IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,743

RAYMOND DOLINSKY,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

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

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

# BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

G. BART BILLBROUGH
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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



OTHER AUTHORITIES

## INTRODUCTION

The appellant, Raymond Dolinsky, seeks review and reversal of the December 16, 1983, judgment and sentence of the Honorable Bill G. Chappell, Circuit Court Judge of the Sixteenth Judicial Circuit in and for Monroe County, Florida.

The appellant, Raymond Dolinsky, was the defendant below and will be referred to as the appellant, the defendant, or by name.

The appellee, the State of Florida, was the prosecution below and will be referred to as the appellee or the State.

References to the record on appeal will be designated by the letter "R".

## STATEMENT OF THE CASE AND FACTS

On May 9, 1983, a Monroe County Grand Jury returned an indictment charging the appellant, Raymond Dolinsky, with three counts of first degree murder, in violation of Section 782.04 (1)(a), Fla.Stat. (1983). (R. 18-21). On May 16, 1983, a written plea of not guilty was entered on the appellant's behalf. (R. 26).

Trial by jury commenced on November 7, 1983. (R. 794). On November 14, 1983, the jury found the appellant guilty of first degree premeditated murder on Count II and guilty of second degree felony murder on Counts I and III. (R. 162-164).

On November 15, 1983, the trial court conducted a separate sentencing proceeding on the second count of the indictment pursuant to Section 921.141, Fla.Stat. At its conclusion, the jury rendered an advisory sentence of life imprisonment without the possibility of parole for twenty-five years. (R. 750). The trial court set sentencing for December 16, 1983. (R. 752).

On December 16, 1983, the trial court found the aggravating circumstances which existed sufficient to warrant imposition of the death penalty. In rejecting the jury's recommendation, the trial court found the following aggravating circumstances:

> 1. Convictions of murder in the second degree of a second and third victim arising out of the same criminal episode, and entered contemporaneously with the first degree murder conviction being reviewed here, is considered an aggravating factor under F.S. 921.141 (5)(b), Fla.Stat.; Lucas v. State, 376 So.2d 1149 (Fla. 1979); King v. State, 390 So.2d 315 (Fla. 1980).
>
> 2. Evidence revealed beyond a reasonable doubt that the murder was perpetrated during the

commission of the crime of Robbery and is then considered to be an aggravating factor under F.S. 921.141 (5)(d), or that it was committed for pecuniary gain under F.S. 921.141 (5)(f).

3. Not only was the Defendant convicted of premeditated murder, but the evidence shows that the victim was lured to a remote section of the Keys for a pretended delivery of a controlled substance where the Defendant awaited, and almost immediately upon the victim's arrival, he was murdered, thus showing cold, calculated and premeditated murder as a aggravated circumstance under F.S. 921.141 (5)(i)."

The trial court noted that the only evidence offered in mitigation was that the appellant had been a reliable employee as a carpet installer. The appellant testified he had three prior convictions. There was no evidence that the appellant was under the influence of any mental or emotional disturbance, nor was there anything to indicate an impairment of his capacity to appreciate or conform his conduct.

The trial court concluded by finding that the three aggravating circumstances outweighed the almost non-existent mitigating factors present. (R. 177-178).

The trial court also sentenced the appellant on Counts I and III to life imprisonment. (R. 205-207).

This appeal ensued.

I

## THE GUILT PHASE

In early morning hours of April 13, 1983, Kenneth Colbaugh, Curtis G. Redman, Jr., and Gerald Hamilton, died as a result of gunshot wounds inflicted by the appellant, Raymond Dolinsky, and his partner, Ronald Bowes, at Cudjoe Key, Monroe County, Florida. The State submitted that the murders were perpetrated during a robbery of the victims. The appellant, however, argued that he had not been present during the offense and had an alibi.

The evidence produced at trial revealed that the victims, Hamilton, Colbaugh, and Redman, residents of Tennessee, sought to purchase fifty pounds of marijuana in Florida. One of the victims, Hamilton, contacted Scott Duncan to determine whether Duncan could procure fifty pounds of marijuana. After making some inquiries, Duncan learned that James Clark, a friend, knew someone who could supply the drugs. That person was the appellant's associate, Ronald Bowes. (R. 337-340; 422-427).

After Duncan notified the Tennessee victims that a source had been located, the victims drove from Tennessee to Ft. Lauderdale in their Ford station wagon and checked into a hotel. (R. 341; 424-425).

At approximately 1:30 a.m. on April 13, 1983, a meeting was held at Scott Duncan's home. The meeting was attended by Duncan and his wife, Melissa, as well as victim Hamilton, James Clark, and Ronald Bowes. An individual who lived above the Duncans, Ron Thornsberry, was also present. (R. 341; 426). After introductions, Bowes, having previously informed the victims that the transaction would have to occur in the Florida Keys, requested that he see the victim's money before the trip. (R. 340; 426). Victim Hamilton showed Bowes the cash and both men counted it on the living room floor. (R. 341-342; 426). When totaled, the amount was approximately fifteen to twenty thousand dollars. (R. 342; 427).

Prior to leaving the apartment, Bowes said to Hamilton, "I hope your gun is as big as mine." In response, Hamilton opened his shirt and showed his gun to Bowes. (R. 342; 428).

Bowes and Clark then left in Bowes' red Corvette. Victim Hamilton followed the Corvette to the LaMancha Motor Inn and picked up his friends from Tennessee, victims Redman and Colbaugh. (R. 343). The station wagon then followed the Corvette south toward the Keys. (R. 343).

During the drive, the Corvette stopped at the Snapper Creek Plaza on the Florida Turnpike and the station wagon

followed. Bowes made a five minute telephone call and then returned to the car to continue the trip south. (R. 344). The call was placed to Bowes' partner, the appellant. (R. 630).

At approximately milemarker 20 of U.S. 1, Bowes turned the Corvette onto a dirt road and entered an area known as the Thompson Estates in Cudjoe Key. The victims followed. (R. 287-290; 345). A few miles down the road, both vehicles stopped. A brown van, driven by the appellant, was parked approximately 40 yards away. (R. 345-346).

At that time, Clark and Bowes got out of the Corvette and the victims from Tennessee exited their station wagon. Prior to getting out, however, Bowes tucked a .357 Magnum into his pants. Bowes and victim Hamilton then walked toward the van. The other two victims, as well as Clark, stayed by the cars. (R. 347-348).

As victim Hamilton and Bowes approached the van, an individual, later identified as the appellant, was seen in the vehicle. (R. 349-350). After the appellant exited the van, Clark, standing with the other victims, heard a loud laugh followed by a gunshot. (R. 348). The gunshot struck victim Hamilton and caused his death. (R. 485-486).

Clark, with the other two victims, froze when the gunshot was heard. (R. 349-350). Because the van could not clearly be seen, (R. 349), Clark stepped a short distance away from the two victims. After a period of time, a voice from the bushes, later determined to be Bowes, yelled, "police, freeze." (R. 351). Bowes then ordered Clark and the two victims to discard their weapons and lay on the ground. (R. 351-356).

