IN THE SUPREME COURT OF FLORIDA

THOMAS HARRISON PROVENZANO Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 65,663

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR APPELLEE

TOPICAL INDEX

AUTHORITIES CITED

AUTHORITIES (Continued)

AUTHORITIES (Continued)

AUTHORITIES (Continued)

AUTHORITIES (Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellee accepts and adopts appellant's statement of the case and facts, except for certain areas of disagreement or omission, as indicated below. For continuity, some facts are repeated.

On August 1, 1983, Provenzano was arrested by Orlando Police Officers Shirley and Epperson for disorderly conduct (R 873, 902).[1] Shirley observed Provenzano making obscene gestures at oncoming traffic, stopped him, and gave him two citations (R 870, 873). Provenzano acted hostile and irate from the outset (R 871). Provenzano would not leave after receiving the citations, but stood in the street, yelling obscenities (R 872, 899). After asking him to leave three different times, he was placed under arrest for disorderly conduct (R 873, 901). When the officers tried to take him into custody, he went berzerk (R 902). From the day he was arrested until January 10, 1984, Provenzano continued to threaten to kill these two officers (R 865, 873, 878, 905, 923).

On November 4, 1983, Provenzano bought a .38 caliber Rossi revolver from Joe's Pawn Shop (R 823). On December 13, 1983, he purchased a 12 gauge Winchester shotgun from Prager's Gun Shop (R 828). On January 3, 1984, appellant purchased a .45 caliber semi-automatic Commander weapon (R 838). When he

---

[1](R) refers to record on appeal. (AB) refers to appellant's initial brief.

bought the shotgun, the barrel was eighteen inches long (R 831). Provenzano purchased ammunition with each weapon, and bought additional ammunition on January 6th and 9th, 1984 (R 843, 1600).

During the first six days of 1984, Provenzano visited the Shoot Straight Gun Range three times for target practice (R 1589). On or about January 4, 1984, the proprietor, Wayne Blecha, explained the operation of the shotgun to Provenzano (R 1590-1591). When Blecha examined the gun on January 4, the barrel had not been shortened (R 1590). When confiscated six days later, the barrel had been shortened two-and-one-half inches (R 721). In his three visits, Provenzano practiced shooting with the .45 weapon and his shotgun (R 1592-1593). Another employee of the gun range, David Laufman, also had contact with Provenzano on or about January 4, 1984 (R 1597). Laufman, a gunsmith, examined appellant's .45 caliber weapon (R 1598). Provenzano complained that the weapon was not feeding correctly, and told Laufman that he would return the defective weapon, which he did (R 1599, 1605). He returned on January 6, 1984, to test his new weapon (R 1600).

Provenzano had the pockets sewn in his coat on January 6, 1984, not just before Christmas, 1983. Several weeks before Christmas, appellant visited Stitch and Save, Geraldine Eubanks, proprietor (R 816). At first, Provenzano wanted <u>six</u> pockets sewn into his jacket lining (R 817). Unable to agree with the seamstress, Provenzano left (R 818). On January 6, 1984, Provenzano returned to Mrs. Eubanks' shop with a long topcoat

(R 818). Provenzano had basted two long pockets into the lining of the coat, and asked Eubanks to sew them securely in place (R 818-819). He emphasized that the pockets had to be "good and strong" (R 819). Provenzano wore this coat into the courthouse on January 10, 1984 (R 790). Inside the coat he secreted his shotgun and semi-automatic, suspended from a small chain and holster or shoulder harness (R 690).

On January 10, 1984, the morning his trial was to have started, appellant visited his public defender's office at about 9:30 a.m. (R 922). Provenzano appeared to be in a cheerful and pleasant mood (R 922). The secretary told him that his attorney was in court (R 922). He replied, "Good. I can't wait. I have got it beat. I can't wait until those two policemen walk in. I'll show them." (R 923)

Provenzano walked down the hallway of the fourth floor of the courthouse, where his trial was to take place in Room 416 (R 610). Provenzano was pacing in the hallway, muttering to himself, "I'm going to do it. I'm going to do it. This is where guys get their asses kicked." (R 865)

As Provenzano entered Judge Conser's courtroom at about 9:30, he was carrying a red knapsack (R 548, 584). Bailiff Mark Parker stopped him at the door, and told him that the judge had given Parker permission to search the knapsack, or else Provenzano would have to leave it outside (R 585). Provenzano replied that he would take the knapsack to his car (R 585).

The knapsack was found inside Provenzano's locked

car, under the driver's seat (R 797). The knapsack contained a gun stock for his .45 caliber weapon, and additional ammunition for the .38 caliber weapon (R 798). While visiting his vehicle in the municipal parking lot, Provenzano fed the meter for three hours, the maximum time, at 10:19 a.m. (R 796-797). Steven Trombly, a heavy equipment operator, observed Provenzano standing beside his car in the parking lot (R 790). Trombly asked if Provenzano's car was inoperative, or if he needed any help, to which Provenzano shook his head "no" (R 790).

Provenzano returned to the courtroom without his knapsack at about 10:15 (R 586, 612). Provenzano's case was called for trial by Judge Conser (R 612). He approached the bench with his hand in his pants pocket (R 549, 612). His hand never left his pocket (R 552). Judge Conser told Provenzano he would have to wait until his attorney arrived, Assistant Public Defender Frank Colon (R 549, 612).

Provenzano moved through the small gate separating the courtroom from the spectator section, and as he passed, he made a hand gesture toward Bailiff Parker (R 549-551). Bailiff Dalton approached Provenzano before he sat down (R 551, 587). Parker exited the courtroom, and reentered directly behind Provenzano and Dalton (R 588).

Dalton said, "I'm going to search you," and took off his glasses (R 589).[2] Dalton was unarmed (see states' exhibit

---

[2]See state's exhibit 2 for court reporter's transcript of this in court exchange between Provenzano and Dalton.

22). Provenzano replied, "What do you want from me," or words to that effect (R 551, 613). Dalton said that he was his friend (R 551). Provenzano answered, "You are not my friend, mother fucker." (R 551, 576) Then Provenzano produced a pistol from his right pocket, and shot Bailiff Harry Dalton point-blank in the face (R 552, 576, 589, 613).

Bailiff Parker exited the courtroom with Provenzano on his heels, so close they were almost touching (R 589, 605, 620, 627). Provenzano fired at Parker (R 590, 620). Although the bullet that most severely wounded Parker came from Wilkerson's gun, Provenzano fired at least two shots at Parker (R 723).

The people in Judge Coleman's adjacent courtroom heard the shots (R 633, 674). The bailiff in charge of Judge Coleman's courtroom was William Arnold Wilkerson (R 633). Wilkerson exited the courtroom into the hallway where the shooting was taking place, and ten seconds later, gunfire at a close range was heard (R 634).

Linda Dunham, a court reporter, was trapped in the hallway when the shooting started (R 657, 665). She pressed against the wall, and saw the gunman come around the first corner from Judge Conser's courtroom. Provenzano ran past her, stopped, turned around and faced Linda (R 659). Linda ran in the opposite direction from Provenzano, past Wilkerson, who had his gun drawn and was advancing towards Provenzano (R 660).

Bailiff Kenneth Kinzler was also attracted by the sound of gunfire (R 636). He was in the opposite direction of

Judge Conser's courtroom, in the north hall (R 636). Kinzler saw Provenzano in the hallway, holding a shotgun (R 638). Several people were in the hallway between Provenzano and Kinzler (R 638).

Provenzano took a position in the corner, where he could observe both the hallway where Wilkerson was located, and ninety degrees to his left, down the hallway where Kinzler was located. Provenzano pulled out a "large caliber rifle" (shotgun) (R 665, 666). He took a military stance in the corner (R 666). First he pointed the shotgun toward Kinzler's hallway, then pointed in the direction where Wilkerson was located (R 666). Provenzano yelled, "I'm going to kill you, mother fuckers, I'm going to kill all of you" (R 665). An eyewitness said he then "felt" the shotgun blast (R 667).

