IN THE FLORIDA SUPREME COURT

ENRIQUE GARCIA,

Appellant, Cross Appellee

vs. Case No. 64,841

STATE OF FLORIDA,

Appellee, Cross Appellant

BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

FRANK J. MIGLIORE JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

OF COUNSEL FOR APPELLEE

FJM/cww

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

PRELIMINARY STATEMENT

This brief refers to the State of Florida as "Appellee"; to Enrique Garcia as "Appellant"; to Appellant's trial counsel, Roger Bone, Esq. as "Counsel"; and to the Record on Appeal as "R" followed by the appropriate page number. The record consists of nineteen volumes.

The State of Florida Cross Appeals.

For purposes of clarity and consistency this brief refers to the State of Florida (cross-Appellant) as Appellee; and to Enrique Garcia (cross-Appellee) as Appellant;

STATEMENT OF FACTS

Appellee accepts Appellants statement of facts, supplemented as follows.

Surviving victim Rosenna Welch identifies Appellant as one of the four men in the back room of the West Farm Market who robbed and killed the Wests (R 2025, 2029).

Geraldo Gaona, Appellant's brother-in-law, testified that on the same day of the shooting that Appellant tells Gaona that Appellant shot somebody (R 1405, 1407-1409); and that the purpose in shooting the victims was to eliminate them as witnesses (R 1407-11408).

Former fellow prisoner Johhny Huewitt testifies that Appellant tells him:

Appellant and some friends of his planned to rob a farm store because one of his friends was out of a place to stay (R 1777).

When they asked the man to give them the money he wouldn't give it to them (R 1777).

The man told one of Appellant's friends to get away from a certain cabinet. This "kind of ticked him off." (R 1777-1778), 1787).

So, Appellant shot the man (R 1778).

He next put the gun up to the lady's face and told her to give him money. Every time he put the gun up to her face, she just pushed it down and away (R 178). He made her lay down on the floor (R 1779).

Then, he shot her, several times (R 1779).

Appellant next told an older man to shoot this older lady. He wouldn't. Appellant then draws his pistol towards the older man's head and tells him to shoot the woman. He does (R 1779).

He made the older guy shoot the second woman because he did not have any more bullets. Had he the bullets, he would have done it himself (R 1788).

He knew more than likely they would probably find him guilty, but the other guy would get found guilty too (R 1790).

From the beginning, the victims knew this older man and they would therefore have to kill them (R 1781).

Four people went to the farm market but only he and the older man were going to do the killing (R 1781).

Appellant, the older man and a third man went inside the farm market, while the fourth waited outside (R 1781).

Finally, Appellant was in jail because the older guy shot the second woman with his head turned and wasn't paying attention to what he was doing (R 1782).

SUMMARY OF THE ARGUMENT

Prior to sentencing, the trial court dismissed Count IV of the indictment, attempted first degree murder, for failure of the indictment to allege premeditation.

The state cross appeals this dismissal.

This omission is not fatal. The indictment is sufficient. It charges a crime.

If it is defective, the defect is a mere imperfect allegation of the elements of premeditation of attempted first degree murder. It is not wholly void for failure to state a crime.

Appellant claims his absence from the courtroom on a total of nine pre-trial, trial and post trial occasions abrogated fundamental constitutional rights (Issue I).

However at no time was Appellant absent from the courtroom at a critical state of his trial. All absences were voluntary.

Appellant would both waive his presence and then claim constitutional infirmity.

The trial court properly admitted evidence of three statements Appellant gave the police (Issue II).

He gave the first to a Det. Stout on a Friday evening; the second to Det. Stout on the following Monday morning. They are on tape.

Appellant fails to properly preserve objection to these two statements for appeal.

No improper promise of leniency infects the former. No attempt to delude Appellant infects the latter.

Appellant attempts to characterize his third statement, which occurred in a car while the Sheriff's office transported him to the Manatee County jail, as a response to the functional equivalent of questioning. It was not. Appellant simply blurted out an incriminatory statement. It is admissible.

Error, if any is harmless, in light of the rest of the evidence against Appellant.

Surviving victim Rosenna Welch's statements to Det. Stout, at the crime scene, prior to her transportation by ambulance to the hospital, sprang spontaneously and instinctively from the stress, pain and excitement the shootings caused. She made them so soon after the shooting that they preclude the idea of deliberation, fabrication or design (Issue III).

The trial court properly admitted them through the testimony of Det. Stout.

The trial court imposed no sentence on the two robbery charges (counts six and seven of the indictment) underlying Appellant's felony-murder convictions (counts two and three of the indictment).

It was not error to adjudicate Appellant guilty on the underlying convictions (Issue IV).

Appellant has no right to a PSI on the non-capital counts of his indictment (Issue V).

The State made no attempt to mislead jurors during final argument. If it did, then Appellant fails to demonstrate how the state mislead them (Issue VI).

Neither did the court mislead jurors its answer to their concurrent life sentences question. The trial court responded with a specific answer which was a correct statement of the law. Appellant demonstrates no abuse of discretion (Isse VI).

Appellant engages mere speculation. He then attempts to cloak it beneath the mantle of constitutional infirmity.

Appellant misdirects his attack on comments by the State reference Appellant's sentence because the prosecutor made them to the Court after the Court discharged the jury (Issue VII A).

The comments were in any event proper. The evidence adduced at trial supports them.

The State rejects as an unsupported summary conclusion Appellant's argument, raised here and elsewhere, that the jury's felony-murder verdicts preclude any finding that the Appellant planned the victims deaths.

Appellant murdered the victims in order to avoid and prevent his own arrest (Issue VII B).

The trial court properly instructed the jury on the existence of this aggravating aspect of the killings. It properly found it in its amended judgment.

There is ample record support for the trial court' decision. It did not speculate. Neither did it impute the motives of another participant to Appellant.

What happened to the victims prior to their deaths set these crimes apart from the norm of capital felonies and justifies the trial court's finding that these murders were heinous, atrocious and cruel (Issue VII C).

The trial court properly denied admission of a photograh of Appellant's home for its failure to give a clear view of the home. It admitted three others. Appellant published just one to the jury (Issue VII D).

Appellant, having had one sentencing hearing, protests denial of another at which he acknowledged he planned to submit more evidence of the same nature submitted at the prior hearing (Issue VII D).

Finally, Appellant demonstrates no abuse of discretion in the trial court's failure to find several factors which may or may not constitute statutory mitigating circumstances (Issue VII D).

The Record amply demonstrates that the trial court did not merely rubberstamp the jury's recommendation of the death penalty (Issue VIII).

Assuming an erroneous jury instruction on the weight of a jury's recommendation of life or death, Appellant fails to preserve the issue for appeal. Error, if any, was harmless.

Appellant was the triggerman in the killings. This justifies imposition of the death penalty.

Alternatively: He aided and abetted the homicides, not just the underlying felonies. This justifies imposition of the death

penalty.

There is no reasonable hypothesis Appellant did not kill, attempt to kill or intend to kill the homicide victims (Issues IX - X).

ISSUE I

ENRIQUE GARCIA'S ABSENCE FROM SEVERAL STAGES OF THE PROCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

Appellant claims his absence from the courtroom on a total of nine pre-trial, trial and post-trial occasions abrogated his fundamental constitutional rights. Francis v. State, 413 So.2d 1175 (Fla. 1982).

Appellee distinguishes this case from Francis on the same basis this honorable court distinguished Hall v. State, 420 So.2d 872 (Fla. 1982) from Francis:

At no time was Appellant absent from the courtroom during a "critical stage"[1] of his trial.

Conversely, he was present at all critical stages of the proceedings and available to consult with his counsel.

There is a second distinction. Francis and Hall were cases where the defendant's absence was involuntary.

Here, Appellant's voluntary absence during a non crucial portion of the trial is not error, irrespective of waiver by defense counsel: Herzog v. State, 439 So.2d 1372 (Fla. 1983).

In any event, the record below amply demonstrates that Appellant waived his presence either directly or through counsel.

> A waiver is ordinarily an intentional relinquishment of a known right or privilege. The determination of whether there has been an intelligent waiver...[of the right to counsel].. must depend in each case upon the

---

1. Critical stages are "all stages of a trial when the defendant's absence might frustrate the fairness of the proceedings." United States v. Stratton, 649 F.2d 1066, 1080 (5th Cir 1981) (footnote omitted)

> particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.
> Johnson v. Zerbst, 304 U.S. 458, 82 L.ED 1461, 58 S.Ct. 1019 (1938)

If the defendant has no objection to his counsel, counsel may waive objection to his absence and case law imputes actual or constructive knowledge of the proceedings to the defendant. Upon his re-appearance, defendant must acquiesce or ratify the actions his counsel took in his absence. State v. Melendez, 244 So.2d 137 (Fla. 1971). Henzel v. State 212 So.2d 92, (Fla. 3d DCA 1968). Smith v. State, 453 So.2d 505 (Fla. 4th DCA 1984).