Clark and victim Colbaugh complied with the order, but victim Redman merely crouched behind the station wagon. (R. 351). When the appellant saw that victim Redman had failed to comply with Bowes' order, the appellant yelled, "there is still one behind the car", and ordered victim Redman to come out. (R. 353). Although Bowes repeated the order, Redman just laid on the ground. Both the appellant and his partner then emerged from some bushes and frisked the two victims. (R. 355). The appellant searched Redman and Bowes searched Colbaugh. (R. 353-357).

The appellant then moved to where Clark was laying and asked Clark, "Are you with us or against us?" (R. 357). Clark, after observing that the appellant was wearing white surgical gloves, stated that he was with the appellant and his partner. (R. 356-358). Bowes handed Clark a gun and told him to go with the appellant. The appellant picked

victim Redman up from the ground and the three proceeded toward the van. (R. 360).

Clark turned back toward Bowes when he heard a gunshot. Bowes said, "I blew my thumb off. Kill him, Ray." (R. 360-361). The appellant then shot victim Redman in the chest. Victim Redman fell to the ground with blood coming from the victim's mouth. After shaking for a moment, the body stopped moving. Clark also noted some other gunshots by Bowes toward Colbaugh. (R. 361-362).

Bowes next joined the appellant and Clark by Redman's body. Bowes instructed Clark to shoot Redman, but Clark informed Bowes that the victim was already dead. Bowes then pointed the gun at Clark and again told Clark to shoot Redman. Clark fired one shot into the victim. (R. 361-362).

The cause of death for victim Redman was bullet wounds to the head and chest. The chest wound was in the middle of the chest. The bullet perforated the heart and lungs of the victim. Both wounds were mortal in nature. (R. 479-481).

Victim Colbaugh died as a result of bullet wounds to the forehead and chest. (R. 481-483). Colbaugh also suffered gunshot wounds to the genitalia and the left elbow. (R. 482-483).

After the shootings, the appellant returned to his van and exited Thompson Estates. Bowes and Clark followed in the Corvette. (R. 362-364). During the return trip north, the appellant stopped and Bowes joined him in the van. Clark drove the Corvette. (R. 364). A short time later, Bowes returned to the Corvette with a tee-shirt containing money. Upon their arrival in Ft. Lauderdale, Bowes gave Clark approximately $4700.

Clark saw the appellant later that same day. The appellant asked Clark if Clark was alright and Clark said that he was. (R. 367-368). A few days later, the police contacted Clark regarding the Cudjoe Key murders. Clark reported these developments to the appellant and told the appellant that Clark would say he did not go to the Keys. The appellant responded by stating that that was fine. (R. 368).

Upon the appellant's arrest, the appellant denied ever knowing or hearing of an individual named Ronald Bowes. (R. 507-508).

## II

## THE PENALTY PHASE

During the penalty phase, the State relied on the evidence at trial. The defense, however, presented

testimony from Marcia Marie Dolinsky, a relative of the appellant, and Kathleen Dolinsky, appellant's wife.

Marcia Dolinsky testified that the appellant maintained close contact with his family and was a good provider. (R. 727-731).

The appellant's wife testified that the appellant was a hard worker and a good family man. (R. 732-734).

The appellee reserves the right to argue additional facts in the argument portion of this brief.

## ISSUES ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A MISTRIAL BASED UPON A LAW ENFORCEMENT OFFICIAL'S TESTIMONY THAT THE APPELLANT REMAINED SILENT AT THE TIME OF HIS ARREST WHERE THE APPELLANT DID MAKE A STATEMENT AT THAT TIME, THE DEFENSE ITSELF INTRODUCED EVIDENCE OF THE APPELLANT'S SILENCE UPON ARREST, AND ANY ERROR WAS OVERWHELMINGLY HARMLESS.

II

WHETHER THE APPELLANT WAS DENIED A FAIR TRIAL BY IMPROPER QUESTIONS OF THE PROSECUTOR WHERE THE APPELLANT FAILED TO OBJECT OR IN ANY WAY CHALLENGE THE INQUIRIES AND WHERE THE TESTIMONY WAS PROPERLY ADMISSIBLE UNDER THE RULES OF EVIDENCE.

III

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH WHERE THE COURT PROPERLY FOUND THREE AGGRAVATING FACTORS, CONSIDERED ALL EVIDENCE PRESENTED IN MITIGATION, AND DETERMINED THAT THE AGGRAVATING FACTORS OVERWHELMINGLY OUTWEIGHED THE MITIGATING EVIDENCE.

IV

WHETHER THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON AGGRAVATED BATTERY AS TO COUNT II OF THE INDICTMENT WHERE THE PROPOSED INSTRUCTION WAS NOT SUBMITTED IN TIMELY FASHION, WAS NOT SUPPORTED BY THE EVIDENCE, WAS NOT PRESERVED FOR APPELLATE REVIEW, AND ANY OMISSION WAS PLAINLY HARMLESS.

## SUMMARY OF THE ARGUMENT

I. The appellant's initial argument that the trial court should have granted a mistrial after an arresting officer suggested that the appellant had remained silent in the face of police questioning is without merit. First, the officer's erroneous statement about the appellant's silence was remedied by the following witness, who testified that the appellant did make certain statements. Because the appellant did not remain silent, he cannot complain about any such comment. Donovan v. State, 400 So.2d 1306 (Fla. 1st DCA 1981), pet. rev. den., 417 So.2d 674 (Fla. 1982).

The appellant also should not be permitted to benefit from any possible error. The appellant himself presented to the jury substantial testimony about his silence at the time of arrest. The well-established rule that when incompetent evidence is admitted over objection, but the same evidence is thereafter admitted without objection, the benefit of the objection is lost applies to the present case.

Should this court construe the comment in the instant case to be error, it should nonetheless affirm the appellant's conviction on the overwhelming evidence of the appellant's guilt. The current state of Florida law, as reflected in this court's decision in State v. Murray,

443 So.2d 955 (Fla. 1984), shows that the harmless error rule is now applicable to comment on silence cases.

II. Although the appellant attacks the introduction of testimony that the appellant had an alias and objects to the hearsay testimony of his co-perpetrator, the matter has not been preserved for appellate review. The present record reveals that the appellant failed to object to any of the errors. An examination of the merits reveals that the alias was relevant to the identification of the appellant and the hearsay properly admissible pursuant to Section 90.803 (18), Fla.Stat. (1979).

III. The myriad of challenges to the appellant's sentence lacks merit. Each of the aggravating factors were supported by substantial, competent evidence and were fully applicable to the appellant's conduct. Because the appellant could show nothing more than the fact that he was a good family man, the trial court did not err in overriding the jury's recommendation of life imprisonment. The three aggravating circumstances, when compared to the negligible mitigating evidence, demonstrates that affirmance is warranted.