Provenzano then ducked into room 436, a lunchroom for bailiffs, and took a barricade position with the shotgun pointing into the hall (R 639). Bailiff Alex Jacobs observed Provenzano through a window between the lunchroom and the bailiff's office (R 650). Jacobs opened the window and shot Provenzano, subduing him (R 650). Provenzano stated, "I'm shot, I'm dying." (R 647, 654)

Each of Provenzano's three firearms were loaded with live ammunition when seized (R 710, 712). In his pockets, he carried two boxes of bullets and a clip containing thirty rounds (R 689).

While receiving treatment at the hospital after the shooting, Provenzano stated, "Shirley and Epperson arrested me

for resisting. They stopped me for no reason. I wanted to get rid of them, get them out of my sight. I was scared. I always carried a gun with me. I'm not saying anything further anymore." (R 950)

Appellant's trial was conducted June 11 through 19, 1984 (R 1). The jury returned a verdict of guilty as to all three counts alleged in the indictment (R 3314-3316). The same jury reconvened on July 11, 1984, for the penalty phase, and returned an advisory sentence of death by a vote of seven to five after over two hours of deliberation (R 2237).

On July 18, 1984, the Honorable Clifford B. Shepard pronounced sentence upon appellant (R 2298). As required by section 921.141(3), Florida Statutes (1983), the court entered its written order setting forth its findings as to the existence of aggravating and mitigating circumstances (R 3452-3462). The court determined that five aggravating circumstances were established beyond a reasonable doubt, to wit: previous conviction of two counts of attempted first degree murder, the defendant knowingly created a great risk of death to many persons, the murder was committed for the purpose of avoiding his lawful arrest for attempted murder, the murder was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws, and the murder was committed in a manner that was cold, calculated and premeditated, without any pretense of moral or legal justification. § 921.141(5)(b)(c)(e)(g) and (i), Fla. Stat. (1983). Only one

mitigating circumstance was found to exist, namely that the defendant had no significant history of prior criminal activity. § 921.141(6)(a), Fla. Stat. (1983). Weighing the totality of the circumstances, and after considering all argument and evidence presented, the court determined that death, as recommended by the jury, was the appropriate sentence for the murder of William Arnold Wilkerson.

SUMMARY OF ARGUMENT

POINT I

The doctrine of transferred intent applies to the facts of this case. The jury was properly instructed that "if a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated." Provenzano's attempt to effectuate his premeditated design to kill Officers Shirley and Epperson directly resulted in the death of William Arnold Wilkerson. Even if it was improper to so instruct the jury, any error is harmless due to the competent, substantial evidence of premeditated design to murder Wilkerson, independent of the doctrine of transferred intent.

POINT II

There was never a sufficient motion for change of venue before the court upon which to rule, so it cannot have been error to try Provenzano in Orange County where the crime occurred. A fair and impartial jury was impaneled with no difficulty. The pretrial publicity was factual in nature, and did not create an atmosphere of deep hostility in the community. Appellant exercised only eight of his peremptory challenges and personally acquiesced in the jury as selected.

POINT III

There is ample evidence of premeditation to sustain the verdict of guilty of murder in the first degree. Provenzano

was carrying three firearms and surplus ammunition when he arrived at the courthouse for his trial on January 10, 1984. At first, he carried a knapsack containing more ammunition into the courtroom, but when told by a bailiff that he either had to submit to a search or carry the knapsack outside, Provenzano took the knapsack to his car and returned to the courtroom.

After shooting Bailiff Dalton, Provenzano ran down the hallway of the courthouse chasing Bailiff Parker. Provenzano took a military stance with his back to a corner where he could see down two hallways. He laid in wait as Wilkerson approached. Provenzano yelled "I'm going to kill you, mother fuckers, I'm going to kill all of you," produced a loaded twelve gauge shotgun from a special pocket inside his raincoat, aimed and fired, mortally wounding Wilkerson. This is sufficient evidence of premeditation.

POINT IV

The trial court correctly found that the murder was committed in a manner that was cold, calculated and premeditated, without any pretense of moral or legal justification. Provenzano planned for weeks to effectuate his design to murder two officers and anyone else who got in his way. Unlike a bungled burglary, Provenzano planned from the beginning to murder. The trial court correctly determined that there was no pretense of moral or legal justification.

POINT V

The fact that the murder was committed in the Orange County Courthouse minutes before commencement of appellant's trial supports the finding that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. The fact that Provenzano attempted to kill Bailiffs Dalton and Parker supports the finding that Bailiff Wilkerson was subsequently murdered for the purpose of avoiding what would have been his lawful arrest for attempted murder. There are separate factual circumstances to support these two aggravating circumstances.

POINT VI

The trial court considered all statutory and non-statutory mitigating factors. In his sound discretion he determined that only one mitigating circumstance had been established by a preponderance of the evidence.

POINT VII

The allegedly improper comment made by the prosecutor during closing argument of the penalty phase is proper when viewed in context. The issue has not been preserved due to the failure to move for mistrial and request a curative instruction. Even if preserved and improper, any error is harmless.

The trial court correctly denied a motion for mistrial during the cross-examination of appellant during the penalty phase. Once the appellant became a witness, the state was entitled to develop matters testified to during direct. The

allegedly improper cross-examination further illuminated appellant's testimony concerning the "judicial conspiracy" of which he was a victim.

POINT VIII

Alleged errors which are unavailing individually are no more potent or convincing when lumped together. Appellant received a fair trial.

There are only two new allegations of error contained in this Point VIII. First, he claims that the court limited the cross-examination of two witnesses during the rebuttal portion of the state's case. Review of the record reveals that the defense was not limited, but vigorously and completely cross-examined the witnesses in question. Second, he complains that Wilkerson's relatives in the audience began crying as a tape of the shooting was replayed. The trial court did not notice the behavior, so it must not have been obvious. Any error is harmless.

POINT IX

The constitutionality of Florida's death penalty statute has been repeatedly upheld by this honorable court and federal courts.

POINT I

THE JURY WAS PROPERLY INSTRUCTED ON THE DOCTRINE OF TRANSFERRED INTENT BECAUSE APPELLANT'S ATTEMPT TO EFFECTUATE HIS PREMEDITATED DESIGN TO MURDER OFFICERS EPPERSON AND SHIRLEY DIRECTLY RESULTED IN THE DEATH OF ANOTHER HUMAN BEING, WILLIAM ARNOLD WILKERSON.

Appellant contends that reversible error occurred when, over timely objection, the jury was instructed that "if a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated" (R 1970). He claims that this instruction is not supported by the evidence adduced at trial and prejudiced him by confusing the jury on the element of premeditation. Appellee asserts that the premeditation design to kill Officers Shirley and Epperson directly resulted in the death of another human being and so the original malice can be transferred to the person who actually suffered the consequences of the planned attack. The doctrine of transferred intent applies to the facts of this case. If the current scope of the principle does not embrace the peculiar factual circumstances of this criminal episode, then it should be expanded to effectuate its purpose. Even if it was improper to so instruct the jury, any error is harmless because of the overwhelming evidence of guilt.

The doctrine of transferred intent has been approved by the courts of the state in every degree of homicide. Wright

v. State, 363 So.2d 617 (Fla. 1st DCA 1978) (manslaughter); Pressley v. State, 395 So.2d 1175 (Fla. 3d DCA 1981) (second degree murder); Dawson v. State, 139 So.2d 408 (Fla. 1962) (first degree murder). The First District recently reversed an order granting a motion to dismiss a charge of first degree murder in a case involving transferred intent. In State v. Pforr, 461 So.2d 1006 (Fla. 1st DCA 1984), that court held that "an indictment need only charge a premeditated attempt to kill the victim, even if the proof establishes that the requisite intent was directed toward another human being." Hence, the fact that this indictment alleged that appellant, by premeditated design, effectuated the death of William Arnold Wilkerson does not render the principle inapplicable (R 2769).