The first incident occurs in chambers immediately prior to the beginning of jury qualification on Nov 14, 1983 (R 1-15).

Defense counsel waives Appellant's presence (R 5-6).

The court and attorneys discuss Appellant's motions for change of venue, additional peremptory challenges, sequestration of the jury and jury selection procedures (R 6-15).

Appellant's constitutional right to be present begins when the trial begins. The trial begins when selection of a jury to try the case commences. Melendez, supra, Shaw v. State, 422 So.2d 20 (Fla. 2d DCA 1982). This is a pre-trial conference (R 5). Hence, there is no constitutional violation.

Furthermore, counsel's oral waiver of Appellant's presence, in open court, recorded and transcribed by the court reporter, obviated the writing requirement of Florida Rules of Criminal Procedure 3.180(a)(3). Eastwood v. Hall, 258 So.2d 269 (Fla. 2d DCA 1972).

The second incident is a hearing on defendant's motion to suppress witness Cindy Ziroll's testimony that Appellant was one of two men she saw running from the West Farm Market on Oct. 8, while two others sat in a car (R 1561-1563-1564, 1568, 1591).

The hearing begins on a Saturday, Nov. 19. Appellant is in court. Ziroll identifies him (R 1563-1564).

The court recesses following Ziroll's testimony and reconvenes Monday, Nov. 21, 1983 (R 1578, 1579-1580).

Appellant's counsel now waives Appellant's presence at argument on the motion, (R 1580) which the court subsequently denies (R 1591).

However, Appellant cannot show prejudice: Ziroll never testifies!

In any event, no Appellate court has extended a defendant's right to be present at trial to an evidentiary hearing. United States v. Gradsky, 434 F.2d 880 (6th Cir 1971); Hall v. Wainwright, 733 F.2d 766 at 786 (1984). (Judge Hill, concurring)

The third incident is similar to the second in that Appellant absents himself from the courtroom during argument on defense objections to certain evidence on grounds that the State did not establish its claim of custody:

> (In open court)
> THE COURT: Members of the jury, we will recess for the evening at this time. We will reconvene in the morning at nine-thirty.
> (Whereupon, the jurors left and the following proceedings occurred outside the presence of the jury:)
> MR. BONE: May it please the court, I have spoken with my client. I have advised

him that at this hearing we will be discussing the admissibility of evidence based upon the chain of evidence and not substantive evidence being taken.

He has requested that he waive his presence and be allowed to go upstairs and have dinner.

THE COURT: Is that correct, Mr. Garcia?

THE DEFENDANT: Yeah.

THE COURT: All right.

(R 1872)

See: Gradsky, supra; Hall, supra.

Appellant next complains of his absence at an unreported charge conference (R 2090). Once again, counsel waives his presence (R 2090-2091).

THE COURT:... Let the record show that we have had an instruction conference and that the attorney for the defendant represented that the defendant waived his presence.

MR. BONE: I spoke with the defendant before we left and gave him the choice, and, again, he said he would rather be upstairs during the conference, when deciding sentences and the charges.

THE COURT: Also, let the record show that no prior rulings have been made at the conference. We were just discussing wording, and all objections will be put on the record as to any of the instructions given or not given. (R 2090-2091)

Failure to have the defendant present during a charge conference is not fundamental error. Defendant need not be present. Randall v. State, 346 So.2d 1233 (Fla. 3rd DCA 1977).

Incidents five and six occur while the jury deliberates its verdicts.

Five: The jury sends the court this note:

> Can we use the felony first degree murder law in an attempted murder case, reference is to count number four (signed: Stewart Anderson, jury foreman)
> (R 2197)

Appellant's counsel waives his presence. (R 2196)

The court writes "yes" on the note and returns it to the jury. (R 2196).

Smith v. State, 453 F.2d 505 (Fla. 4th DCA 1984) holds that error, if any, was harmless, when the trial court denied a jury request to hear the penalties for lesser included offenses while the defendant was absent, his counsel was present and counsel expressly waived defendant's presence.

Subsequent to incident five and prior to incident six, the court reconvenes so that it might discuss the jury's dinner accomodations. The jury then resumes deliberation. (R 2198) This discussion follows:

> MR. BONE: I have had several discussions with my client at this point, being that he would rather go upstairs and wait for the jury in the event of the verdict. If they have further questions, you want to waive your presence to the questions?
> THE DEFENDANT: Yes.
> MR. BONE: If they ask about dinner?
> THE DEFENDANT: I just want to stay up there.
> MR BONE: That is your desire?
> THE COURT: Are you satisfied about everything? That is the point.
> THE DEFENDANT: Yes
> MR. GARDNER: Thank you.
>
> (R 2199-2200)

The sixth incident occurs later the same evening when the jury asked to and did rehear the testimony of Geraldo Gaona, Garcia's brother-in-law. (R 2200-2201)

> THE COURT: Before we bring the jury in, Mr. Bone, I understand that your client has waived his right to be here and in open court?
>
> MR. BONE: Yes, sir, with Martha, that the court reporter has that down, and he indicated he would stay upstairs and wait pending the outcome, the final verdict.
>
> He necessarily didn't want to be here for these preliminary type hearings and questions. He indicated that on the record.
>
> For the record, I waive his appearance additionally.
>
> MR. GARDNER: You understand that this is the giving of testimony?
>
> MR. BONE: Yes, sir; it's not giving testimony; it's recanting [sic] testimony.
>
> MR. GARDNER: But it is receiving testimony.
>
> MR. BONE: They have already heard it. They are reviewing evidence.
>
> THE COURT: Okay, bring the jury in... (R 2200)

The seventh and eighth incidents occur during jury deliberation of a recommended sentence.

This colloquy precedes their return to the courtroom.

> MR. BONE: Your honor, it's my understanding that the reason we are reconvening at this juncture is to receive a verdict form for each count for which the defendant stands convicted, wherein the penalty of death by electrocution is the possible sentence.
>
> I have previously discussed with my client coming back for questions and whatever. He has indicated he would not like to be here until the jury comes back with the verdict.
>
> Additionally, I am doing this not only because he agreed and waived his presence,

> but additionally, as the jury departed, while the jury was still present, while they were filing out of the room, even though my desk is approximately twenty-five to thirty feet from the front of the jury box, my client said to me, "I hope they give me death."
>
> The court indicated he didn't hear it, nor the court reporter, who was located halfway between my desk and the jury box.
>
> However, in an abundance of caution, because the defendant has requested specifically that I waive his presence at these hearings, we are waiving them for both reasons.
>
> (R 2263-2264)

Finally, counsel waives Appellant's presence at a Nov. 29, 1983 post-trial hearing (R 2509). This is no basis to disturb Appellant's conviction. Luster v. State, 262 So.2d 910, (Fla. 3rd DCA 1972).

Appellant cites Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984); and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) as supplementary authority on this issue.

They are inapplicable. They deal with defendant's absence at a critical stage of the trial.

Appellee iterates its position that Appellant was at no time absent during any critical stage.

Appellee nonetheless argues further: Hall, supra, reads Proffitt to hold that a defendant may not waive his presence at any critical stage of the trial. Hall, supra at 775.

However, notwithstanding its analysis, Proffitt, supra, specifically declines to decide the issue of whether presence at a capital trial is ever waivable. Proffitt, supra, at 312.

Judge Hill, in his concurring opinion in Hall analyzes the

same line of cases the Proffitt court analyzes[2] and concludes "that the defendant may waive his presence in a capital trial and that he may do so in any variety of ways." Hall, supra at 785.

Appellee respectfully submits that Judge Hill's is the better analysis.

In summary: The record allows no doubt that Appellant intentionally relinquished a known right. It is replete with waivers by both Appellant and his counsel in Appellant's absence.

At no time did his absence frustrate the fairness of the proceeding.

Appellant would both waive his presence and then claim constitutional infirmity. However, as the Third District wrote in another waiver case, State v. Belien, 379 So.2d 446, (Fla. 3rd DCA 1980):

> ..."gotcha!" maneuvers will not be permitted to succeed in criminal any more than in civil litigation.

---

2. Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed 500 (1912); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed 262 (1884); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed 2d 353 (1970); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed 1011 (1892); Drope v. Missouri, 420 U.S. 162, 95 S.Ct 896, 43 L.Ed 2d 103 (1975).

ISSUE II

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT ENRIQUE GARCIA'S TRIAL STATEMENTS GARCIA MADE TO LAW ENFORCEMENT PERSONNEL.