The appellant also attacks his sentence in light of those received by his companions. Close review of the

record, however, reveals that the accomplice after the fact had little participation in the planning or execution of the instant offense. Further, the lesser sentence given the appellant's partner does not mean as a matter of law that the appellant cannot receive the death sentence. In the present case, the appellant was the trigger man in the death of victim Redman and, as such, warranted imposition of the death penalty.

The final attack on the appellant's sentence relates to the inability of the appellant to review the pre-sentence investigation report and a sentencing guideline scoresheet. Because the trial court stated that it did not consider the documents in the sentence, they can serve as no basis for attack on appeal.

IV. The last issue raised on appeal is that the trial court erred in failing to instruct the jury on the lesser included offense of aggravated battery on Count II. The appellant failed to submit the request for such an instruction in a timely fashion and waived appellate review by failing to object to the instructions as given. Further, the record contains no evidence which supported the proposed instruction and, in any event, the jury's failure to avail itself of a lesser included offense on which it had been instructed renders any error harmless under State v. Abreau, 363 So.2d 1063 (Fla. 1978).

## ARGUMENT

### I

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL BASED UPON A LAW ENFORCEMENT OFFICIAL'S TESTIMONY THAT THE APPELLANT REMAINED SILENT AT THE TIME OF HIS ARREST WHERE THE APPELLANT DID MAKE A STATEMENT AT THAT TIME, THE DEFENSE ITSELF INTRODUCED EVIDENCE OF THE APPELLANT'S SILENCE UPON ARREST, AND ANY ERROR WAS OVERWHELMINGLY HARMLESS.

The appellant initially argues that the trial court should have granted a mistrial after an arresting officer suggested that the appellant had remained silent in the face of police questioning. A close review of the evidence presented at trial demonstrates that the appellant did not remain silent, but instead made certain statements to the police. Further, the appellant should not be heard to complain about any misstatements of an arresting officer when the appellant presented detailed testimony regarding the appellant's silence. Should this court determine that the failure to grant the motion for a mistrial was error, the overwhelming evidence of the appellant's guilt rendered any defect harmless.

During the presentation of the State's case, the following exchange occurred between the prosecuting attorney and Deputy Donald J. Veliky, one of the appellant's arresting officers:

> Q: Would you read us now, please, the rights that you gave to Raymond Dolinsky on the occasion of his arrest?
>
> A: Yes, sir, one moment so I can put my glasses on. 'You have the right to remain silent and refuse to answer questions.' Then he is asked, 'Do you understand?' 'Anything you say may be used against you in a court of law, do you understand? You have the right to consult an attorney before speaking to the police and to have an attorney present during questioning now or in the future. Do you understand? If you cannot afford an attorney, one will be appointed for you before any questions if you wish. Do you understand? If you decide to answer the questions now, without an attorney present, you will still have the right to stop answering at any time until you talk to an attorney. Do you understand? And knowing and understanding your rights as I have explained them to you, or you willing to answer my questions without an attorney present?'
>
> Q: And did Mr. Dolinsky indicate to you that he understood his rights?
>
> A: Yes, sir, and he refused to answer any questions at that time.
>
> (R. 503).

At sidebar, the defense objected on the ground that the answer was a direct comment on the appellant's right to remain silent and moved for a mistrial. (R. 504). The prosecutor informed the court that the appellant in fact did make certain statements and that he did not remain silent.

(R. 504). The trial court sustained the objection and reserved ruling on the motion for mistrial until the prosecutor further developed his position. (R. 505-506).

The next witness was Detective William Gallinaro, another arresting officer. After testifying that Detective Veliky had read the appellant his Miranda rights, Gallinaro stated that he had asked the appellant if his name was Bowes and whether he knew Ronald Bowes. (R. 507). The appellant responded by stating that his name was not Bowes, that he did not know any Ronald Bowes, and that he had never heard of any Ronald Bowes. (R. 507-508).

On cross-examination, the appellant himself brought out the Veliky statement that the appellant had remained silent. (R. 508). Further, the appellant had Gallinaro testify that Gallinaro recalled the appellant remaining silent during a previous deposition. (R. 509-510).

At the conclusion of the State's case, the trial court denied the motion for mistrial. In doing so, the trial court held that Donovan v. State, 417 So.2d 674 (Fla. 1982), should control.

NO ERROR

Although substantial authority suggests that any comment on an accused's exercise of his right to remain silent is reversible error[1], Donovan v. State, 417 So.2d 674 (Fla. 1982); Bennett v. State, 316 So.2d 41 (Fla. 1975); Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), the totality of the circumstances in the present case demonstrate that such a rule is inapplicable. Detective Veliky's statement regarding the appellant's failure to answer any questions at the time of his arrest was incorrect. The next state witness, Detective Gallinaro, plainly testified that the appellant did make certain statements regarding his name and knowing his partner, Ronald Bowes. As such, the appellant did not remain silent.

The instant case should be directly controlled by Donovan v. State, 400 So.2d 1306 (Fla. 1st DCA 1981), pet. rev. den., 417 So.2d 674 (Fla. 1982). On appeal from a first degree murder conviction, Donovan argued that his arresting officers commented on his silence when they testified at trial. The evidence revealed that although Donovan had initially remained silent during questioning, he subsequently gave a statement to the police. The First District Court of Appeal rejected the argument and affirmed Donovan's

[1]But see, harmless error, infra.

conviction. Donovan v. State, 400 So.2d 1306, 1309 (Fla. 1st DCA 1981).

This court, on Donovan's petition for review, also rejected the challenge to his conviction. This court noted that any comment on an accused's right to remain silent is reversible error, but held that the accused must have exercised that right for cases such as Bennett v. State, 316 So.2d 41 (Fla. 1975), to apply. A review of the facts in Donovan revealed that he had not invoked his right to remain silent and had made a statement to the authorities. Having elected not to remain silent, Donovan had no reason for complaint. Donovan v. State, 417 So.2d 674, 675-676 (Fla. 1982).

A similar result occurred in United States v. Martinez, 577 F.2d 960 (5th Cir.), cert. den., 439 U.S. 914 (1978). The defendants challenged their convictions by arguing that the government had introduced the following testimony in violation of Miranda v. Arizona, 384 U.S. 436 (1966):

> "Q: Did either of the defendants make any statements in your presence?
>
> A: No, not at that time. We read them both their rights."

The United States Court of Appeals, Fifth Circuit, found that the trial court did not err in denying the defendants' motion for a mistrial:

> "The district court denied the motion on the ground there was nothing wrong within the context of the testimony elicited from the witness. The Court's percipience was confirmed at trial when the witness thereafter testified to statements made by defendants at a later time. Thus, the fact that defendants had made statements and that 'no, not at that time' of the witness could not have carried with it the kind of comment on silence that is condemned in Doyle and Hale. Cf. United States v. Sklaroff, 552 F.2d 1156 (5th Cir. 1977)(single spontaneous remark from witness which did not contradict exculpatory story was harmless error notwithstanding mention of defendant's post-Miranda silence); United States v. Davis, 346 F.2d 583 (5th Cir. 1977)(where there was a trivial infraction of the Doyle rule which was not linked to the defendant's exculpatory story, mention of the defendant's silence was harmless error)."
>
> United States v. Martinez, supra, 577 F.2d at 963.