The usual case involving transferred intent is as appellant has stated: The defendant aims and shoots at A intending to kill him but instead misses and kills B. See, Pressley v. State, supra. Succinctly stated, the intent follows the bullet. "As a matter of law, the original malice is transferred from the one against whom it was entertained to the person who actually suffered the consequences of the unlawful act." Id. at 1177.

Appellant's interpretation of this rule is confused by this graphic and common example. The normal case involves shooting into a crowd, intending to hit one person but killing another. Appellant's definition is limited to this usual but not exclusive example. He implies that both the intended vic-

tim and actual victim must always be in the same place when the murder occurs. Provenzano points to the fact that he murdered Wilkerson while Officers Shirley and Epperson were not even in the building, and claims that this fact negates application of the principle of transferred intent (AB 30-31).

Appellee respectfully disagrees with this interpretation of the rule. Appellee agrees that the normal case involves the defendant, the intended victim and the deceased all in the same place at the time of the murder. But this is not a usual case. Simply because this case does not fit into his narrowly defined principle, defined mostly with an example, does not automatically make the principle inapplicable.

The less common, but equally valid factual scenario could involve an intricate design to effectuate death from afar which goes awry. In at least one case decided by this honorable court, the victim and the defendant were not in the same place; in fact the victim was completely unknown to the defendant, yet his conviction for first degree murder was affirmed. Coston v. State, 139 Fla. 250, 190 So. 520 (Fla. 1939). In Coston, the defendant poisoned a small bottle of whiskey with five times the fatal dose of potassium cyanide. Coston gave the bottle to Donald Long, intending to kill Long. Instead of drinking the whiskey, Long gave the whiskey to Robert Etty, who in turn gave the bottle to Dolores Myerly, who drank it and promptly died. In affirming the conviction for first degree murder, the court explained:

> The law, as well as reason, prevents (defendant) from taking advantage of his own wrong doing, or excusing himself when this unlawful act, if committed by (defendant), strikes down an unintended victim. The original malice as a matter of law is transferred from the one against whom it was entertained to the person who actually suffered the consequences of the unlawful act.

Id. at 522.

Obviously Provenzano was present at the scene when he murdered Wilkerson. The point is that the definition of transferred intent urged by appellant relies upon a common example that does not include all possible variations of this concept. Transferred intent encompasses more than just poor marksmanship.

The real question here is whether, at the time the murder was committed, Provenzano was attempting to effectuate his premeditated design to kill Officers Shirley and Epperson. The state submits that he was. Provenzano should not profit from his mistaken belief that his intended victims were among the uniformed law enforcement officers that encircled him. It is clear that Provenzano came to the courthouse that fateful day to effectuate his premeditated design to kill Officers Shirley and Epperson. Attempting to carry out that plan, Bailiff Wilkerson was killed, and Bailiffs Dalton and Parker were almost killed. As a matter of law, the malice directed toward Shirley and Epperson is transferred to Wilkerson.

In Lee v. State, 141 So.2d 257 (Fla. 1962), this

court affirmed a conviction for first degree murder, where the defendant had murdered his father-in-law, intending to kill his wife. The court examined the evidence, and determined that it was sufficient to establish premeditation.

> When a man repeatedly makes invidious threats about his wife . . . and the invidious threats extend to the father and other members of his family, then arms himself with a pistol and a rifle, goes out on the highway in the manner shown by the evidence, passes his wife and her father with others traveling in the opposite direction, turns his car and pursues them, overtakes them, attempts to force them off the highway, repeatedly fires his rifle and pistol into the car where his wife and father were riding, kills both of them and injures others riding in the car, that of itself is sufficient to show a premeditated intent to murder the father if believed by the jury.

Id. at 259.

Provenzano repeatedly made threats against several people involved in the criminal justice system, including the officers (R 923), the City of Orlando (R 915), the Orlando Police Department (R 928, 942), "those people" (R 935), and the "establishment" (R 913). Then Provenzano armed himself with three firearms and ample ammunition, and proceeded to the courthouse on the morning of his trial (R 710-712). After being confronted by Parker concerning his knapsack, Provenzano had the presence of mind to take the knapsack outside rather than submit to a search, knowing that the knapsack contained

gun grips and ammunition (R 584, 798). Provenzano returned to the courtroom, still heavily armed. Within a minute, he shot Harry Dalton with a pistol and mortally wounded Arnie Wilkerson with a shotgun. In attempting to effectuate his premeditated design, Provenzano's actions resulted in the death of a human being.

Should this honorable court determine that the state of the law in Florida presently would not allow application of the doctrine of transferred intent to the unusual facts of this case, the state respectfully requests that the court expand the principle to effectuate its purpose. The malice and premeditated design to kill Officers Shirley and Epperson, once formulated and commenced when he entered the courthouse heavily armed, resulted in the death of a human being. Just as in the usual case, if a defendant cannot profit from his mistake and claim that he did not intend to kill his unlucky victim, then Provenzano should not profit from his mistake in unleashing his murderous attack before the arrival of his intended victims. True, this is not the most common construction of this doctrine, and perhaps even an expansion, but nevertheless the jury was properly instructed on the theory of transferred intent.

Even if this honorable court determines that the instruction was improper, any error is harmless beyond a reasonable doubt. There was competent, substantial evidence that Provenzano entertained the premeditated design to kill Wilkerson. See, Point III, infra. Provenzano saw Wilkerson advancing, removed a loaded shotgun from a special pocket inside his coat,

said "I'm going to kill you, mother fuckers, I'm going to kill all of you," and fired the fatal shot when Wilkerson was two to three feet away. The state submits that this is competent, substantial evidence from which the jury could conclude that Provenzano formed a premeditated design to kill Wilkerson. See, Washington v. State, 432 So.2d 44 (Fla. 1983).

The instruction on transferred intent was requested by the state because it was part of the law of the case. An equally important motivating factor is to rebut the defense presented at trial and reiterated here on appeal. Loosely translated, Provenzano's defense was that due to his insanity, when Dalton asked to search his person in Judge Conser's courtroom, Provenzano felt threatened, cornered, trapped. In response to this perceived threat, he lashed out at any approaching uniformed officer. The ensuing bedlam was likened to the shootout at the OK Corral. As a victim of a "judicial conspiracy," Provenzano did not perceive himself as an antagonist; his homosexual paranoia caused him to violently react whenever he was touched by a man.

Provenzano maintains this position. "The uncontroverted evidence shows that Provenzano was at most simply firing at any uniformed bailiff that approached him." (AB 43) The state requested the instruction on transferred intent to rebut this position. There is ample evidence that Provenzano planned the homicide(s) of law enforcement officers (including Shirley, Epperson and "any uniformed bailiff" who got in the way) long before any particular bailiff crossed his path. This fully

formed premeditated design to kill is transferred as a matter of law, and focuses on the hapless officer who was actually killed. It is not a defense to assert that, in furtherance of his attempt to effectuate his premeditated design to kill Shirley, Epperson, and/or unspecified others, he accidentally or unintentionally killed Wilkerson. It is this defense that tended to confuse the jury, not the instruction.

This honorable court cannot presume that the instruction so confused the jury that the substantial rights of the appellant were injuriously affected in light of the substantial evidence of premeditation without reference to transferred intent. § 924.33, Fla. Stat. (1983).

An analgous situation where the harmless error rule has been applied is when the jury is incorrectly instructed on the elements of the underlying felony when the state is prosecuting under both felony murder and premeditation theories. Even if there is insufficient evidence of the felony to support the instruction, if there is sufficient evidence of premeditation, the error is harmless. Frazier v. State, 107 So.2d 16 (Fla. 1958); McKennon v. State, 403 So.2d 389 (Fla. 1981); Buford v. Wainwright, 428 So.2d 1389 (Fla. 1983).