Appellant does not properly preserve for appeal his challenge to the admissibility of taped statements numbers two and three. (States Exhibits #50A and #53)

The State informed Appellant long before trial it intended to use his statements (R 2609, 2560, 2576-2577, 2615, 2621, 2651-2652).

Nonetheless Appellant failed to file a pre-trial motion to suppress either statement[1].

Neither are his objections to either statement specific or contemporaneous. Steinhorst v. State, 412 So.2d 332, (Fla. 1982); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Stanley v. State, 357 So.2d 1031 (Fla. 3rd DCA 1978).

> Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. State v. Jones, 377 So.2d 1163 (Fla. 1979); State v. Barber, 301 So.2d 7 (Fla. 1974); Silver v. State, 188 So.2d 300 (Fla. 1966); Dukes v. State, 3 So.2d 754, 148 Fla. 109 (1941). Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below. Haager v. State, 83 Fla. 41,

---

1. Florida Rules of Criminal Procedure 3.190(1)(2) Motion to Suppress a confession or admissions, illegally obtained, time for filing: The motion to suppress shall be made prior to trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in the discretion may entertain the motion or an appropriate objection at the trial. (emphasis added)

90 So. 812, 813 (1922); Kelly v. State, 55 Fla. 51, 45 So. 990 (1908); Camp v. Hall, 39 Fla. 535, 22 So. 792 (1897); Black v. State, 367 So.2d 656 (Fla. 3d DCA 1979).

Steinhorst, supra, at 338 (emphasis added)

In Herzog, a first degree murder case, the trial court imposed the death penalty after the jury recommended life in prison.

Herzog contested the admission of taped statements which he claimed the police took from him in violation of his right to remain silent:

> At the outset we note that the defendant failed to object to the introduction of the tape as evidence. Defendant urges that this is not fatal to an appeal on this issue. He argues that the trial court's determination of voluntariness, notwithstanding the lack of objection, serves to satisfy the policy reasons for the contemporaneous objection rule and preserves the issue for appellate review. We find this argument to be of no merit. See Wainwright v. Sykes, 433 U.S. 72, 88-89, 97 S.Ct. 2497, 2507-08, 53 L.Ed.2d 594 (1977).
>
> Herzog, supra, at 1377

So too, in Stanley, the defendant sought to suppress statements he made while in police custody.

> A specific objection to the introduction of evidence must be timely raised during trial in order to be properly considered on appeal, as failure to raise such objection constitutes a waiver. The objection cannot be raised either at a later stage of the proceedings or on appeal, even though a motion to suppress the evidence was preliminarily made and denied by the court. See Shea v. State, 167 So.2d 767 (Fla. 3d DCA 1964); Koran v. State, 213 So.2d 735, 737 (Fla. 3d DCA 1968). Also see Rodriguez v. State, 189 So.2d 656 (Fla. 3d DCA 1966); State v. Dixon, 348 So.2d 333 (Fla. 2d DCA 1977).
>
> Stanley, supra, at 1034 (emphasis added)

In both cases, when Appellant objects, he does so only generally (as to the voluntary nature of his statements) and at the wrong time. (R 1373) He makes no mention of the arguments he now raises on appeal.

Arguably, the state is not even seeking admission of statement number two at this point ("we are only going to play the first one.") (R1373). However, the trial court overrules Appellant's objection, and the record reflects admission of both statements (R 1373).

The State subsequently acknowledges that tape number two (State's Exhibit #50-A) is in evidence when it moves to publish it to the jury (R 1442).

Appellant offers no objection at this point; and at no point does he object specifically to State's purported promise of leniency (R 1443-1444).

Later, Appellant objects again, generally, to the admission of his third taped statement (State's Exhibit #53) for failure of the state to show that it was voluntary (R 1490). The court denies the objection (R 1490).

However, once again, Appellant fails to object specifically, or contemporaneously to the alleged error which Appellant raises for the first time on this appeal: the statement by the officer questioning Appellant that "It's not going to change anything... if you tell us your entire involvement in this crime" (R 1501).

Neither has the state any burden of proving "dissipation of taint" attaching to the Friday night, Oct. 9, taped statement

prior to taking Appellant's Monday morning, Oct. 11, statement, where Appellant has failed to raise the initial allegation of taint at the trial level. Steinhorst, supra, Herzog, supra, Stanley, supra.

Assuming for the purpose of argument Appellant's specific contemporaneous objection to the admisson of taped statement number two (State's Exhibit 50-A), Appellant still fails to demonstrate error.

Appellant initiated that part of the conversation which led to Det. Stout's alleged improper promise of leniency.

Appellant asked what consequences he faced if he wasn't a shooter in the murders (R 1441). Det. Stout simply answered Appellant's question. See: LaRocca v. State, 401 So.2d 866 (Fla. 3d DCA 1981).

Appellant's taped statement implicitly put his understanding of what Stout said at odds with Stout's recollection of that conversation. However, the trial court need not credit the uncorroborated testimony of the Appellant and discredit Stout's testimony. Green v. State, 363 So.2d 188 (Fla. 1st DCA 1978).

Appellant advances as argument the summary conclusion that Det. Stout attempted to delude Appellant during the Monday, Oct. 11 interview by telling Appellant it was not going to change anything if Appellant confessed his entire involvement in this crime.

In any event, an analysis of Appellant's statements after this alleged attempt to delude him reveals no admission(s) beyond those he had already made.

Appellee next addresses the "McCrosson" statement.

At the outset, Appellee rejects as wholly unsupported Appellant's proposition that the alleged taint of the undue influence investigators exercised on Oct. 8th and 11th infected a conversation almost three months later when Dep. McCrosson transported Appellant from Polk County to Manatee County on Dec. 30, 1982.

Appellant errs in his argument that mere denial of a motion to suppress does not constitute a clear finding that the statement which is the subject of the motion was made voluntarily.

> This Court, however has modified the strict requirement that an express finding must appear in the record. See Wilson v. State, 304 So.2d 119 (Fla. 1974); Henry v. State, 328 So.2d 430, 431 n.1, (Fla.), cert denied, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976)[3] Ideally, the trial judge should specify his conclusions concerning the voluntariness of a disputed confession or inculpatory statement. However, due process is not offended when the issue of voluntariness is specifically before the judge and he determines that the statements are admissible without using the magic word "voluntary."
>
> Antone v. State, 382 So.2d 1205 (Fla. 1980) (footnote omitted) (emphasis added)

The record below reflects that the only issue then before the court was the voluntariness of Appellant's statements to Dep. McCrosson (R 2470).

Neither did McCrosson engage in the "functional equivalent of questioning."

The "functional equivalent of questioning" contemplates

> ...any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

> incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.
>
> Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed2d 297, 100 S.Ct. 1682 ( )(footnotes omitted)

The record clearly supports Appellee's position that McCrosson had no reason to suspect that what he said was reasonably likely to elicit an incriminating response from Appellant:

McCrosson asked Appellant no questions about his case (R 2476, 2479).

McCrosson asked one initial question: Did the Polk County jailers treat Appellant fairly? (R 2473)

Appellant continues the conversations (R 2496). He asks McCrosson about his attorney (R 2476). McCrosson subsequently asks Appellant the name of his attorney (R 2477). That is as close to asking anything about the case as McCrosson comes.

Ten minutes of silence follow (R 2478).

Appellant then blurts out an incriminating statement (R 2478). See: Witt v. State, 342 So.2d 497 (Fla. 1977): Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983)

The testimony of Geraldo Gaona (R 1399-1426), Appellant's brother-in-law, and Johnny Huewitt, former fellow prisoner (R 1766- 1802) render the admission of Appellant's confessions, if error, harmless error.

Gaona testifies that later on the same day of the shooting, Appellant tells Gaona he shot somebody (R 1405).

Q. (By Mr. Gardner) What did Ricky Garcia tell you about what had happened?

A. Well, when we went walking to the hardware store --

Q. Please speak into the microphone.

A. And there was talking about the shooting over there, and I don't know what it was, but they -- they were arguing about the shooting over there and only tried to take the lady and the man to the room and shoot them, shoot them all in the room so that they can not leave evidence.

Q. So they could not live?

A. Leave evidence.

Q. And be evidence?

A. Yeah.

MR. BONE, Now, your honor, he is leading the witness.

THE COURT: Let the witness talk.

Q. (BY MR. GARDNER) What was the word? Could you again tell me in as good as [sic] you can?

A. That they tried to put them in a room so they can shoot them in the room, so they didn't have evidence in the room, the robbery.

Q. Was your word "Evidence"?

A. Yeah.

Q. What did Ricky Garcia tell you about Bennie?

A. That he was scared to shoot that old lady: that old lady tried to tell him to not shoot at her; that she only tried to say, "Don't shoot, Bennie, don't shoot." And they came out and tell him to not be affected; to shoot them.