The only difference between the two discussed decisions and the present case is that the appellant's statement was introduced by a second witness. That, however, should make no difference. The essential thrust of both Donovan and Martinez is that the accused must exercise his right to remain silent before he can complain of a comment on it.

The appellant here did not remain silent, but instead answered Detective Gallinaro's inquires regarding the appellant's name and his knowledge of Raymond Bowes. Because the appellant in fact made a statement to the police, no reversible error has been demonstrated.

NO STATE-CREATED PREJUDICE

Although the appellant objected to Detective Veliky's observation that the appellant had made no statements at the time of his arrest, (R. 503), the appellant introduced the same testimony through cross-examination of Detective Gallinaro. (R. 508-511). Even though the defense apparently contended that the appellant had made no statements, the appellant himself testified that he answered questions from Gallinaro regarding Raymond Bowes when arrested. (R. 639-640).

It is a well established rule that when incompetent evidence is admitted over objection, but the same evidence was thereafter admitted without objection, the benefit of the objection is lost. State v. Rogers, 275 N.C. 411, 432, 168 S.E.2d 345, 358 (1969), cert. den. 396 U.S. 1024 (1970); Wright v. American General Life Insurance Co., 59 N.C. App. 591, 297 S.E.2d 910 (1982), rev. den., 307 N.C. 583, 299 S.E.2d 653 (1983); Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. den., 450 U.S. 927 (1981); Campbell v. State,

227 So.2d 873 (Fla. 1969), cert. dismissed, 400 U.S. 801 (1970); Allah v. State, ___So.2d____, Case No. 83-2825 (Fla. 3d DCA June 4, 1985)[10 F.L.W. 1366]; Holland v. State, 359 So.2d 28 (Fla. 3d DCA 1978).

Applying that rule to the present case, it is clear that the appellant should not be heard to complain on appeal. Although the complaint was raised when Detective Veliky said the appellant did not answer questions, the next witness testified that the appellant did give answers. The appellant's cross-examination of that following witness focused on establishing that the appellant in fact had remained silent. As such, the appellant himself subsequently brought out testimony indicating that the appellant had remained silent at the time of his arrest. Having done so, the appellant cannot now complain that the State's introduction of silence prejudiced him. This is so because the appellant himself also introduced such testimony.

## HARMLESS ERROR

The appellant concludes the first issue on appeal by contending that the harmless error doctrine is inapplicable to comment on silence cases. The argument ignores, however, the current state of Florida law on this issue and the historical development of the harmless error doctrine.

In State v. Murray, 443 So.2d 955 (Fla. 1984), this court adopted the reasoning of United States Supreme Court in United States v. Hasting, 103 S.Ct. 1974 (1983), and held that improper prosecutorial conduct could constitute mere harmless error:

> "...Nevertheless, prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless. The correct standard of appellate review is whether 'the error committed was so prejudicial as to vitiate the entire trial.' Cobb, 376 So.2d at 232. The appropriate test for whether the error is prejudicial is the 'harmless error' rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and its progeny. We agree with the recent analysis of the court in United States v. Hasting, __U.S.____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations. The opinion here contains no indication that the district court applied the harmless error rule. The analysis is focused entirely on the prosecutor's conduct; there is no recitation of the factual evidence on which the state relied, or any

> conclusion as to whether this evidence was or was not dispositive."
>
> State v. Murray, supra, 443 So.2d at 956.

Relied upon in Murray, the Hasting decision makes clear that notwithstanding the protections afforded by the Fifth Amendment, a comment upon the failure of the defendant to testify is not per se reversible error. Instead, reviewing courts, prior to reversal, should examine the appellate record to determine if the error was harmless or the evidence of guilt overwhelming. United States v. Hasting, supra, 103 S.Ct. at 1979-1981.

This court's opinion in the Murray decision clearly adopts the rationale in Hasting and makes clear that an improper comment on the silence of a defendant does not necessarily mandate reversal of a conviction. Instead, the error must be first evaluated in light of the evidence presented at trial.

The appellant's reliance on cases such as Bennett v. State, 316 So.2d 41 (Fla. 1975), and Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967), is clearly misplaced. A review of the Bennett decision and its mandatory reversal rule reveals that the particular holding was far from unequivocal and was dicta in light of the court's conclusion

that the harmless error doctrine was inapplicable because the evidence was not overwhelming. Bennett v. State, supra, 316 So.2d at 44.

In analyzing the Bennett decision, however, it is more important to note that the per se reversal rule and rationale therefor was developed solely from the Fifth Amendment to the Federal Constitution and the Third District Court of Appeal's construction of the then recent Miranda decision in Jones v. State, 200 So.2d 574 (Fla. 3d DCA 1967). The Jones decision, adopted by this court in Bennett, concluded that a comment on a defendant's silence constituted fundamental error requiring reversal without regard to timely objection. In formulating the rule, the Third District Court of Appeal stated that due consideration to the Miranda decision and the views of the United States Supreme Court was required. Jones v. State, supra, 200 So.2d at 56.

In Clark v. State, 363 So.2d 331 (Fla. 1978), however, this Court retreated from the fundamental error language in Jones and held that a contemporaneous objection was required at the trial level. In doing so, this court noted that the Federal Constitution and the holdings of the United States Supreme Court did not mandate the adoption of an absolute rule requiring reversal in every case where there had been an improper comment on the right to remain silent. Clark v. State, supra, 363 So.2d at 334.

As a result, it was little wonder that this court further retreated from the absolute rule of Bennett in the Murray decision. Since a comment on silence is not a fundamental error, application of the harmless error rule therefore became appropriate. The same concerns about the promotion of judicial administration in Florida which guided this court to the adoption of a contemporaneous objection requirement in Clark also mandated application of the harmless error rule in Murray.

Further, it should be noted that Section 924.33, Fla. Stat. (1983), provides a clear legislative restriction on an appellate court's authority to reverse convictions where the errors asserted are "harmless". See Perri v. State, 441 So.2d 606 (Fla. 1983). Section 924.33, Fla.Stat. (1983), merely represents a codification of the same standard applied by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1967) and its progeny.

The absurdity of the mandatory reversal requirement is no more clearly demonstrated than in the case at bar. Detective Veliky was the only person at trial to state that the appellant had remained silent at the time of his arrest. The witness who followed Veliky stated that the appellant did answer questions at the time of his arrest and this testimony was corroborated by the appellant himself. Nonetheless, the appellant contends reversal is warranted.