The doctrine of transferred intent was properly before the jury. In attempting to effectuate his premeditated design to kill Officers Shirley and Epperson, a human being was killed. Although appellee disagrees with his narrow interpretation of this theory, even if appellant is correct that the theory does not apply to this case, it should be ex-

panded to embrace this unique situation. The instruction was requested to rebut a defense that was contrary to law, or at least a defense that tended to confuse the jury. Even if the instruction was erroneously given, any error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). There is competent, substantial evidence of premeditation directed towards Wilkerson to sustain the jury's verdict.

POINT II

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR CHANGE OF VENUE BECAUSE A MOTION WAS NOT PROPERLY BEFORE THE COURT AND BECAUSE A FAIR AND IMPARTIAL JURY WAS IMPANELED.

Appellant claims that he was denied a fair trial by an impartial jury in violation of his constitutional rights. Appellant asserts that there was great difficulty in selecting a jury, and claims that this raises a presumption of partiality. The particular allegation of error is that the trial court failed to ensure that both sides received a fair trial by an impartial jury, and abused its discretion in failing to grant an oral motion for change of venue on the first day of the trial.

This issue has not been preserved for appellate review. The oral motion was conditional in two respects which were never met, and no ruling was ever obtained on the motion.

Florida Rule of Criminal Procedure 3.240 requires that motions for change of venue be in writing, accompanied by affidavits and a certificate of good faith. The motion must be made no later than ten (10) days before trial unless good cause is shown for the failure to do so.

On the morning that the trial started, the defendant stated for the first time that he had been laboring under the misconception that the venire would be selected from voters

throughout the state, and that he did not want to be tried by a jury selected from Orange County voters (R 3-8). After some discussion, appellant's attorney requested leave to file an oral motion for change of venue, to be followed by a written motion which complied with the rule (R 18). The trial court allowed the oral motion upon the condition that a written motion would follow at his first opportunity (R 18, 21). This condition was never met; no written motion was ever filed.

Secondly, the oral motion was further conditioned upon the inability to seat an impartial jury. The oral motion by the defense requested that a decision or ruling be deferred until after voir dire (R 19, 22). The oral motion was never renewed; it was apparently abandoned by the defense because they were satisfied with the impaneled jury (R 369). In any event, there was never a ruling on the motion. Absent an affirmative ruling in the record, the issue is not preserved for appellate review.

The state strenuously urges this honorable court to dispose of this issue on procedural grounds. A better case for lack of preservation cannot be found. Lack of preservation should simply end the discussion. See, Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981).

Appellant correctly points out that trying the case in Orange County was a tactic of the defense (AB 38). This defense strategy was stated immediately by appellant's counsel when his desire to change venue first became known.

> Mr. Edmund (defense counsel): Your Honor, we discussed possibility of change of venue. I had been advised by someone that the case would probably be transferred to St. Augustine. I told the client that I would much prefer selecting a jury from Orange County than I would a jury from St. Augustine, because I felt the area of St. Augustine would be much more conservative than the area of Orlando. I felt that the area of Orlando would be much more receptive to the defense that I saw to this being conjunctive with lack of premeditation, and that is the insanity defense.
>
> I told him that, in my opinion, if you walk the streets of Orlando and stop twenty people, if any of them knew about his case -- and I didn't think all of them would -- that immediate reaction I was getting from everybody that he was insane. And this was our defense. And it seemed to me this was the place to keep it.

(R 9-10). The trial court discharged its duty to insure a fair trial by inquiring at least twice before the trial whether the defendant wanted a change of venue (R 6, 2387). In two pretrial conferences, the trial court was assured that the defendant wanted to be tried in Orange County where his friends and family lived.

Appellant's initial brief acknowledges this tactical maneuver, but claims that the defendant did not concur with this decision. First of all, if Provenzano was not satisfied with his distinguished and eminent trial attorneys, he could have

discharged them. Indeed, Provenzano was given numerous opportunities to represent himself or to discharge his attorneys, all of which he declined (R 14). Second, this is not the proper time or place to raise allegations of ineffective assistance of counsel. If Provenzano's attorneys did not adhere to his desires concerning the conduct of his defense, that dispute raises possible ethical violations which do not concern the court at this juncture. Third, the defendant personally acquiesced in the selection of the jury panel (R 369). After consulting with his client (R 364-365), appellant's attorney accepted the jury panel (R 369). Lastly, and most significantly, the defense only used eight of their peremptory challenges (R 247-248; 366-369). If he had any lingering doubts as to the partiality of any of the jurors, he could have easily cured the problem by using one of his numerous remaining peremptory challenges. This is the best evidence that Provenzano was personally satisfied with the jury as selected. See, Davis v. State, 461 So.2d 67 (Fla. 1984); Straight v. State, 397 So.2d 903 (Fla. 1981). Since Provenzano was satisfied that he had impaneled an impartial jury, there was no reason to move the trial.

> If it is possible to empanel a jury comprising persons who can be relied upon to decide the case based upon the evidence, and not be influenced by knowledge gained from sources outside the courtroom, then a denial of change of venue is proper.

Copeland v. State, 457 So.2d 1012, 1017 (Fla. 1984).

Appellee agrees that this case received extensive publicity. However, the extent of publicity or public knowledge is not the issue. "The critical factor is the extent of the prejudice, or lack of impartiality among potential jurors that may accompany the knowledge." Copeland v. State, 457 So.2d at 1016. The constitutional standard of fairness requires indifferent jurors, not jurors who are totally ignorant of the facts and issues involved. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). The test in Florida for determining whether a change of venue is required is:

> (W)hether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So.2d 1276, 1278 (Fla. 1977); Manning v. State, 378 So.2d 274, 276 (Fla. 1979).

The question of the jury partiality is a mixed question of law and fact, requiring independent appellate review to evaluate the voir dire testimony. Copeland v. State, supra. The burden is on the defendant to raise a presumption of partiality. An atmosphere of deep hostility raises a presumption, which can be demonstrated by either inflammatory publicity or a great difficulty in selecting a jury. Murphy v.

Florida, supra.

Appellee specifically disputes that the voir dire in this case demonstrates that "the community of Orange County was so patently biased that neither Thomas Provenzano nor the State of Florida could receive a fair trial," or that the "vast majority of jurors admitted holding fixed, unalterable positions concerning guilt" (AB 38, 40). These statements are belied by appellant's own appendix "A" entitled "Chart Concerning Venire Voir Dire." Of the 87 veniremen called, by appellant's calculation, only 33 potential jurors expressed fixed opinions as to appellant's guilt due to information received pretrial. Approximately one-third is hardly an overwhelming majority. In Murphy v. Florida, supra, 20 of 78 persons were excused with cause, in Copeland v. State, supra, 17 of 70 persons were excused with cause, but in neither case did these figures evince a "great difficulty" in selecting a jury. As in Mills v. State, 462 So.2d 1075 (Fla. 1984), the great majority of jurors were excused for reasons other than biased or prejudice or preconceived opinions.

Furthermore, appellant's appendix "A" contains several factual errors, and is at best misleading. Appellant does not distinguish between fixed opinions concerning guilt due to pretrial publicity and all other fixed opinions. At least four potential jurors were excused for cause on the basis of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Veniremen Neal, Bauer, Bauman and Cook were excused for cause

at the request of the state due to their fixed opinions concerning the death penalty (R 91, 244, 317, 388). Two other potential jurors, Panko and Califf, were excused because of their fixed opinion against the insanity defense (R 298, 377). Finally, two additional jurors who expressed a fixed opinion of guilt were actually excluded for other reasons (Smith, medical condition, R 110; Dixon, sequestration problems, R 299). Hence, only 25 of 87 potential jurors were excused for cause based upon their fixed opinion as to guilt. Appellee respectfully submits that this demonstrates that there was no great difficulty in selecting a jury.