So, Bennie shoot them.

A JUROR: I didn't hear that answer.

THE COURT REPORTER: "So, Bennie shoot them."

Q. (BY MR. GARDNER) when you got back to the car, did you see a gun in the car?

A. Yeah.

MR. BONE: I renew my objection to the leading type of questions.

THE COURT: Sustained.

Q. (BY MR. GARDNER) Did you see a gun in the car?

MR. BONE: Your Honor, I believe the court has already ruled on that question.

MR. GARDNER: Well, I will withdraw the

question.

Q. Did you look into the car?
A. Yeah.
Q. What did you see?
A. A gun.
Q. What else did you see?
A. I saw a box of bullets. And Ricky told me they was -- the gun was from Junior and Contrars. [sic] (R 1407-1409)

See also: R 1419, 1422-1423.

Former fellow prisoner Johnny Huewitt testifies that Appellant tells him:

Appellant and some friends of his planned to rob a farm store because one of his friends was out of a place to stay (R 1777).

When they asked the man to give them the money he wouldn't give it to them (R 1777).

The man told one of Appellant's friends to get away from a certain cabinet. This "kind of ticked him off." (R 1777-1778, 1787).

So, Appellant shot the man (R 1778).

He next put the gun up to the lady's face and told her to give him money. Every time he put the gun up to her face, she just pushed it down and away (R 1778). He made her lay down on the floor (R 1779).

Then, he shot her, several times (R 1779).

Appellant next told an older man to shoot this other lady. He wouldn't. Appellant then draws his pistol towards the older man's head and tells him to shoot the woman. He does (R 1779).

He made the older guy shoot the second woman because he did not have any more bullets. Had he the bullets, he would have done it himself (R 1788).

He knew more than likely they would probably find him guilty, but the other guy would get found guilty too (R 1790).

The victims knew this older man and they would therefore have to kill them (R 1781).

Four people went to the farm market but only he and the older man were going to do the killing (R 1781).

Appellant, the older man and a third man went inside the farm market, while the fourth waited outside (R 1781).

Finally, Appellant was in jail because the older guy shot the second woman with his head turned and wasn't paying attention to what he was doing (R 1782).

The jury's request during deliberations to hear Gaona's testimony read to them (R 2200-2201) obviates any doubt of the importance the jurors placed on Appellant's admission to Gaona.

It also obviates any argument by Appellant that but for admission of the three contested statements, there could be no conviction.

Finally, "A trial court's ruling on a motion to suppress comes to this court with a presumption of correctness and must be accepted by this court if the record reveals evidence to support the findings. See e.g., State v. Battlemen, 374 So.2d 636 (Fla. 3d DCA 1979);" State v. Spurling, 385 So.2d 672 (Fla. 2d DCA 1980). See also: Williams v. State, 338 So.2d 913 (Fla. 3d DCA 1976); Finney v. State, 420 So.2d 639 (Fla. 3d DCA 1982).

ISSUE III

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE PRIOR CONSISTENT STATEMENTS MADE BY ROSENNA WELCH IN ORDER TO BOLSTER THE TESTIMONY SHE GAVE AT TRIAL.

Rosenna Welch's spontaneous statements to Det. Stout shortly after the shooting were part of the res gestae. The trial court properly allowed Stout to testify to these statements.

Res gestae is an exception to the hearsay rule.

> A statement admissible as res gestae must be spontaneous, made with little or no opportunity for reflection. There are no set criteria, each case is judged on its peculiar facts. Florida, while not stable in its allowance of res gestae, does follow a liberal rule concerning its admittance. Lambright v. State, 1894, 34 Fla. 564, 16 So. 582, and Atlantic Coast Line Railroad Co. v. Shouse, 1922, 83 Fla. 156, 91 So. 9.
>
> Appell v. State, 250 So.2d 318 (Fla. 4th DCA 1971) (emphasis added)

Generally, there are four factors to consider on the admission of res gestae:

1) The time gap between the statement and the accident.

2) The voluntary nature of the declaration.

3) The self serving nature of the statement.

4) The declarant's physical and mental condition at the time of the statement.

> Time is quite important. Naturally the more time elapsing, the less chance of a spontaneous reflection on the occurrence... The time span alone won't make the statement within or without the res gestae. But the

> comparatively short time in combination with a lack of other factors mitigating spontaneity would, and do substantiate a finding of res gestae.
>
> Appell, supra

"While time is an important factor, the spontaneity of the utterance is probably most controlling. Thus, res gestae is not limited only to those statements made simultaneously with the act in question. Monarca v. State, 412 So.2d 443 (Fla. 5th DCA 1982).

> A more liberal statement of the rule as announced by many recent decisions is that, not only such declarations and acts as accompany the transaction are admissible as parts of the res gestae, but also such as are made or performed under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance or act created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they were the result of premeditated design.
>
> Washington v. State, 118 So.2d 650(Fla. 2d DCA 1960.)

Thus, in State v. Williams, 198 So.2d 21, (Fla. 1967) this honorable court found that a statement by a shooting victim eight minutes after the shooting occurred that "A man tried to rob me, I have been hurt, I need help," was substantially contemporaneous with the offense and within the res gestae rule.

In Johnson v. State, 314 So.2d 248 (Fla. 1st DCA 1975) the First District admitted statements made at least within thirty minutes of the incident and probably closer to fifteen minutes from the time the victim was stabbed.

The record reveals:

Customer Charles Campbell entered West's Farm Market within a few minutes of the shooting (R 1011). He heard Rosenna Welch groan (R 1012). She could have been pleading for help (R 1012).

Rosenna Welch tells him she's dying and needs help (R 1013).

Customer Clete Fortwendel was with Campbell: Rosenna Welch pled for help; said she was in pain; and that her chest hurt; that she couldn't breathe; and was going to die (R 1022).

Welch knew she'd been shot, but didn't know where (R 1036). She indicated there were some people in the back that were hurt (R 1038).

Det. Stout arrives at the Farm Market at 1:28 p.m. (R 1338). It appeared to Stout that Rosenna Welch had been shot a number of times in the chest and pelvic areas; and at least once in the head. She was conscious and bleeding profusely (R 1339).

She appeared "more than excited" but rational (R 1339).

> Q. (By Mr. Clark) What did you hear her say?
> A. She told me that she had been in the store and three or four Mexicans had come in; that they all had guns, and that they pushed her into the back room and sat her on a chair; they started demanding money; that while they were demanding money, they kept pointing a gun into the face of Mr. and Mrs. West; When they apparently didn't get the amount of money that they thought should be in the store, they laid Mr. and Mrs. West on the floor and shot them.
> (R 1340)

In light of the foregoing, Appellee submits there can be no doubt but that Rosenna Welch's statements sprang spontaneously and instinctively from the stress, pain and excitement caused by

the shooting; and occurred so soon after the shooting as to preclude the idea of deliberation, fabrication or design.

Appellee distinguishes this case from every case Appellant cites which rejects the State's "res gestae" argument. Two elements, either or both of which, were present in those cases are absent here. They are the time and distance that separate the disputed statement from the locus and corpus of the crime.

Lamb v. State, 357 So.2d 437 (Fla. 2d DCA 1978): Lamb put a gun to his girlfriend and threatened to shoot her. She was the sole witness.

The Second District found that the event of the crime had long occurred and terminated by the time she related her story to the police.

McRae v. State, 383 So.2d 289, (Fla. 2d DCA 1980) was a rape case.

"Here, several hours had elapsed between the June 20 events and the victim's statements [to Riley and Hoylman], and eight days had elapsed between the June 12 events and the statements" McRae, supra, at 292.

Holliday v. State, 389 So2d 679 (Fla. 3d DCA 1980) was another rape case. The disputed testimony came from an examining physician. How long after the incident occurs and where the examination takes place is not clear. However, it is apparent that, as in Lamb, the events of the crime have long occurred and terminated.

Johnson v. State, 58 So. 540 (Fla. 1912). The victim's

"dying declarations" occurred four to five hours after the defendant shot him. Victim spoke with several people in the interim.

Brown v. State, 344 So.2d 641. (Fla. 2d DCA 1977). The defendant faced a charge of committing a lewd and lascivious act. The victim's statements came three days after the incident.

Finally, Perez v. Florida, 371 So.2d 714 (Fla. 2d DCA 1979) was a first degree murder and aggravated battery case. Defendant shot and wounded one Joel Gutierrez in a wooded area. Despite this, Gutierrez was able to run away, escape Perez, and eventually make his way to a main road where he obtained help.