Had Veliky not made his statement, the next witness would have testified that the appellant answered questions at the time of his arrest. In response, the defense apparently would have challenged the testimony by presenting previous deposition statements that the defendant had remained silent. Yet, reversal is suggested simply because the State brought it out first.

Application of a mandatory reversal requirement on such facts would be a miscarriage of justice. The appellee submits that application of the harmless error doctrine to the present case requires affirmance. The evidence at trial reveals that the appellant and another perpetrated a brutal murder. The State introduced eyewitness testimony that the appellant and his partner had acted in concert to rob the victims and then murder them. The observations of other witnesses, including the medical examiner, supported the eyewitness testimony. This court should be satisfied that the evidence in the present case was of such a nature that any mistaken comment regarding the appellant remaining silent was harmless in nature.

## II

THE APPELLANT WAS NOT DENIED A FAIR TRIAL BY IMPROPER QUESTIONS OF THE PROSECUTOR WHERE THE APPELLANT FAILED TO OBJECT OR IN ANY WAY CHALLENGE THE INQUIRIES AND WHERE THE TESTIMONY WAS PROPERLY ADMISSIBLE UNDER THE RULES OF EVIDENCE.

The appellant suggests he was denied a fair trial by the introduction of testimony that the appellant had an alias. He also objects to certain alleged hearsay testimony. In both situations, however, the appellant did not object or otherwise challenge the admissibility of the evidence. Under such circumstances, the error cannot serve as the basis for reversal.

As a general matter, a reviewing court will not consider points raised for the first time on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978); Dorminey v. State, 314 So.2d 134 (Fla. 1975). The requirement of a contemporaneous objection is based on a practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually. Castor v. State, supra.

To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. Castor v. State, supra; Rivers v. State, 307 So.2d 826 (Fla. 1st DCA) cert. den., 316 So.2d 285 (Fla. 1975).

In the present case, there is no record evidence to suggest that the appellant ever challenged the inclusion of his alias in the indictment. Further, the appellant never objected when the indictment was shown to the jury. Under similar circumstances, this court has rejected a complaint regarding evidence of an alias where a proper objection had not been made. Parker v. State, 456 So.2d 436, 443 (Fla. 1984).

The suggestion that the State manufactured the alibi is ludicrous. The trial transcript reveals that the appellant was known as the brother of Ronald Bowes. (T. 405). As such, the alias had a factual foundation relevant to identification.

The appellant's complaint regarding the hearsay statements of Ronald Bowes were also not preserved for appellate review. Tillman v. State, ___So.2d____, Case No. 64,653 (Fla. June 7, 1985)[10 F.L.W. 305]; Simpson v. State, 418

So.2d 984 (Fla. 1982), cert. den., 459 U.S. 1156 (1983); Jalbert v. State, 95 So.2d 589 (Fla. 1957); Hills v. State, 428 So.2d 318 (Fla. 1st DCA 1983).

Had the appellant challenged the hearsay, the statements would have been properly admissible. Hearsay statements of co-conspirators are not dependent upon the existence of a count charging a conspiracy. The admissibility of such statements depends, instead, on the rule of evidence which excepts such statements from the general rule which makes hearsay inadmissible. Damon v. State, 289 So.2d 720 (Fla. 1974); Honchell v. State, 257 So.2d 889 (Fla. 1982); Tresvant v. State, 396 So.2d 733, 736 (Fla. 3d DCA 1981).

Section 90.803 (18), Fla.Stat., (1979), provides that a statement by a person who was a co-conspirator of the party during the course of the conspiracy is admissible hearsay. In order for such testimony to be admissible, the State must show a conspiracy by some independent evidence. Tresvant v. State, supra, 396 So.2d at 737.

In the present case, independent evidence clearly would have existed. The appellant admitted receiving a call from his partner prior to the murders. (R. 630). Further, the independent statements and actions of the appellant himself

provided more than a sufficient basis for introduction of his partner's conversations. (R. 349-361).[2]

The present record reveals that the appellant failed to object to the errors raised on appeal. As such, appellate review is precluded. Regarding the merits, the alias was relevant to the identification of the appellant and the hearsay properly admissible pursuant to Section 90.803 (18), Fla.Stat. (1979). As such, no reversible error has been demonstrated.

[2]In this instance, the failure to object was plainly strategic. The appellant, by flooding his trial with the statements of his partner, Ronald Bowes, sought to deflect attention from his own participation. (R. 1069-1070).

III

THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT TO DEATH WHERE THE COURT PROPERLY FOUND THREE AGGRAVATING FACTORS, CONSIDERED ALL EVIDENCE PRESENTED IN MITIGATION, AND DETERMINED THAT THE AGGRAVATING FACTORS OVERWHELMINGLY OUTWEIGHED THE MITIGATING EVIDENCE.

The appellant presents a myriad of challenges to his sentence. He attacks the applicability of the aggravating factors found by the trial court, complains that the jury recommendation should not have been overridden, and suggests his sentence is not proportional to that of the other participants in the appellant's crime. In review of each argument demonstrates that the trial court correctly concluded that death was the appropriate sentence.

## AGGRAVATING FACTOR: PREVIOUS CONVICTION FOR A CRIME OF VIOLENCE

Although acknowledging that this court in Johnson v. State, 438 So.2d 774 (Fla. 1983), and Hardwick v. State, 461 So.2d 79 (Fla. 1984), have held that contemporaneous convictions may be considered in death penalty sentencing, the appellant nonetheless argues that a contemporaneous conviction cannot be "previous" for the purpose of Section 921.141 (5)(b), Fla.Stat. This court, however, has repeatedly rejected such an argument. Hardwick v. State, 461 So.2d 79,

81 (Fla. 1984); Johnson v. State, 438 So.2d 774, 778 (Fla. 1983); King v. State, 390 So.2d 315 (Fla. 1980), cert. den., 450 U.S. 989 (1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). The term, "previous", as utilized in Section 921.141 (5)(b), Fla.Stat., simply means convictions for violent felonies existing prior to the sentencing proceedings.

According to the appellant, the above cited cases are inapplicable because the actual perpetration of the felony murders were done by the appellant's partner, Ronald Bowes. According to the appellant, the perpetration of Bowes' killings does not show a propensity toward violence on the part of the appellant. Such an argument, however, ignores the long standing rule in Florida that aiders and abettors present at the scene fully share in the actual perpetrator's responsibility for criminal offenses. James v. State, 453 So.2d 786 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. den., 103 S.Ct. 3129 (1983); Hall v. State, 403 So.2d 1321 (Fla. 1981).