The other way for a defendant to raise a presumption of partiality is by demonstrating that inflammatory publicity created an atmosphere of deep hostility in the community. Appellant has not directed this court's attention to anything other than the number of news articles; he has not, because he cannot, point to any articles which are inflammatory or highly colored. All of the articles are straight news stories, all are factual in nature. See, Oats v. State, 446 So.2d 90 (Fla. 1984). Only one article, exhibit 16, can be characterized as an editorial cartoon. However, the subject of the cartoon is the easy access of guns, and has nothing to do with the defendant personally. The editorial above the cartoon concerns another incident entirely.

Exhibits 24 and 25 is an article which appeared in the Orlando Sentinel newspaper on January 22, 1984.[3] The sub-

[3] The exhibits appear to be misnumbered and out of order; in actuality there is but one article.

ject of the article was an interview conducted over the telephone between reporter Roger Roy and Provenzano. Provenzano called the press from his jail cell in order to give these exclusive interviews at least twice, against the advice of his appointed attorney. Appellee recognizes the potential prejudice that might be caused by news articles directly quoting Provenzano on his version of the events. However, it should also be recognized that the state is powerless to prevent a defendant from courting the news media. Provenzano called the reporters himself. Any prejudice flowing from it is surely of his own making. Although there was extensive pretrial publicity of this case, none of it was inflammatory or colored such that the community of Orange County was infected by an atmosphere of deep hostility. Cf. Manning v. State, supra.

The trial court did everything in its power to ensure that the defendant received a fair trial. Any potential juror with even a hint of prejudice was immediately removed for cause. See, Straight v. State, supra. The jury was sequestered (R 432). Dobbert v. State, 328 So.2d 433 (Fla. 1976). There was a comprehensive gag order covering even peripheral participants (R 3066-3068). Dobbert v. State, supra. Even assuming that there was a motion properly before it, the trial court did not abuse its discretion in denying the motion for change of venue.

POINT III

THERE IS COMPETENT, SUBSTANTIAL EVIDENCE OF PREMEDITATION TO SUSTAIN THE JURY'S VERDICT OF GUILTY OF MURDER IN THE FIRST DEGREE.

Appellant asserts that there is insufficient evidence to support the jury's verdict of guilty of the first degree murder of Arnold Wilkerson. Specifically, he contends that there was not substantial, competent evidence from which the jury could find that Provenzano killed Wilkerson from premeditated design. See, Tibbs v. State, 397 So.2d 1120 (Fla. 1981).

Premeditation can be shown by circumstantial evidence. Spinkellink v. State, 313 So.2d 666 (Fla. 1975). "Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." Sireci v. State, 399 So.2d 964, 967 (Fla. 1981) (citation omitted). There is no prescribed length of time which must elapse between the formation of the purpose to kill and the execution of the intent; a few moments reflection will suffice. Dino v. State, 405 So.2d 213 (Fla. 1981); Dobbert v. Strickland, 532 F.Supp. 545 (M.D.Fla. 1982).

Circumstantial evidence from which premeditation may be inferred includes:

> . . . the nature of the weapons used, the presence or absence of adequate provocation, previous

> difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the intent of the deed he is about to commit and the probable result to flow from it in so far as the life of his victim is concerned.

Larry v. State, 104 So.2d 352, 354 (Fla. 1958); Sireci v. State, 399 So.2d at 967.

In the instant case there was competent, substantial evidence of premeditation to support the jury's verdict. Provenzano appeared in court at approximately 9:30 a.m. carrying a knapsack (R 548, 584). As he entered the courtroom, he repeatedly stated, "I'm going to do it. I'm going to do it. This is where guys get their asses kicked." (R 865). Judge Conser instructed a bailiff to tell Provenzano to either take the knapsack outside of the courtroom or to submit to a search (R 548, 584). Bailiff Parker approached Provenzano and related this instruction (R 584). Provenzano asked Parker if the instruction came from Judge Conser, and was informed that it did (R 585). Provenzano then told Parker that he would leave the knapsack outside in his parked car (R 585).

Provenzano returned within the hour to the courtroom after leaving his knapsack in his car (R 797). The knapsack contained a box of .38 caliber ammunition and two clips of .45 caliber ammunition and parts of his rifle (R 798, 801).

Even after it was clear that court personnel would intercede to prevent Provenzano from fulfilling his intentions,

he returned to the courtroom heavily armed. Provenzano wore a long topcoat with special pockets sewn inside (R 819). He carried a twelve gauge Winchester pump shotgun with a barrel that had been shortened two-and-a-half inches in the pocket of the coat (R 710). Provenzano also armed himself with a .45 caliber Volunteer Enterprizes Commando Mark 45 assault rifle and a .38 caliber Rossi revolver (R 711). When seized, all of the weapons were loaded with live ammunition (R 710-712). In Provenzano's pants pockets, he carried a box of .38 caliber shells, a box of .45 caliber shells, and a clip containing .45 caliber ammunition (R 689). The nature and the number of the weapons used permits the inference that Provenzano formed the premeditated design to kill his intended victims, as well as anyone else that might get in the way. The manner in which the crime was committed, particularly the location, allows the same inference. Provenzano clearly entered Judge Conser's courtroom on January 10, 1984, with the fully formed premeditated design to kill any and all law enforcement officers that he encountered.

After shooting Baliff Dalton in the face, Provenzano ran out into the hallway, immediately pursuing Baliff Mark Parker, so close to Parker that they were almost touching (R 605, 620, 627). Provenzano followed Parker, firing shots at him, and pursued him around the corner (R 620). The people in Judge Coleman's adjacent courtroom heard the shots (R 633, 674). Bailiff Arnie Wilkerson, the executive officer in Judge Coleman's courtroom, called over Deputy Bailiff Robert Brown

to relieve him while Wilkerson investigated the gunfire (R 633). Wilkerson exited the courtroom, and ten seconds later, gunfire at a close range was heard (R 634). The lapse of time was long enough for Bailiff Brown to wonder what was keeping Wilkerson (R 634).

Linda Dunham, a court reporter, and her husband, James, an Orange County Fire Department deputy, were in the hallway when the shooting started (R 657, 665). Unable to take cover, Linda pressed herself against the marble wall (R 657). Linda moved toward the gunfire (R 657). She saw the gunman come around the corner and run past her but did not see a gun in his hand (R 659). He made an abrupt movement, turned around and faced Linda (R 659). At that point, she ran around the corner in the hallway where Parker was lying and Provenzano and Wilkerson were standing (R 660). Wilkerson had his gun drawn (R 660). Linda ran around the second corner to the clerk's office for assistance (R 661).

James saw his wife go forward around the first corner, but he backed up (R 665). Within seconds, he heard someone yelling, "I'm going to kill you, mother fuckers, I'm going to kill all of you." Immediately, the defendant came around the corner and a few shots were fired (R 665). James saw Provenzano reach into his coat and pull out a large caliber rifle (R 665-666). Provenzano took "a military stance, almost a three point stance" in the corner where he could observe both hallways (R 666). Provenzano first pointed the shotgun toward James and Bailiff Kinzler, who had taken cover behind James (R 666).

Provenzano then pointed in the direction of the hallway where Wilkerson was located (R 666). James turned towards the wall, heard a very loud discharge, and "felt" the noise of the blast. (R 667).

The medical examiner testified that Arnie Wilkerson was mortally wounded in the right side of his neck and shoulder by six penetrating shotgun pellets (R 749, 752, 760). The trajectory of the pellets was parallel to the floor (R 751). Wilkerson's right hand was bruised and powder burned, and the distal portion of his right index finger was nearly amputated (R 749). These injuries to his hand are consistent with Wilkerson having a weapon in his extended hand when he was shot (R 758-759). His weapon was damaged. The doctor opined that Wilkerson was closer than ten feet, and probably two to three feet away from Provenzano when he was shot (R 760).

