't remember." Therefore, appellee submits that any error which occurred during the prosecutor's closing argument was clearly harmless beyond any reasonable doubt.

C

THE TRIAL JUDGE DID NOT FAIL TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES IN HIS ASSESSMENT OF THE DEATH PENALTY.

Appellant's complaint that the trial judge overlooked non-statutory mitigating circumstances is belied by the transcript.

Near the conclusion of his findings, the trial judge stated:

> Fourth, any other aspect of the Defendant's character or record and any other circumstance of the offense. And I have considered everything that took place during the trial, everything that you presented or that was presented during the sentencing proceedings. I'm well aware that neither the jury nor the court are bound by the mitigating factors that were originally set forth in the statute and that we can, for mitigation take into consideration anything that could be set (sic) on your own behalf. (R 1307).

The judge then found the record totally devoid of any mitigating circumstances, after having already ruled out the application of the statutory mitigating circumstances which might have arguably applied (R 1304-1307).

Appellant's complaint that the judge did not apply Enmund v. Florida, supra, to this case is refuted by the judge's finding that even accepting appellant's version of events, his participation in this crime was not minor. See Hall v. State, 420 So.2d 872, 874 (Fla. 1982). Appellant's complaint about other non-statutatory mitigating circumstances which the judge allegedly overlooked fit the same category as those argued in Porter v. State, 429 So.2d 293, 296 (Fla. 1983), where this court stated:

> There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those limited to those listed in Section 921.141(6), Florida Statutes (1981). What Porter really complains about here is the weight the trial court accorded the evidence Porter presented in mitigation.

> However, "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence." Quince v. State, 414 So.2d 185, 187 (Fla. 1982). We do not find that the trial court failed to consider the evidence presented in mitigation of the sentence.

The same reasoning and conclusion applies here. In conclusion, since three aggravating circumstances were found, and no mitigating circumstances, the death penalty was properly applied in this case. Furthermore, even if one of the aggravating circumstances was improperly applied, the sentence should still stand. See Brown v. State, 381 So.2d 690, 696 (Fla. 1980).

POINT XI

THE TRIAL COURT DID NOT ERR IN SENTENCING APPELLANT FOR FIRST DEGREE MURDER, ROBBERY AND KIDNAPPING BECAUSE PREMEDITATION WAS PROVEN.

Appellee maintains that separate convictions and sentences for first degree murder, robbery, and kidnapping were justified in this case because there was adequate proof of premeditation to support the first degree murder charge. As appellee has already recounted under Point X A, the jury was entitled to reject the exculpatory portion of appellant's statements,and to attribute to him an active role in the commission of the crimes. The critique of appellant's testimony during the penalty phase applies equally to the virtually-identical contents of the fourth taped statement played at trial (R 809-848). During that statement, appellant claimed that he wanted to let the victim go, but that "they decided that they, we had been seen and that she might identify us." (R 821). Again, appellant owned and drove the car, owned the gun, and admitted stabbing the victim (R 548, 767-768, 771, 812). This was not a death resulting from a shoot-out during a robbery. Rather, it was a premeditated execution following a robbery, and there was ample reason for the jury to determine that appellant played an integral part in it. Thus, the first degree murder conviction did not depend upon the other convictions, so that all three convictions and sentences were justified. State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); State v. Pinder, 375 So.2d 836 (Fla. 1979).

CONCLUSION

Based on the foregoing argument, appellee respectfully submits that no error was committed by the trial court and respectfully requests the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

Russell S. Bohn

RUSSELL S. BOHN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 25th day of August, 1983 by United States Mail upon MARTHA C. WARNER, ESQUIRE, P. O. Box 175, Stuart, Florida 33495.

Russell S. Bohn
OF COUNSEL