As the appellant correctly notes, Section 921.141(5) (b), Fla.Stat., permits courts to engage in character analysis to ascertain whether a defendant exhibits propensity to commit violent crimes. Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). The appellant cannot reasonably argue that Section 921.141 (5)(b), Fla.Stat., is inapplicable

simply because he failed to pull the trigger in the murder of the two other victims in this case. The evidence at trial clearly revealed that the appellant and his partner had planned the execution of the victims. During the trip to the Keys, the appellant's partner notified the appellant by telephone that the transaction had begun. The appellant, waiting at a pre-determined location and wearing surgical gloves, held the victims at gunpoint, alerted his partner as to the location of each victim, and asked State witness Clark whether he was with the appellant and his partner or not. Later, the appellant transported the proceeds of their crime in his van. The totality of the circumstances in the present case show that the appellant contributed to the actual perpetrator's murder of victims Hamilton and Colbaugh. Other than pulling the trigger himself, the appellant could have done no more to contribute to their deaths. As such, the appellant cannot suggest that his convictions for second degree felony murder do not show a propensity toward violence.

The appellant also attacks the aggravating factor of previous conviction for a crime of violence by arguing that it unlawfully duplicates the finding that the crime was committed for pecuniary gain. In Blockburger v. United States, 284 U.S. 299 (1932), the United States Supreme Court held:

> "The applicable rule is that 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 additional fact which the other does not."
>
> Blockburger v. United States, supra, 284 U.S. at 304.

Applying Blockburger, as adopted by this court in State v. Baker, 456 So.2d 419 (Fla. 1984), it becomes readily apparent that both the evidence and the elements establishing violations of Section 921.141 (5)(b), Fla.Stat., and Section 921.141 (5)(f), Fla.Stat., are completely different.

Section 921.141 (5)(b), Fla.Stat., requires proof that the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. The essential elements include commission of a violent felony on an individual and a conviction therefor. In the present case, the State relies on the appellant's conviction for second degree felony murder on victims Hamilton and Colbaugh.

Section 921.141(5)(f), Fla.Stat. requires that the capital felony be committed for the purpose of pecuniary gain. The essential elements are the murder of an individual and the perpetration with the purpose of pecuniary gain.

In the present case, the proof showed that the appellant murdered victim Redman after luring him to a remote section of the Keys for a pretended delivery of a controlled substance for the purpose of taking the fifteen to twenty thousand dollars to be supplied by the buyers in the transaction.

An examination of each statutory aggravating circumstance makes clear that the Blockburger test is satisfied. Each section requires proof of a fact that the other does not, even though a substantial overlap in proof may exist. In the present case, however, the evidence as to each aggravating circumstance is different and the trial court did not erroneously double aggravating circumstances.

Finally, the appellant's suggestion that his felony-murder convictions cannot establish a felony involving the use or threat of violence is utterly ridiculous. On the facts in this case and the instructions given to the jury, the appellant cannot reasonably suggest that his two second degree felony murder convictions do not show the use of violence. Felony murder, by its very nature, establishes the element of force. Section 782.04, Fla. Stat.

The challenge to the trial court's sentencing order is equally meritless. The appellant apparently would require

the trial court to specifically set out what facts established the aggravating circumstances. The sentencing order, however, plainly shows that the trial court found the appellant lured the victims to the Keys for a pretended delivery of drugs and then participated in the murder of the victims. (R. 177). The only theory ever presented for such an action was to take the buyers' money, amounting to approximately fifteen to twenty thousand dollars. Further, the evidence supporting the appellant's second degree felony murder convictions is readily apparent from the record. Under such circumstances, this certainly fails to constitute a basis for reversal.

## AGGRAVATING CIRCUMSTANCE: MURDER DURING ROBBERY AND COMMITTED FOR PECUNIARY GAIN

The trial court concluded that the murder in the present case was perpetrated during the commission of a robbery and therefore established the aggravating circumstances in Section 921.141 (5)(d), Fla.Stat. or Section 921.141(5)(f), Fla.Stat. (R. 177). Contrary to appellant's argument, the evidence overwhelmingly established the murder was committed during a robbery and for pecuniary gain.

The appellant's partner, Ronald Bowes, made all the arrangements to allegedly sell approximately fifty pounds of marijuana to the victims for approximately fifteen to twenty

thousand dollars. (R. 337-341; 422-427). The victims were required to show their purchase money prior to being taken to the Keys. (R. 340; 426). The appellant's partner took the parties to a prearranged location where the appellant awaited. (R. 343-348).

The appellant and his partner then murdered Hamilton, holder of the purchase money, and later killed his two companions. On the return trip to Fort Lauderdale, the appellant and his partner gave their companion, Clark, almost $5,000. (R. 349-368). Throughout the episode, there was no evidence that the appellant or his partner ever intended to actually sell the victims a quantity of marijuana. The evidence presented at trial and the inferences drawn therefrom clearly establish these aggravating factors. Heiney v. State, 447 So.2d 210 (Fla. 1984).[2]

AGGRAVATING CIRCUMSTANCE: COLD, CALCULATED AND PREMEDITATED

The trial court also properly concluded that the murder in the instant case was committed in a cold, calculated and premeditated manner without any pretense of moral or legal

[2]The appellant also argues that the robbery/pecuniary gain aggravating circumstance is improperly doubled with the previous conviction finding of Section 921.141 (5)(b), Fla. Stat. This argument has already been addressed in this brief and the response is readopted here.

justification. Section 921.141 (5)(i), Fla.Stat. This court has often stated that this aggravating circumstance should not be utilized in every murder prosecution. Although not intended to be all inclusive, McCray v. State, 416 So.2d 804 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. den. 456 U.S. 984 (1982), it has been recognized that this factor traditionally applies to those murders which can be characterized as execution, contract, or witness elimination killings. Herring v. State, 446 So.2d 1049 (Fla. 1984).

The evidence adduced at trial plainly supports the trial court's application of this factor to the present case. The record shows that the victim and his friends were lured to a remote area of the Keys. The appellant awaited their arrival in his van. The appellant and his partner initially separated victim Hamilton from the remainder of the group and killed him. (R. 349-350; 485-486). For twenty minutes, victim Hamilton's companions were left to wonder what had happened to their friend. (R. 349-350). The appellant and his partner then forced the other two victims to the ground. (R. 351-356).

The appellant, wearing surgical gloves, searched victim Redman at gunpoint. (R. 353-358). The appellant then marched victim Redman off in the same direction that Hamilton had gone. (R. 358-360).

Victim Redman next heard another gunshot and a second companion fall. (R. 360-362). Finally, the victim heard the appellant's partner direct the appellant to kill Redman. (R. 360-362).

The described facts explicitly show that the appellant and his partner had planned the deaths. The appellant, wearing surgical gloves, executed the victim. It was clear that the perpetrators were not going to leave any witnesses to their crime.

For victim Redman's part, he experienced a half-hour of terror. He heard his friends fall one by one to gunshots, knowing that he must be next. Finally, he heard the direction that ended his life.