Appellant contends that he was firing at any uniformed bailiff that approached him, not Wilkerson personally (AB 43). Appellee is not aware of any authority for the proposition that the murderer need know his victim's name or identity before premeditation can be found to exist. He cites Purkhiser v. State, 210 So.2d 448 (Fla. 1968), for the proposition that he is guilty of only second degree murder (AB 43). That case is distinguishable in that the court found no evidence upon which to base the conclusion of law that the defendant entertained the requisite intent. In Purkhiser v. State, supra, the killing was accidental. "Eyewitness testimony was that the fatal shots were discharged suddenly as defendant turned

toward a doorway to an adjacent room from which someone was moving." Id. at 449. Appellant herein makes no allegation that his shotgun was fired accidentally; it was a deliberate act.

Appellant admits that he killed Wilkerson (AB 43). The state respectfully submits that the acts of retrieving a loaded shotgun from inside of his coat, yelling "I'm going to kill you . . . I'm going to kill all of you," pointing the shotgun at a uniformed bailiff two to three feet away and firing is sufficient, competent evidence from which the jury could infer that Provenzano entertained a fully-formed conscious purpose to kill Wilkerson. Blanco v. State, 447 So.2d 939 (Fla. 3d DCA 1984); Washington v. State, 432 So.2d 44 (Fla. 1983). The very act of firing the shotgun at Wilkerson is sufficient to warrant a jury finding of premeditation. Buford v. State, 403 So.2d 943 (Fla. 1981).

POINT IV

THE TRIAL COURT CORRECTLY FOUND THAT THE MURDER WAS COMMITTED IN A MANNER THAT WAS COLD, CALCULATED AND PREMEDITATED, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In his first of three issues relating to sentencing, appellant claims that the trial court erred in finding that this murder was committed in a manner that was cold, calculated and premeditated, without any pretense of moral or legal justification. § 921.141(5)(i), Fla. Stat. (1983). Appellee submits that this and all other aggravating circumstances were established beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973).

Appellant claims that the heightened premeditation necessary for this circumstance must be directed towards the victim. This argument is wrong for two reasons. First, it ignores the plain language of the statute. It is an aggravating circumstance if the murder was committed in a manner that was cold and calculated. The crime itself, and particularly the manner in which it is carried out is the focus here.

Second, his position is contrary to the decisions of this honorable court. In Duest v. State, 462 So.2d 446 (Fla. 1985), the defendant formulated a premeditated design to "roll a fag." Duest met the victim at a gay bar, went with him to his home, and robbed and murdered him. The conviction for premeditated murder was upheld, as was the application of this aggravating circumstance. In finding that the murder was

cold, calculated and premeditated, the trial court recounted Duest's intent to rob and beat homosexuals. Although Duest's unlucky victim was not the particular object of his design, the murder was cold, calculated and premeditated all the same.

In a case similar to this case, the premeditated design to "kill a cop" supported the conviction and sentence of death based in part upon this aggravating circumstance. Jones v. State, 440 So.2d 570 (Fla. 1983). Seven days prior to the murder, Jones was arrested for a traffic infraction. He violently resisted arrest. At that time he stated that "he was tired of police hassling him, he had guns, too and intended to kill a pig." Id. at 577. One week later, Jones killed an officer as he passed in his marked patrol car, with a high powered rifle from a second story window. This sniper attack was cold, calculated and premeditated even though Jones intended to kill an unspecified law enforcement officer. Provenzano carried out his intention to murder law enforcement officer(s) in a manner that was equally cold and calculated as a sniper attack.

It is clear that if a defendant formulates a premeditated design to effectuate the death of any member of a particular class, and then carries out this plan in a manner that is cold and calculated, the argument that he did not premeditate the death of the individual class member killed must be unavailing. Provenzano intended to kill law enforcement officer(s). That he succeeded in killing a general class member as opposed to two particular class members is immate-

rial. His intent to disrupt his trial by the use or display of his several weapons included his intention to kill any officers that opposed him. The manner in which he effectuated his designs of death was cold, calculated and premeditated beyond a reasonable doubt.

Appellant cites felony murder cases for the proposition that the premeditation to commit the underlying felony cannot be transferred to the murder in order to establish this aggravating circumstance. E.g. Gorham v. State, 454 So.2d 556 (Fla. 1984); Hardwick v. State, 461 So.2d 79 (Fla. 1984). This line of cases is easily distinguishable from this case because Provenzano planned from the very beginning to commit murder. Unlike a planned robbery which accidently results in death, Provenzano planned murder and succeeded.

In the same vein, appellant argues that this murder is not cold, calculated and premeditated, but is more like a burglary that gets out of hand. E.g., Bates v. State, 465 So.2d 490 (Fla. 1985). He analogizes this case to Thompson v. State, 456 So.2d 444 (Fla. 1984), where this honorable court determined that this aggravating circumstance did not exist. "No evidence was produced to set the murder apart from the usual hold-up murder in which the assailant becomes frightened or for reasons unknown shoots the victim . . ." Id. at 446. Again, this case is distinguishable because it is a felony murder not premeditated murder. Provenzano planned from the outset to murder. He did not plan for weeks to rob or steal but to kill.

McCray v. State, 416 So.2d 804 (Fla. 1982), is distinguishable in that a higher standard was applied in evaluating the findings in aggravation and mitigation because death was imposed after a jury recommendation of life. In Mann v. State, 420 So.2d 578 (Fla. 1982), there was uncontroverted evidence of a serious psychological disorder, pedophilia. Provenzano proved that he was obnoxious and antisocial, but not mentally ill or impaired.

Appellant contends that there is a pretense of moral justification which raises a reasonable doubt, namely, that Wilkerson had his gun drawn and had fired four shots before he was murdered. Initially, appellee notes that this is not preserved because this argument was never advanced below. Appellee submits that the reason it was not argued to the judge and jury is because it is patently ludicrous. Provenzano initiated this gun battle by attempting to murder two bailiffs. It is ridiculous to suggest that because Wilkerson returned his gunfire, Provenzano was morally justified in murdering him. Unlike a defendant who kills during an unprovoked attack by the victim, Provenzano most certainly provoked Wilkerson's response by his unprovoked murderous attack upon Harry Dalton and by chasing Mark Parker down the hallway, firing shots attempting to kill him also. C.f. Cannady v. State, 427 So.2d 723 (Fla. 1983).

Even if through some contorted, illogical construction of the events this factor can be considered a pretense of moral justification, it is but one element that is considered

in finding this aggravating circumstance. The trial court balanced the evidence, and correctly determined from this calculation that this circumstance was established beyond a reasonable doubt.

Appellee notes that of five aggravating circumstances found by the trial court, appellant assails only two as improper. Only one circumstance was found in mitigation. The trial court stated that there are no mitigating circumstances that could outweigh the aggravating circumstances so as to justify a sentence of life imprisonment (R 3460). Assuming arguendo appellant is correct that two aggravating circumstances were improperly found, in light of the three that remain, balanced against only one mitigating circumstance, the weighing process is unaffected. Kennedy v. State, 455 So.2d 351 (Fla. 1984). The sentence of death was properly imposed on Thomas Provenzano.

POINT V

THE TRIAL COURT CORRECTLY FOUND THAT THIS MURDER WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS.

Seconds after Provenzano's case was called for trial in Judge Lee C. Conser's courtroom, he produced several fire-arms and showered the courthouse with gunfire, which left two men wounded and one man dead. Provenzano fulfulled his direct threats to disrupt the most basic governmental function for the enforcement of laws: his trial.