ISSUE IV

THE COURT BELOW ERRED IN ADJUDICATING ENRIQUE GARCIA GUILTY OF THE TWO ROBBERIES WHICH WERE THE FELONIES UNDERLYING HIS FELONY MURDER CONVICTIONS.

Hawkins v. State, 436 So.2d 44 (Fla. 1983) is on point and adverse to Appellant. It disposes this issue.

Hawkins stood convicted of felony-murder, robbery and burglary. Hawkins contested his sentence for both robbery and first-degree murder.

This honorable court upheld Appellant's robbery conviction but vacated his robbery sentence.

Here, the trial court adjudicated Appellant guilty on the two underlying robbery charges (counts six and seven in the indictment) (R 2528-2529) but imposed no sentence for either count.

ISSUE V

THE COURT BELOW ERRED IN SENTENCING ENRIQUE GARCIA FOR NON-CAPITAL OFFENSES WITHOUT BENEFIT OF A PRE-SENTENCE INVESTIGATION.

Appellant advances as argument the unsupported conclusion that Thompson v. State, 389 So.2d 197 (Fla. 1980); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. den, 444 U.S. 919, 100 S.Ct. 231, 61 L.Ed.2d 176 (1979); and Thompson v. State, 328 So.2d 1 (Fla. 1976) should not abolish his (purported) right to a PSI on the non-capital counts of his indictment.

Thompson (1978) holds unequivocally, however,:

> ...once the jury returns a verdict of first degree murder, the trial court is exempt from the mandatory presentence requirements of Rule 3.710, Rules of Criminal Procedure.

In Harich v. State, 437 So.2d 1082 (Fla. 1983) the defendant stood convicted of first degree murder, use of a firearm in the commission of a felony and two counts of kidnapping.

This honorable court summarily rejected Appellant's contention that the trial judge should have ordered a PSI and affirmed the conviction and sentences for all offenses.

See also: Buford v. State, 403 So.2d 943 (Fla. 1981).

ISSUE VI

THE SENTENCING RECOMMENDATION MADE BY THE JURY WAS TAINTED BY IMPROPER ARGUMENTS OF THE PROSECUTING ATTORNEY AND BY THE COURT'S INCOMPLETE ANSWER TO A QUESTION FROM THE JURY.

The State made no attempt to mislead jurors. Neither did the court mislead jurors in its answer to their concurrent life sentences question.

Appellant engages in mere speculation. He then attempts to cloak it beneath the mantle of constitutional infirmity.

Appellant fails to demonstrate how the State mislead jurors. Assuming for argument that it did so, the Appellant fails to demonstrate any prejudice.

Appellee respectfully submits that those comments which Appellant now challenges are well within the purview of argument directed to establish Appellant's decision to kill all witnesses in his attempt to avoid arrest and prosecution.

If Appellant finds that these arguments depict murders that were especially heinous, atrocious and cruel, it is perhaps because they were.

Unfortunately, the nature of certain statutory aggravating and mitigating criteria are such that they are not susceptible of antiseptic packaging.

Appellant would, nonetheless, have the State separate the waters of a pond.

If in fact Appellant is correct in his assertion, then the State does nothing to advance its argument that Appellant killed to avoid or prevent arrest. (Since the jurors received no "heinous, atrocious and cruel" aggravating factor instruction, to what end does it serve the state to demonstrate these were that kind of murder?) Appellant thus shows no prejudice.

Alternatively, even if Appellant counters that the State directed arguments to both aggravating factors, Appellee interates its position earlier: The contested comments are demonstrably directed at the Appelants decision to kill the witnesses in order to avoid arrest and prosecution. These comments may inevitably also reflect upon the nature of the murders. This does not, however, preclude the State's right to argue them, nor does it necessarily render Appellant's sentence unconstitutional. Barclay v. Florida, ___U.S. ___, 77 L.Ed.2d 1134, 103 S.Ct. ___ (1983).

The trial court properly focused the jury deliberations through its initial instructions (R 2258-2263).

The feasibility and scope of any reinstruction of the jury is a matter residing within the discretion of the trial judge. Henry v. State, 359 So.2d 864 (Fla. 1978).

> In Hysler v. State, 85 Fla. 153, 95 So. 573 (1922), this court established the principle that it is proper for a judge to limit the repetition of the charges to those specifically requested as any additional instruction might needlessly protract the proceedings. We echoed this principle in Hedges v. State, 172 So.2d 824 (Fla. 1965) but added the caveat that the repeated charges should be complete on the subject involved.
>
> Henry, supra at 866

The question before this court in Henry was whether the trial judge abused his discretion and gave an incomplete instruction on the subject involved in reinstructing only upon first and second degree murder. The jury had asked him to clarify the difference between the two offenses.

That's all he did.

This court found no abuse of discretion in limiting reinstruction to a direct response to the jury's specific request.

> Indeed, to do otherwise might not only create confusion in the minds of the jurors but might give the appearance of placing the trial judge in the role of an interested advocate rather than an impartial arbiter.
>
> Henry, supra at 867

In light of Henry, Appellee suggests that the trial court below properly answered the jury's question the only way it could: by refusing to answer it at all; and informing jurors that it had final decision on the matter.

> I cannot answer that question. I refer you to page one of the main instructions that I have given you, the first two sentences of the second paragraph.
>
> As you have been told, the final decision as to what punishment is imposed is the responsibility of the judge.
>
> (R 2270)

The trial court thus gave jurors a correct statement of the law. California v. Ramos, ___U.S.___, 77 L.Ed.2d 1171, 103 S.Ct. __ (1983).

Appellant nonetheless argues that the trial court's answer left the jury "to ponder its concern over whether life sentences would run concurrently."

Appellant argues that a complete reinstruction as to the law and functions of the court would have refocused the jury on their jobs.

What Appellant does not explain is how this would otherwise rescue the jury from the dilemma on which it claims the courts answer left: "pondering" its concern over whether two life sentences would run concurrently.

In summary: Appellant demonstrates no abuse of discretion. The trial court responded to a specific question with a specific answer which was a correct statement of the law.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING ENRIQUE GARCIA TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant mounts four arguments:

ISSUE A

IMPROPER ARGUMENT BY PROSECUTOR

Appellant first attacks comments made by the prosecutor, after the trial court had discharged the jury, at Appellant's sentencing hearing on matters (allegedly) unsupported by the evidence adduced at trial.

Appellee responds:

Appellant advances as argument the summary conclusion that the jury's felony-murder verdicts preclude any finding that Appellant planned the victims deaths.

The evidence adduced at trial simply supports the prosecutors argument:

Appellee, iterates the testimony of Geraldo Gaona, Rosenna Welch and Johnny Huewitt, as well as Appellant's own admissions:

Appellant told investigating officers:

He, Bennie Torres Contreras, Louis Pina and "Jose Perez" [Urbano Ribas] began to plan to rob the West Farm Market on Monday [Oct. 4, 1982] while at Harllee Farms (R 1444, 1492, 1504).

Bennie and Louis said they were going to kill everybody so they wouldn't leave witnesses R 1449).

They all agreed to kill witnesses (R 1505, 1508). This was their intent (R 1508-1509).

He and Louis said they wouldn't kill anyone so they [Bennie Torres Contreras and Urbano Ribas] said not to worry about it; they would take care of it. (R 1465)

They all went inside (R 1515). He went into the back room (R 1527). He held a gun while "Junior" looked for money (R 1446, 1449, 1510, 1530).

Appellant told Dep. James McCrosson (in reference to a conversation with someone from the State Attorney's Office):

> All the fuck that he wanted was for me to confess to something that had nothing to do with me; that he didn't have no witnesses because me and my partners didn't leave none unless one of them told some lies. (R 2478)

The trial court's Amended Judgment (R 3081-3083) finds:

> 1.(e)... The evidence discloses that it was agreed among all participants in the crimes that since one of the participants was known by the victims that all the victims would have to be killed so no one could identify them...
> (h) This defendant in addition to the purpose set forth in (e) admitted he had killed the male victim so that the female victim would disclose where the money was hidden. He also admitted that when the female victim would not disclose its location, he killed her too. The evidence further shows that it was he who ordered the other gunman to kill the third victim because he was out of bullets. The evidence, without contradiction, shows that the two killings were done in execution style while the two victims were laying on the floor.

Huff v. State, 437 So.2d 1087 (Fla. 1983), Appellant's sole authority, is inapplicable.

It deals with comments on matters unsupported by the evidence produced at trial during closing argument to the jury. It does not address argument to the court at sentencing.

Assuming for argument only:

(a) The prosecutor did make impermissible comment;

(b) On matters not supported by the evidence;

(c) Which are not one of the aggravating circumstances enumerated in Section 921.141(5) Florida Statue:

Appellant still engages in mere speculation.