The facts of this case and the inferences drawn therefrom are sufficient to show the heightened premeditation required for the application of this aggravating circumstance. Compare, Johnson v. State, 465 So.2d 499 (Fla. 1984); Mason v. State, 438 So.2d 374 (Fla. 1983); Herring v. State, supra; Mills v. State, ___So.2d___, Case No. 63,092 (Fla. January 10, 1985)[10 F.L.W. 1045]. See, also Middleton v. State, 425 So.2d 548 (Fla. 1982).

The death of the victims in the instant case were not the result of an instantaneous act nor a "result due to

minor differences." Brief of appellant, p. 30. There was sufficient evidence from which the trial court could have concluded that the appellants, in a planned scheme, killed the victims to avoid detection and identification.[3]

## OVERRIDE OF THE JURY RECOMMENDATION

In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla. 1975). It is the function and province of the trial court to determine the weight to be given particular mitigating circumstances and whether they off-set the established aggravating circumstances. Herring v. State, supra. This court must then review the sentence to determine if the facts clearly and convincingly suggest the imposition of death. Section 921.141 (3), Fla.Stat. In the

[3]Assuming arguendo that the trial court erred in finding any one aggravating circumstance applicable, the sentence should nonetheless be affirmed. When one or more of the aggravating circumstances are found, death is presumed to be the proper sentence unless it is overridden by one or more of the mitigating circumstances. State v. Dixon, 283 So.2d 1, 9 (Fla. 1983). If one improper aggravating factor may have been included in the weighing process, "we can know" that the result of the weighing process would not have been different had the one impermissible factor not been considered. Bassett v. State, 449 So.2d 803 (Fla. 1984). As in Brown v. State, 381 So.2d 690 (Fla. 1980), cert. den., 449 U.S. 1118 (1981), and Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. den. 444 U.S. 919 (1979), there are ample other statutory aggravating circumstances to support the weighing process in this case.

present case, the trial court was correct to override the jury recommendation of life imprisonment since there was no reasonable basis for it.

The appellant can point to nothing to support the jury's recommendation. During the sentencing hearing, the appellant presented testimony from two close relatives that the appellant was a hard worker and a good family man. (R. 727-734). The trial court found that this testimony did not rise to the level of substantially mitigating evidence. (R. 177). The trial court also noted that the record was devoid of any evidence of mental impairment or emotional disturbance[4].

The trial court properly found that the murder of victim Redman in the present case was committed during the commission of a felony or for pecuniary gain, was perpetrated in a cold, calculated and premeditated manner, and was done when the appellant had previous convictions for felonies of violence. No truly mitigating factors existed. Faced with three proper aggravating factors weighed against the absence of any substantially mitigating circumstances,

[4]The appellant also argues that the presentence investigation report contained letters from friends and family seeking life imprisonment for the appellant. It should be noted that this report was not presented to the jury during its deliberations and merely constituted cumulative evidence to that presented by the appellant's relatives.

the facts suggesting the sentence of death were so clear and convincing that virtually no reasonable person could differ. Compare, Gorham v. State, 454 So.2d 556 (Fla. 1984); Bolender v. State, 422 So.2d 833 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981). See, also Herring v. State, 446 So.2d 1049 (Fla. 1984); Hargrave v. State, 366 So.2d 1 (Fla. 1978); Meeks v. State, 339 So.2d 186 (1976); Hoy v. State, 353 So.2d 826 (Fla. 1977); Brown v. State, ___ So.2d____, Case No. 62,922 (Fla. June 27, 1985).

## PROPORTIONALITY

Proportionality review is a process where this court reviews a case before it in light of those which have been previously decided to insure rationality and consistency in the imposition of the death penalty. Sullivan v. State, 441 So.2d 609 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den., 416 U.S. 943 (1974). As has previously been discussed, the appellant's death penalty is consistent with other cases in which three aggravating factors have been found and no mitigating evidence exists. As such, his sentence is proportional.

Pointing to the results in the cases against James Clark and Ronald Bowes, the appellant suggests it is fundamentally unfair to sentence him to death where his partner received a life sentence and the accomplice after the fact

was placed on five years probation. Such an argument, however, ignores the culpability of each party for victim Redman's death. Clark, accessory after the fact, initially resisted attempts by the appellant's partner to shoot an already dead victim Redman. Clark finally fired a shot into Redman's body only after being forced to do so at gunpoint. (R. 361-363). Further, Clark cooperated with law enforcement authorities. His nolo contendere plea and the receipt for five years probation in exchange for his testimony was reasonable when compared with the appellant's acts. Bassett v. State, 449 So.2d 803 (Fla. 1984); White v. State, 403 So.2d 331 (Fla. 1981); Brown v. State, ___So.2d___, Case No. 62,922 (Fla. June 27, 1985).

At the time of appellant's trial, his partner, Ronald Bowes, was a fugitive from justice. It was therefore impossible to know what result would occur in Bowes' case. Subsequently, Bowes was captured, tried, and convicted of first degree murder for the killing of victim Redman. After the advisory jury recommended life imprisonment, a different trial judge sentenced Bowes to life. (R. 202-206).

A number of considerations warrant affirmance of the appellant's sentence. First, the trigger man in Redman's death was the appellant, not Ronald Bowes. As such, this case is plainly distinguished from Slater v. State, 316 So.2d 539 (Fla. 1975), where the death sentence of an

accomplice was reduced to life because the trigger man had also received life.

Secondly, the lesser sentence of an equally guilty accomplice does not mean as a matter of law that the appellant cannot receive the death sentence. Bassett v. State, 449 So.2d 803 (Fla. 1984). Indeed, this court has affirmed the death sentence in a situation where two "trigger men" existed, one getting the death penalty and one getting life imprisonment. See Jacobs v. State, 396 So.2d 1113 (Fla.) cert. den., 454 U.S. 933 (Fla. 1981); Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. den., 444 U.S. 885 (1979); Troedel v. State, 462 So.2d 392 (Fla. 1984).

When comparing the respective roles of Clark and Bowes to the actions of the appellant, the sentence of death for the appellant is appropriate. See, e.g., Witt v. State, 342 So.2d 497 (Fla.), cert. den. 434 U.S. 935 (1977). While it may have been fortunate that Ronald Bowes escaped with a lesser sentence, it does not require reduction of the appellant's death penalty. White v. State, 415 So.2d 719 (Fla. 1982).

## INABILITY TO REBUT THE PRESENTENCE INVESTIGATION REPORT

The appellant concludes the attack on his sentence by suggesting that the defense did not have an opportunity to rebut any of the information contained in the presentence investigation report. Prior to sentencing, the appellant moved for a continuance because the defense did not have sufficient time to review a sentencing guideline scoresheet which had been prepared and the presentence investigation report. (R. 756-758). In response, the trial court noted that the sentencing guidelines were inapplicable to the appellant's case and a presentence investigation report was not required. (R. 758). As such, the trial court concluded that anything contained in the presentence investigation report would have no effect on the sentencing. (R. 758).

Because the trial court stated it did not consider either document challenged below, it can serve as no basis for attack on appeal. If the appellant contends that his counsel failed to perform his duties by reviewing the documents, that matter is best reserved for collateral attack.