Appellant claims that this finding is not supported by the evidence, because "the 'facts' contained in the sentencing order purportedly justifying the finding of this circumstance concern solely the intention of Provenzano to kill Shirley and Epperson . . ." (AB 47) (emphasis in the original). Actually, the trial court stated the following in support of this finding:

> This is clearly an aggravating circumstance in this case because the evidence produced at trial shows that it was unquestionably the intention of the defendant to kill Officers Paul Shirley and Rick Epperson of the Orlando Police Department, the officers who had arrested him for the crime for which the defendant was to have appeared in court on January 10, 1984. This defendant armed himself to the teeth and entered said courtroom, but by a quirk of fate neither officer was present at that time, although they were scheduled to appear and were on standby.

> Having listened to the facts, the court is convinced that had either officer been present, the defendant would have undoubtedly attempted to kill them and thus prevented them from testifying against him in his pending case. The defendant was only prevented from carrying out this plan by the absence of Officers Shirley and Epperson, the intervention of Harry J. Dalton, and the subsequent shootout in which the defendant was wounded after he had murdered Bailiff Wilkerson.

(R 3457) The trial court correctly found that appellant intended to disrupt his trial.

Appellant further argues that this finding constitutes an impermissible doubling of two aggravating circumstances based upon the same facts. Provenzano admits that the trial court correctly found the aggravating circumstance that he murdered Wilkerson to avoid or prevent his lawful arrest for the attempted murder of Dalton. He claims that this same fact was the basis for the second aggravating circumstance that the murder was committed to disrupt the enforcement of laws. However, as quoted above, the trial court found this circumstance based upon the fact that Provenzano committed murder to disrupt his trial, and did so by elaborate premeditated design. There are separate factual circumstances to support each finding, there is no improper doubling. Tafero v. State, 403 So.2d 355 (Fla. 1981).

Appellee recognizes that this court has held that these two aggravating circumstances were improperly doubled in cases involving police officers. Sims v. State, 444 So.2d

922 (Fla. 1983); Kennedy v. State, 455 So.2d 351 (Fla. 1984).[4] Appellee respectfully submits that this case is distinguishable due to the scene of the crime.

[4]Cases involving victims who are not law enforcement officers where these two circumstances were improperly doubled include: Riley v. State, 366 So.2d 19 (Fla. 1978); Welty v. State, 402 So.2d 1159 (Fla. 1981); Francois v. State, 407 So.2d 885 (Fla. 1981); Thomas v. State, 456 So.2d 454 (Fla. 1984).

POINT VI

THE TRIAL COURT CONSIDERED ALL EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING CIRCUMSTANCES AND PROPERLY DETERMINED THAT ONLY ONE MITIGATING CIRCUMSTANCE WAS ESTABLISHED BY CREDIBLE EVIDENCE.

Appellant contends that the trial court erred in failing to consider and find the statutory mitigating circumstances that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance and that the defendant was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law. § 921.141(6)(b) and (f), Fla. Stat. (1983). Further, he asserts that the trial court failed to consider and find certain nonstatutory mitigating factors (AB 52).

It is the trial court which must determine whether a mitigating circumstance has been proven and how much weight it should carry in the sentencing decision. Stano v. State, 460 So.2d 890 (Fla. 1984). Just because the court did not find a particular mitigating circumstance does not mean that the trial court ignored the evidence in support thereof. Lusk v. State, 446 So.2d 1038 (Fla. 1984). The trial court assigns the weight to be afforded testimony in the penalty phase. Card v. State, 453 So.2d 17 (Fla. 1984). So long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a culpable abuse of discretion. Pope v. State, 441 So.2d 1073 (Fla. 1983).

The trial court's sentencing order in this case specifically stated that he had ". . . closely considered all of the facts and evidence presented in the trial and viewed and considered the credibility of each witness . . ." before reaching its findings as to each aggravating and mitigating circumstance (R 3454). In support of this finding that this murder was not committed while appellant was under the influence of extreme mental or emotional disturbance, the court stated:

> Although there was some evidence produced at the trial that this defendant may have been under extreme mental or emotional disturbance, the court, after viewing the entire evidence in this case, finds that any mental or emotional disturbance suffered by this defendant prior to the murder occurred many years before the murder in which he has been charged, and though he may have been angry at Officers Paul Shirley and Rick Epperson, or upset by the fact that Bailiff Harry J. Dalton had informed him that he would have to be searched while he was in courtroom number 416 of the Orange County Courthouse, any mental or emotional disturbance suffered by the defendant, either in the past or on the day of the commission of the crime charged, does not rise to the level of a mitigating circumstance.

(R 3458-3459). The trial court properly found that appellant's actions in committing this murder were not significantly influenced by experiences many years in the past so as to justify its use as a mitigating circumstance. Lara v. State, 464 So.2d 1173 (Fla. 1985). Even when the defendant has a history of

hospitalization for mental problems, if unwarranted by the evidence, it is still correct to fail to find this mitigating circumstance or to give it little weight. Medina v. State, 10 F.L.W. 101 (Fla. January 31, 1985); Foster v. State, 369 So.2d 928 (Fla. 1979). Here the trial court considered the evidence, but found in its sound discretion that it did not rise to the level of a mitigating circumstance.

Appellant also complains that the trial court failed to find that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. In support of his rejection of this circumstance, the trial court stated:

> Although there has been some evidence adduced that the defendant may have been emotionally disturbed to some degree, the CREDIBLE evidence in this case shows that this defendant did know the difference from right from wrong and was able to appreciate the criminality of his conduct, and the defendant could have conformed his conduct to the requirements of law if it had not been for the fact that the defendant, by his own admission, has a hot temper and committed the murder charged with a total disregard of its consequences.

(R 3460).

Appellant admitted on cross-examination that he knew it was a crime to carry concealed weapons. The fact that he secreted the weapons indicates he knew it was unlawful. Minutes before the shootout, he put change in the parking meter so he wouldn't get a ticket. Rather than submit to a search of his

knapsack that would have certainly exposed his illegal possession of weapons, he instead decided to take the knapsack outside to his car. These actions indicate that appellant knew his conduct was wrong and that he could conform his conduct to the law if he so desired.

Appellant contends that the evidence establishing this circumstance was unrefuted; appellee disagrees. Doctors Gutman, Wilder and Kirkland each testified that in their opinion the appellant knew right from wrong, and could conform his conduct within the bounds of the law (R 1689, 1753, 1814-1816). Dr. Kirkland stated, "I'm convinced that he knew what he was doing (on January 10, 1984) . . . (the evidence) certainly suggests that he knows the laws about weapons, whether he chooses to obey them or not." (R 1689, 1691) The weight to give psychiatric testimony during the penalty phase is the responsibility of the trial court. Card v. State, supra. The trial court considered all the evidence and determined that this mitigating circumstance had not been established. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Simple disagreement on the part of appellant does not rise to the level of an abuse of judicial discretion.

Lastly, appellant contends that certain nonstatutory mitigating circumstances were established by uncontroverted evidence and therefore the trial court erred in failing to find or consider them; again appellee disagrees. First of all, appellee disputes that there was evidence to establish these alleged nonstatutory circumstances. For example, Provenzano's

love, concern and care for his son and nephew was not established. His son was adopted over ten years ago, severing all of Provenzano's parental rights or duties, and he had not even seen his nephew for two years before the murder. Secondly, each of these factors concern events that occurred several years before the murder. As in Lara v. State, supra, the trial court correctly determined that these factors which occurred many years in the past did not significantly influence his actions in committing this murder. Third, the fact that Provenzano did not carry explosives into the courtroom and alerted the police to their presence in his apartment pales in comparison to the arsenal he secreted on his person and actually used to commit the murder. The trial court, in its discretion, correctly afforded no weight to this factor after due consideration. The appellant's history, although not ideal, is no where near as deprived as the defendant's childhood in Patten v. State, 10 F.L.W. 244 (Fla. January 10, 1985).

The trial court carefully considered and weighed the existing aggravating and mitigating circumstances, and properly determined that the jury's advisory sentence of death was the appropriate penalty.