The United States Supreme Court in Gardner v. State, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed 2d 393 (1977), recognized the ability of the sentencing judge to disregard material in imposing sentence when it said:

> "In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material.
>
> Gardner, L.Ed 2d at 403

> The judicial discretion exercised in imposing the death sentence is limited in such a manner that the judge may not consider many factors of which he is aware... In considering the imposition of the sentence, the trial judge's discretion is guided by statute and case law. He may be "aware" of other factors, but he does not "consider" these factors in the exercise of his discretion. For example the judge may be "aware" of inadmissible evidence after a

proffer has been made, but the evidence is never" considered" by the judge."

Alford v. State,
355 So.2d 108
(Fla. 1977)

The judicial system depends upon the ability of trial judges to disregard improper information and to adhere to the requirements of law in deciding a case of imposing a sentence. Harvard v. State, 414 So.2d 1032 (Fla. 1982).

Thus, Appellant's unsupported a conclusion that "the court apparently felt he could consider the prosecutor's comments,..." is wholly without merit.

ISSUE B

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON, AND FINDING THE EXISTENCE OF, THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONIES WERE COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

Appellant mounts two arguments:

(1) There is too little evidence to justify a finding that he either intended to kill, attempted to kill, or killed the Wests for the purpose of avoiding or preventing a lawful arrest. (R 2926, Appendix, P.1).

(2) The trial court cannot impute Bennie Torres Contreras motives to Appellant in order to make such a finding.

Both argument fail.

The trial court's amended judgment focusses on Appellant's culpability as per the requirement of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed2d 1140 (1982):

> ..."All of the evidence in the case shows the defendant participated in the robbery with three other people.
> ...the evidence discloses that it was agreed among all participants in the crimes that since one of the participants was known by the victims that all the victims would have to be killed so no one could identify them.
>
> [Appellant] admitted he had killed the male victim so that the female victim would dislose where the money was hidden. He also admitted that when the female victim would not disclose its location, he killed her too. The evidence further shows that it was he who ordered the other gunman to kill the third victim because he was out of bullets.
> (R 3081-3082)(Emphasis added)

Appellant once again advances as argument the unsubstantiated summary conclusion that defendant's conviction

for felony murder precludes any finding of advance planning or premeditation. The State rejects this contention.

However, Enmund, is no bar to use of this aggravating circumstance by the court in reaching its decision to impose the death penalty; even assuming:

(1) Appellant was not the triggerman, and

(2) This Court accepts Appellant's assertion that it may not now consider any of the record support for premeditation.

Appellant's statements to fellow prisoner Johnny Huewitt (R 1777-1782) in and of themselves satisfy the Enmund test; as does his admission to his brother-in-law, Geraldo Gaona (R 1405, 1399-1426).

However, Appellee also iterates the Appellant's own admissions to Dep. McCrosson (R 2478) and other investigating officers (R 1444, 1449, 1465, 1492, 1504-15-5, 1508-1510, 1515, 1530) in support of the trial court's findings.

Appellee distinguishes Rivers v. State, ___So.2d___ (Fla. Case No. 62,127, decided Nov. 1 1984) [9 F.L.W. 476]

Rivers appealed his first degree murder conviction and death penalty. There was no doubt he was the shooter. The jury's verdict specified felony murder rather than premeditation as the basis of liability.

This was a restaurant hold up. Appellant shot the [victim] waitress as she turned to run down a hallway.

The trial court therefore concluded that Appellant shot the waitress to keep her from leaving and calling the police.

This Court found the trial court's conclusion speculative.

Here, however, the court does not speculate. It has the benefit of defendant's statements which go directly to his decision to kill all witnesses.

If this Court should find that the Record does not establish proof beyond a reasonable doubt of the decision to kill the victims to avoid arrest, Appellee respectfully suggests that the evidence adduces a very strong inference of that decision, and thus justified the trial court's decision to submit this aggravating circumstance to the jury and to find it as part of its amended judgment. Rivers, supra, 9 F.L.W. at 477.

Finally, Appellee argues that Appellant's conviction for conspiracy to rob Willie and Martha West with a firearm is proof beyond a reasonable doubt that Appellant intended the use of lethal force, and thus overcomes any bar Enmund presents to imposition of the death penalty.

ISSUE C

THE COURT BELOW ERRED IN FINDING AS AN AGGRAVATING CURCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

Appellant cites a line of cases which establish that a homicide is not heinous, atrocious or cruel if the killer fires seven times; Blanco v. State, 452 So.2d 520 (Fla. 1984); the victims survive awhile after their shooting; Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. den., ___U.S.___, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); the victim dies instantly, Armstrong v. State, 399 So.2d 953, (Fla. 1981), Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 99 S.Ct. 2220, 53 L.Ed.2d 239 (1977); or is merely done "execution style"; Parker v. State, ___So.2d___, (Fla. 1984, Case No. 63,700) [9 F.L.W. 349].

None of these cases address what happened to the victims prior to their deaths.

The additional facts which set these crimes apart from the norm of capital felonies are:

Appellant held both victims at gunpoint (R 1446, 1449, 1510, 1530).

He demanded Mr. West give him the money. West refused (R 1777). Appellant shot him (R 1778).

Appellant's put a gun to Martha West's face and demanded money shortly before shooting her. She pushed it away. He did it again. She pushed it away again. This happened several times. (R 1340, 1778-1779).

Survivor Rosenna Welch "kept hearing them tell her she was going to die if she didn't get the money." (R 2028)

She also testified "I heard one of them say" you had better hope that he gets back soon; if he doesn't you're going to die." (R 2019)

He then makes her lay down on the floor and shoots her (R 1779).

These facts establish the fear and emotional strain that preceded the victims deaths. The trial court properly considered them as contributing to the heinous nature of the capital felony. Knight v. State, 338 So.2d 201 (Fla. 1976); Adams v. State, 412 So.2d 850 (Fla. 1982); Francois v. State, 407 So.2d 885 (Fla. 1981).

ISSUE D

THE COURT BELOW ERRED IN RESTRICTING GARCIA'S PRESENTATION OF MITIGATING EVIDENCE AND IN FAILING TO CONSIDER THE MITIGATING EVIDENCE HE WAS ALLOWED TO PRESENT.

Appellant mounts three arguments:

(1) The trial court impermissibly denied his request to introduce a picture of his home as mitigating evidence during the penalty phase of the trial.

(2) The trial court denied him an additional sentence hearing at which to present further evidence of his background.

(3) The trial court failed to find as mitigating circumstances:

(a) he is a parent;

(b) he had a troubled home life;

(c) his age.

Appellant wanted to introduce four photographs of his home into evidence. The State objected on grounds that the Appellant failed to furnish the State copies until the morning of the day Appellant sought to introduce them. (R 2225)

The trial court admitted three of the four photographs despite the State's objection. It sustained the State's objection to the fourth because it was not a clear view of the home. (R 2225-2226)

Appellant subsequently submitted only one of the remaining

three pictures of his home to the jury. (R 2228-2229).

Appellee submits this was not error and that Appellant's own decision to publish just one of the photos to the jury makes it quite clear that it is harmless error, if error at all.

Appellant acknowledges he received a sentencing hearing. His request for a second sentencing hearing was so the trial court could hear a second time information of the Appellant's background which was already in the record and which the court emphasized it would certainly consider. (R 2511 - 1512).

Appellant acknowledges "...it would be repetitious at this point, but there would be some new potential evidence that would be of the same general nature." (R 2512)

The court's decison, if error, is harmless error at best.

Appellant acknowledges that, at best, the fact he is a parent and had a troubled home life may constitute non-statutory mitigating circumstances.

However, the fact that other courts in other cases have found these to be mitigating circumstances by no means mandates this court make the same finding.

Finally, Appellant argues that his age (20) is an unfound statutory mitigating circumstance.

Appellant cites several cases in which other courts have found the youth of other defendants a mitigating circumstance.

Appellant cites no cases in which this Court has found fault with a trial court's failure to find youth as a statutory mitigating circumstance.

Appellee repeats: the fact that other courts in other caes have found Appellant's age to be a statutory mitigating circumstance by no means mandates that this court make the same finding. Lemon v. State, 456 So.d 885 (Fla. 1984); Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2260, 72 L.Ed.2d 864 (1982).

ISSUE VIII

THE COURT BELOW ERRED IN GIVING THE PENALTY RECOMMENDATIONS RETURNED BY THE JURY GREATER WEIGHT THAN THAT TO WHICH THEY WERE ENTITLED.

Appellant mounts two arguments:

(1) The trial court did not exercise independent judgment in reaching its decision to impose the death penalty. It merely went along with the jury's recommendation.