IV

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY ON AGGRAVATED BATTERY AS TO COUNT II OF THE INDICTMENT WHERE THE PROPOSED INSTRUCTION WAS NOT SUBMITTED IN TIMELY FASHION, WAS NOT SUPPORTED BY THE EVIDENCE, AND WAS NOT PRESERVED FOR APPELLATE REVIEW.

The appellant finally argues that the trial court incorrectly failed to instruct the jury on the lesser included offense of aggravated battery. Close review of the record in the present case, however, demonstrates that the appellant failed to submit a request for such an instruction in a timely fashion and waived appellate review by failing to object to the jury instructions as given. Further, the record contains no evidence which supported the proposed instruction and, in any event, the jury's failure to avail itself of a lesser included offense conviction on Count II rendered any error harmless.

TIMELINESS AND WAIVER

On November 8, 1983, the charge conference was held. At that time, both parties engaged in substantial discussion about the instructions to be given the jury. (R. 667-681). On Count II, the appellant requested the lesser included offenses of first degree felony murder, second degree murder, second degree felony murder, third degree felony

murder, and manslaughter. (R. 667-669). The appellant stated his satisfaction with the instructions as formulated. (R. 680).

On the morning of final arguments and conclusion of the case, the appellant requested that the court include an additional instruction relating to aggravated battery on Count II. (R. 681). Because the request was submitted immediately prior to the commencement of the proceedings, the trial court concluded that it came too late and that the requested instruction would not be considered. (R. 682). The appellant did not respond to the trial court's ruling, but instead focused his attention on another portion of the jury instructions. (R. 681-684).

After closing argument by both sides, the trial court instructed the jury on the law. (R. 686-707). Although given the opportunity to again raise objections to the instructions, the appellant did not raise the aggravated battery issue. (R. 707-712).

It is well settled in Florida that instructions on lesser included offenses should be given upon timely request. State v. Bruns, 429 So.2d 307 (Fla. 1983); Chester v. State, 441 So.2d 1165 (Fla. 2d DCA 1983). Where a defendant fails to present a timely request or otherwise fails to object to the instructions as given, appellate review is

precluded. See, Esquires v. State, 450 So.2d 208 (Fla.) cert. den., 105 S.Ct. 268 (1984); Buttoson v. State, 443 So.2d 962 (1983), cert. den., 105 S.Ct. 223 (1984); Harris v. State, 438 So.2d 787 (Fla. 1983), cert. den., 104 S.Ct. 2181 (1984); Evans v. State, 452 So.2d 987 (Fla. 3d DCA 1984).

In the present case, the appellant undisputedly failed to request the lesser included offense of aggravated battery in a timely fashion. Further, the failure to raise the issue when given the opportunity by the trial court waived the issue for appellate consideration. Under such circumstances, this court should deny relief.

PROPRIETY OF THE AGGRAVATED BATTERY INSTRUCTION

A trial judge should instruct on a lesser included offense only after determining that an evidentiary basis exists to support it. State v. Terry, 336 So.2d 65 (Fla. 1976); Gilford v. State, 313 So.2d 729 (Fla. 1975); Brown v. State, 206 So.2d 377 (Fla. 1968). Although the appellant contends otherwise, the present record did not contain evidence warranting an aggravated battery instruction.

The appellant presented an alibi defense at trial. (R. 1046-1052; 1069-1118). The testimony at trial revealed that

victim Redman was shot by the appellant at close range in the chest. The medical examiner testified that the gunshot perforated the victim's heart and lungs. The wound was considered mortal in nature and the medical examiner estimated that the cessation of life would have occurred within approximately two to three minutes. (R. 478-491). It was further noted that a second, subsequent gunshot struck victim Redman in the head. (R. 479-480).

Because state witness Clark testified that he fired the second shot which struck the victim's head, the appellant argues an aggravated battery instruction was required. To support this conclusion, the appellant directs this court's attention to the medical examiner's testimony that the wound to the chest would have taken minutes to kill the victim and the wound to the head would have caused instantaneous death. (R. 478-482; 490-491). In essence, the appellant argues that Clark could have fired the shot which instantaneously killed the victim while the victim laid dying from the appellant's inflicted wound.

Such an argument, however, ignores the medical testimony that both wounds were mortal. (R. 479-480; 481). Even if the appellant's scenario is accepted, an aggravated battery instruction still was not appropriate. Florida law has consistently established that persons engaged in a

common criminal scheme are individually liable as principals for the death of a victim, even though there is no proof as to which actually killed the victim. Hall v. State, 403 So.2d 1319 (Fla. 1981); Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. den., 411 U.S. 987 (Fla. 1973); Pope v. State, 84 Fla. 428, 94 So. 865 (1922). See, also, Francois v. State, 407 So.2d 885 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981). As such, the appellant was a principal under any construction of the evidence and the trial court properly rejected the aggravated battery instruction.

## HARMLESS ERROR

Finally, any error by the trial court in failing to instruct on aggravated battery must be harmless error. Because an aggravated battery instruction was more than one step removed from the offense charged and the jury declined to avail itself of the lesser offense, the appellant cannot argue that the failure to instruct on an offense more than one step removed prejudiced him.

This court, in State v. Abreau, 363 So.2d 1063 (Fla. 1978), described why a situation such as the present case presents harmless error:

> "For example, if a defendant is charged with the offense 'A' of which 'B' is the next immediate lesser-included offense (one step

> removed) and 'C' is next below 'B' (two steps removed), then when the jury is instructed on 'B' yet still convicts the accused of 'A' it is logical to assume that the panel would not have found him guilty only of 'C' (that is, would have passed over 'B'), so that the failure to instruct 'C' is harmless."
>
> State v. Abreau, supra, 363 So.2d at 1064.

See, also, DeLaine v. State, 262 So.2d 655 (Fla. 1972).

The jury in the present case convicted the appellant on Count II of the offense as charged, premeditated first degree murder. The jury did not convict on the lesser-included offenses of second degree murder and manslaughter. Because the jury declined to exercise its pardon power in convicting on any lesser included offense as instructed, the appellant cannot now be heard to complain regarding an even lower lesser-included offense.

## CONCLUSION

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

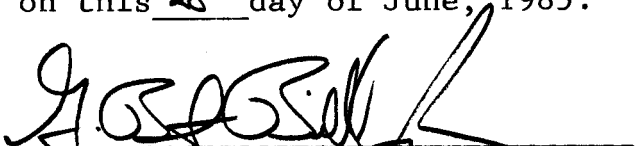
Respectfully submitted,

JIM SMITH
Attorney General

G. BART BILLBROUGH
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to MICHAEL L. SULLIVAN, Attorney for Appellant, 800 S.W. 3rd Avenue, Okeechobee, Florida, 33474, on this 28th day of June, 1985.



G. BART BILLBROUGH
Assistant Attorney General

ss/