(2) The court gave an allegedly erroneous instruction to the jury. It tainted their vote on the recommended penalty.

Appellant bases his first argument on three statements by the trial court:

> (1)... your [the jury's] recommendation cannot be lightly taken by the judge, and must be given very strong consideration. In fact, the law is that a recommendation of a jury should not be overruled unless there is no reasonable basis for it existing. (Jury instruction, penalty phase, in open court (R 2258))
>
> (2) This Court, independent of but in agreement with, the advisory sentence recommendation of the jury, does hereby impose the death penalty... (Judgment, R 2926) (emphasis added)
>
> (3) On these findings, [the aggravating and mitigating circumstances which the court articulates in its judgment, R 2926-2927] the Court is in agreement with the jury that the aggravating circumstances outweigh the mitigating circumstances." (Judgment, R 2927)

The first sentence of statement one is no more than an accurate statement of the law. Tedder v. State 322 So.2d 908 (Fla. 1975).

Indeed, elsewhere in this brief Appellant takes the trial court to task for failure to apprise the jurors of the importance of the role in sentencing process. (Appellant Initial Brief Pg. 30)

Appellant now turns about to take the trial court to task for alleged fatal deference to the jury's role.

Assuming for argument only that the court sentenced Appellant in the belief that a recommendation of a jury should not be overruled unless there is no reasonable basis for it existing, Appellant still fails to make his point because:

(1) By its very terms, the court indicates in statement two that it is exercising its reasoned judgment in deciding to impose the death penalty.

(2) Finally, Appellant omits the words "on these findings..." that preface statement three.
"...These findings" are the court's own reasoned and articulated statements of aggravating and mitigating circumstances surrounding the murders (R 2926-2927).

Thus he takes the statement out of context. He does so in order to place the trial court's decision within the purview of Ross v. State, 386 So.2d 1191 (Fla. 1980)

Plainly however, this is not a Ross situation, despite Appellant's efforts to make it look like one. The record amply demonstrates that the trial court did not merely rubberstamp the jury's recommended penalty.

Appellant argues that the following statement by the court during instructions in the penalty phase tainted the jury deliberations:

> ...the law is that a recommendation of a jury should not be overruled unless there is no reasonable basis for it existing.
> (R 2258)

Assuming only for argument that this was an erroneous instruction, Appellant did not object. He thus fails to preserve the issue for appeal. Steinhorst, supra, at 338; Rose v. State, __ So.2d ___, (Fla. Case No. 63,996, Dec 6, 1984) [9 F.L.W. 515]

> Fundamental error...is error which goes to the foundation of the case or goes to the merits of the cause of action.
>
> Clark v. State
> 363 So.2d 331
> (Fla. 1978)

> For an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process.
>
> Castor v. State
> 365 So.2d 701
> (Fla. 1978)

See also: State v. Smith, 240 So.2d 807 (Fla. 1970).

Thus, if error, this error does not remotely amount to anything resembling a denial of due process.

ISSUE IX

SENTENCING ENRIQUE GARCIA TO DEATH WHEN IT WAS NOT PROVEN THAT HE INTENDED TO KILL THE WESTS CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Appellant advances two arguments:

(1) These are felony murder convictions. There is no evidence he himself killed, attempted to kill or intended to kill the Wests. Therefore, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982) bars imposition of the death penalty.

(2) Nothing in the trial court's findings of fact in support of the death sentence establish whether Appellant himself killed, attempted to kill or intended to kill the Wests. Therefore, Brumbley v. State, 453 So.2d 381 (Fla. 1984) mandates that this honorable court remand the case to the trial court to reconsider whether it may impose the death penalty in this felony murder case.

Appellant argues there is a "dearth of concrete evidence" that shows exactly what role he played in the robbery and killings at the Farm Market.

Appellant once again advances as argument the unsupported conclusion that the jury's decision to find him guilty of felony-murder precludes introduction of any evidence of premeditation.

To the contrary: Appellant planned to kill every witness to the robberies.

The surviving victim, Rosenna Welch identified Appellant as one of the four men who were in the back room of the West Farm Market when the Wests died, moments prior to her own shooting. (R 2025, 2029)

Appellee reiterates the testimony of Appellant's brother-in-law, Geraldo Gaona (R 1399-1426); former fellow prisoner Johnny Huewitt (R 1766-1802); As well as Appellant's own admission to Dep. McCrosson (R 2478) and other investigating officers (R 1444, 1449, 1455, 1492, 1504, 1505, 1508-1510, 1515, 1530) cited earlier in this brief.

Appellee distinguishes this case from Enmund on the same basis this court distinguished Hall v. State, 403 So.2d 1321 (Fla. 1981) from Enmund:

(1) Enmund was an aider and abettor only to the underlying felony. Hall was an aider and abettor to the homicide as well as the underlying felony. Hall, supra at 874.

(2) Hall was present (and provided the weapon used) at the killing.

In James v. State, 453 So.2d 786 (1984), although a co-defendant did the actual killing, James was present and actively participated in the event. This Honorable court upheld imposition of the death penalty. The jury found that defendant James met the Enmund test:

> "In such a situation we have held that who is the actual killer is not determinative because each participant is responsible for the act of the other. Hall v. State, 403 So.2d 1321 (Fla. 1981)

Appellee argues that here, as in James, supra, the jury could reasonably infer that defendant, by his continued presence, intended or contemplated that lethal force might be used or that life might be taken. James, supra at 791.

Accord: Ruffin v. State, 420 So.2d 591 (Fla. 1982)

Appellee respectfully submits: The foregoing record citations are ample support that Appellant himself intended to and did in fact kill the Wests.

His is not the sort of passive, remote involvement in a felony-murder which Enmund holds the State may not punish by execution.

In any event Appellee further submits: The weight of the evidence is such that there is no reasonable hypothesis that Appellant did not himself kill, attempt to kill or intend to kill the Wests.

ISSUE X

ENRIQUE GARCIA'S SENTENCE OF DEATH DENIES HIM EQUAL JUSTICE UNDER THE LAW, AS NONE OF THE OTHER PARTICIPANTS IN THE INCIDENT AT THE FARM MARKET WAS SENTENCED TO DIE.

The linch pin of Appellant's argument is that he was not the triggerman.

However, even if this Court accepts the unsubstantiated assertion that the jury's felony verdict precludes any finding of premeditation, this is still no basis to conclude that the jury therefore did not believe Appellant's own admissions that he was the shooter, or actively participated in the crimes, anticipating death (cited earlier in this brief) whether or not he premeditated the killings.

Conversely, Appellant concludes by arguing that the trial court properly found that Appellant was the shooter. There is ample record support for this proposition. The trial court justifiably imposed the death penalty.

ARGUMENT

APPELLEE'S ISSUE

WHETHER THE TRIAL COURT ERRED IN DISMISSING COUNT IV OF THE INDICTMENT (ATTEMPTED FIRST DEGREE MURDER) FOR FAILURE TO ALLEGE PREMEDITATION; WHETHER APPELLANT WAIVED OBJECTION TO ANY SUCH FAILURE.

The indictment is legally sufficient. It charges a crime.

If it is defective, the defect is a mere imperfect allegation of the elements of premeditation of attempted first degree murder. It is not wholly void for failure to charge a crime.

The indictment is neither so vague, indistinct or indefinite as to mislead Appellant and embarrass him in the preparation of his defense. It does not expose him after conviction or acquital to substantial danger of a new prosecution for the same offense.

The trial court consequently erred in dismissing it.

Appellant has, in any event:

(1) failed to object to the absences of an allegation of premeditation in the indictment; or,

(2) failed to do so in a timely fashion.

Appellant thus waives any such objection.

Premeditation is an element of first degree murder. Robinson v. State, 68 So. 649, (Fla. 1915). A first degree murder indictment which does not allege premeditation is defective. Simmons v. State, 13 So. 896 (Fla. 1893).

"The state will admit that normally, under routine circumstances, in an attempted murder case, that the element of premeditation should be there or be replaced by the element of that there was an attempted

murder in the course of a felony." (R 2516).

Nonetheless the test to determine if an information is fatally defective is whether:

> (1) there is a total ommission of an essential element of the crime, or
>
> (2) the indictment or information is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to the substantial danger of a new prosecuton for the same offense.

Jones v. State, 413 So.2d 852 (Fla. 5th DCA 1982); State v. Fields, 390 So.2d 128 (Fla. 4th DCA 1980).

As to part one of this two part test:

> Florida recognizes a great difference in law between an information that wholly fails to allege an essential constituent element under circumstances where that omission results in an information that wholly fails to charge a crime and an information which attempts to allege a necessary element and does so imperfectly in some detail or degree but sufficient to meet jurisdictional concepts and constitutional standards. In the first instance, the total omission goes to the jurisdiction of the trial court and the failure to provide constitutional requirements.
>
> Brewer v. State, 415 So.2d 1217 (Fla. 5th DCA 1982) [Footnotes omitted] (emphasis added)

This Honorable Court articulated what is sufficient to meet jurisdictional concepts and constitutional standards in State v. Black, 385 So.2d 1372 (Fla. 1980):

> First, an indictment must apprise a person of the charges in a manner which enables the accused to prepare a defense, second, the allegations must

> be specific enough to protest the accused from twice being placed in jeopardy for the same offense. U.S. v. Debrow, 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed 92 (1953); State v. Smith, 240 So.2d 807 (Fla. 1970).

Reading Jones, Brewer and Black together: If an indictment is merely imperfect in its allegation of an essential element, then the measure of its efficacy is the second part of the Jones test. Black states this test in positive terms.

Fla.R.Crim.P. 3.140(o) forbids the dismissal of an indictment which meets this test:

> Defects and Variances. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court shall be of the opinion that the indictment or information is so vague indistinct and indefinite as to the mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.
>
> (Emphasis added)

See also Rule 3.020 Fla.R.Crim.P.

This is not a case of complete omission.

The indictment informs Appellant he did "...attempt first degree murder...in violation of Florida Statutes 782.04 and 777.04,..." (R 2532-2533).

Section 782.04 includes the words, "from a premeditated design."

> If the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted words, it cannot be said that the imperfection of the information prejudices the defendant in his defense.

Bass v. State, 263 So.2d 611 (Fla. 4th DCA 1972), cert. denied, 271 So.2d 142 (Fla. 1972). See also, United States v. Arteaga-Limones, 529 F.2d 1183 (5th Cir. 1976).

Jones, supra
(Emphasis added)

Failure to allege one ingredient of an offense does not necessarily render the charge void as wholly failing to state a crime, State v. Taylor, supra, particularly where the information charges the specific section of the statute under which the prosecution proceeds. Haselden v. State, 386 So.2d 624 (Fla. 4th DCA 1980), Kiddy v. State, 378 So.2d 1332 (Fla. 4th DCA 1980), Bass v. State, 263 So.2d 611 (Fla. 4th DCA 1972).

Asmer v. State,
416 So.2d 485
(Fla. 4th DCA 1982)
(Emphasis added)

Thus, the indictment is not fatally defective for total omission of an essential element of the crime.

A further examination of the Record below reveals that the indictment otherwise comports with constitutional requirements:

It informs Appellant of the time, date, place, victim and method of the attempted murder (R 2532-2533).

Appellant did not contest the state's argument:

(1) Appellant received a copy of this indictment early in this case (R 2518);

(2) Appellant took extensive depositions on Court IV and the issue of premeditations (R 2518);

(3) The State proved premeditation (R 2518);

(4) The trial court instructed the jury on premeditation and attempted murder during the course of a felony (R 2518):

> ...I instruct you that in order to prove that the defendant committed the crime of attempted murder in the first degree, the state must prove the following beyond a reasonable doubt:
>
> First: that Enrique Garcia had consciously decided to kill Rosenna Welch, or that he was then in the commission of the crime of robbery and did then attempt to kill Rosenna Welch.
>
> (R 2177)
> (emphasis added)

In short: Appellant shows no prejudice. The record is devoid of any indication that the indictment misled or embarrassed him in the preparation of his defense.

The Record is in fact devoid of any reference to the absence of an allegation of premeditation until the trial court was about to sentence the Appellant (R 2515).

Appellant's trial counsel ..."would especially draw the court's attention to the motion to dismiss count four of the indictment..." (R 2515) but, save his oral motion then and there, there is no such motion.

Appellant filed a spate of pre-trial motions to dismiss the indictment (albeit after the trial court's deadline for the filing of such motions) (R 2604-2607, 2637-2644).

The closest Appellant comes to directing any of his pre-trial motions to dismiss the indictment to the absence of an allegation of premeditation in Count IV is in his Motion to Dismiss Indictment, paragraph one (R 2642) wherein he asserts generally:

> That the allegations of the indictment do not charge the Defendant with the violation of any laws of the State of Florida.

However,

A motion to quash must state specifically the grounds and be directed to the defect attacked. Section 909.03(1), F.S.A.; and Wharton's Criminal Law and Procedure, Vol. 4, section 1854, P. 710. See also 27 Am.Jur., Indictments and Informations, sections 187, p.733, where it is said:

> "it is the general rule, too, that defects and omissions may be waived by failure to specify them in challenging the sufficiency of the indictment or information; that is, the inclusion of certain grounds of objection in a motion to quash waives grounds of objection not specified."

Channel v. State,
107 So.2d 284
(Fla. 2d DCA 1958)
(Emphasis added)

See also: Tracey v. State, 130 So.2d 605 at 610 (Fla. 1961); and Selley v. State, 403 So.2d 427 at 428 (Fla. 5th DCA 1980).

Appellant's motion neither specifies which count of the grand jury's seven count indictment the motion addresses nor the specific grounds supporting it.

> ...the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time--before trial, after trial, on appeal, or by habeas corpus. See, E.G., State v. Black, 385 So.2d 1372 (Fla. 1980); State v. Dye, 346 So.2d So.2d 538 (Fla. 1977); La Russa v. State, 142 Fla. 504, 196 So. 302 (1940); State v. Fields, 390 So.2d 128 (Fla. 4th DCA 1980); Catanese v. State, 251 So.2d 572 (Fla. 4th DCA 1971).

State v. Gray,
435 So.2d 816
(Fla. 1983)

> On the other hand, the latter type of imperfect or incomplete allegation of an essential element of a crime must be raised in the trial court or it is deemed waived. Florida Rule of Criminal Procedure 3.140(o) and 3.190(c),

> [1] and errors in rulings relating thereto may be subject to the harmless error statutes, sections 59-041 and 924.33, Florida Statutes (1981), See Gray v. State, 404 So.2d 388 (Fla. 5th DCA 1981) (citing with approval State v. Fields, 390 So.2d 128 (Fla. 4th DCA 1980). Brewer, supra, (Emphasis added)

See also: Tracey v. State, supra, at 610; State v. King, 426 So.2d 12 at 15 (Fla. 1983).

"The law does not favor a strategy of withholding attack on the information until the defendant is in jeopardy, then moving to bar the prosecution entirely." State v. Cadieu, 353 So.2d 150 (Fla. 1st DCA 1978); Fields, supra, at 131.

Hence, Appellant's attempt to raise the absence of an allegation of premeditation at sentencing came too late. It violated F.R.Crim.P. 3.140(o) and 3.190(c).

The trial court erred in hearing and granting it because it did not go to the complete failure of the indictment to charge a crime.

Finally,

> indictments and informations should be upheld if they are in substantial compliance with the law. Barber v. State, 52 Fla. , 42 So. 86 (1906).
>
> State v. Barnett, 344 So.2d 863 (Fla. 2d DCA 1977)

and:

---

[1] Time for Moving to Dismiss. Unless the court grants him further time, the defendant shall move to dismiss the indictment or information either before or upon arraignment. The court in its discretion may permit the defendant to plead and thereafter to file a motion to dismiss at a time to be set by the court. Except for objections based upon fundamental grounds, every ground for motion to dismiss which is not presented by a motion to dismiss within the time hereinabove provided for shall be taken to have been waived. However, the court may at any time entertain a motion to dismiss on any of the following grounds:...

> Adherence to the technicalities of common law pleading has yielded in modern practice to the general principle that formal, non prejudicial defects will be disregarded.
>
> Black, supra

In summary:

The indictment's reference to Florida Statutes §782.04, which includes the words "by premeditated design" vitiates the absence of that allegation.

The indictment is otherwise sufficient.

Defendant demonstrates no prejudice.

He failed to make his objection prior to trial. Even assuming he did object prior to trial, the trial court violated Fla.R.Crim.P. 3.140(o) and 3.190(c) in granting it.

This honorable court should therefore reverse the decision of the trial court to dismiss Count IV of the indictment; then remand the case to the trial court for reinstatement of the jury's guilty verdict and imposition of sentence.

CONCLUSION

The State asks this Honorable Court to affirm Appellant's convictions and sentences on Counts I, II, III, V, VI and VII of the indictment; to quash the Trial Court's Dismissal of Count IV; and to remand this case to the Trial Court for imposition of sentence in accordance with the jury's verdict of guilty on Count IV.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

FRANK J. MIGLIORE
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Hall of Justice Building, 455 N. Broadway Avenue, Bartow, Florida 33830 this 28th day of January, 1985.

OF COUNSEL FOR APPELLEE.