POINT VII

THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT AND QUESTION ON CROSS-EXAMINATION DURING THE PENALTY PHASE WERE PROPER, OR IF IMPROPER, HARMLESS; THIS ISSUE IS NOT PRESERVED FOR REVIEW.

Appellant contends that the prosecutor's closing argument during the penalty phase was grossly improper and so prejudicial that a new sentencing proceeding is required. Also, he complains of a question asked of him on cross-examination during the penalty phase.

Appellant claims that the prosecutor's closing argument contained improper appeals for the jury to consider factors outside of the statutory aggravating circumstances. The record reveals an objection was made upon this ground (R 2198). However, this issue is not preserved for appellate review because there was no motion for mistrial and no request for a curative instruction. Clark v. State, 363 So.2d 331 (Fla. 1978); Castor v. State, 365 So.2d 701 (Fla. 1978).

> When there is an improper comment, the defendant, if he is offended, has the obligation to object and to request a mistrial . . . if the defendant fails to object or if, after having objected, he does not ask for a mistrial, his silence will be considered an implied waiver . . .
>
> If the defendant, at the time the improper comment is made, does not move for mistrial, he cannot, after trial, in the event he is convicted, object for the first time on appeal.

Clark v. State, 363 So.2d at 335. Following an objection and motion for mistrial, the proper procedure is to request a curative instruction. Ferguson v. State, 417 So.2d 639 (Fla. 1982). Appellant's failure to move for a mistrial and request a curative instruction waives appellate review of this issue. Bassett v. State, 449 So.2d 803 (Fla. 1984).

Even if this issue is determined to be properly preserved, the error if any, was harmless. State v. Murray, 443 So.2d 955 (Fla. 1984). Appellee urges this honorable court to review the entire closing argument, which, when read in context, clearly did not constitute prejudicial error (R 2170-2200). Darden v. State, 329 So.2d 287 (Fla. 1976); Gibson v. State, 351 So.2d 948 (Fla. 1977); Breedlove v. State, 413 So.2d 1 (Fla. 1982).

Given the facts of this case, the prosecutor was remarkably restrained in his closing argument. The gist of the prosecutor's allegedly improper remarks was that a collective society that respects the sanctity of human life is the real victim in a murder case, and that the death penalty is an appropriate sanction. Appellee is unable to conceive of an argument asking a jury to recommend a sentence of death which would not necessarily require some comment upon the nature of the punishment. Appellee submits that, when viewed in context, the argument of the prosecutor was proper, notwithstanding Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984).

Even if the comments were improper, and assuming

they were properly preserved, the conduct is not so clearly improper that automatic reversal is required. Cf. Teffeteller v. State, 439 So.2d 840 (Fla. 1983). The minor impact of the comments does not require resentencing, even given the 7-5 vote by the jury. Bush v. State, 461 So.2d 936 (Fla. 1984). The comments did not substantially contribute to the jury's advisory recommendation of death, and hence, are harmless. State v. Murray, supra.

Second, Provenzano complains that the trial court erred in denying a motion for mistrial during his cross-examination. He testified on his own behalf at the sentencing hearing (R 2050), and regressed twenty years, relating events during that time which allegedly demonstrated his lack of capacity and his lack of logical thought processes. He testified that prior to 1970, he took drugs, which indirectly caused him to drop out of high school and later to leave the Air Force (R 2053, 2059, 2071). He stopped experimenting with drugs entirely in 1970 (R 2071).

Provenzano related his version of his two unsuccessful marriages (R 2055-2061). His son by his first marriage was adopted by his ex-wife's new husband (R 2065-2066). He did not contest the adoption, as he explained, "It was her will. She wanted it, and she got it . . . I wish I had my son with me, but I always did whatever my wife wanted." (R 2066) He did not have deep feelings for his second wife (R 2060). Their marriage lasted less than two years (R 2060). A child by this wife was stillborn (R 2060). Provenzano testified that this

experience was not as traumatic as the adoption of his first son, and was much more traumatic for his second wife than for him (R 2060).

In his recent past, Provenzano related several incidents to cast further doubt upon his sanity or logical thinking ability. He related a brief, one-sided courtship with Teresa Chambers (R 2062-2063). His relationship with his sister was emphasized (R 2067-2072). He testified that, "she's been framing me since I've been a little child." (R 2067, 2071). He also claimed that he stopped visiting his sister's house because of his belief that she was putting amphetamines and/or barbituates in his food (R 2071).

Provenzano denied having delusions that he was Christ or that he was on a religious mission, or that he had any special religious powers (R 2073).

His paranoid tendencies were traced from a visit to Chicago for a friend's funeral in 1975 (R 2075-2078) through his experiences in applying for workmen's compensation (R 2079-2081) to his general feelings that "there is a conspiracy around me." (R 2085).

Specifically, Provenzano suspected a "judicial conspiracy" existed in the Susan Assaid case (R 2083). As he testified, Provenzano went from discussing this particular conspiracy to a general conspiracy of which he was a victim.

> Q. (by defense counsel, Brawley) Why do you mean by "judicial conspiracy"?
>
> A. (by Provenzano) The lawyers, the judges.

Q. Her lawyers?

A. Her lawyer.

Q. The judge that was presiding over her case?

A. Especially.

Q. Why would these people conspire against her?

A. Why wouldn't they?

Q. You tell me.

A. Well, why would a girl -- see, I don't want -- I don't want to go into that in detail, but let's face it. Judges are not so perfect. Neither are lawyers or police officers, even though they appear that way. I don't see them that way, because they're not.

Q. How do you see them?

A. I see them as able to and in many cases make critical mistakes in cases, and people go to jail on those mistakes that they just plain and simple don't want to open their eyes to. And that's the way I see it.

Q. How is that the same as a judicial conspiracy?

A. Well, when I say "judicial," I mean anything involved in a court of laws, judges, clerks, public defenders, whatever, attorneys.

(R 2084-2085).

While discussing his August 1 arrest, Provenzano reiterated this theme, by stating that his attorneys representing him in that case prevented him from calling a witness to establish his defense (R 2082-2084). Further, he stated that

the cause of the arrest was a "homosexual conspiracy." (R 2097). The jail personnel were also involved in this homosexual conspiracy (R 2098-2102).

On cross-examination, the prosecutor attempted to rebut this lengthy recital of Provenzano's lack of logical thought, his alleged insanity. First, he impeached Provenzano by demonstrating that, although he claimed to disown her, he had given his sister "power of attorney" to file several pre-trial motions on his behalf (R 2149-2150). Second, he challenged Provenzano's denials that he had been interviewed by several psychiatrists (R 2152-2153). Next, the prosecutor asked him why he took his knapsack outside rather than submit to a search (R 2153-2154), and established that Provenzano knew it was a crime to carry concealed weapons (R 2154). Provenzano's version of the murder was the next subject of impeachment (R 2155-2158).

The next line of inquiry was as follows:

> Q. (by Mr. Kunz) Okay. Mr. Provenzano, you made some comments to the jury about Mr. Edmund and Mr. Brawley's not calling a specific witness. You weren't happy with them representing you, were you?
>
> A. (by Provenzano) Absolutely not.
>
> Q. In fact, you don't think you got a fair trial, do you?
>
> A. No, sir; I don't.
>
> Q. In fact, you think these jurors were prejudiced against you from day one.

Mr Edmund: Your Honor, I object on the grounds this is argumentative.

The Witness: I won't answer that.

The Court: Sustained.

Q. (by Mr. Kunz) Did you ever tell any person, Mr. Provenzano, you never had a chance with this jury?

Mr. Edmund: I object, if it please, Your Honor, on the grounds that's inflammatory and prejudicial.

Your Honor, may we approach the bench?

(R 2158-2159). The purpose of this inquiry was to clarify his state of mind concerning the judicial conspiracy involving the courts and Provenzano's attorneys which was developed on direct. The state contends that this was a proper line of cross-examination because it further illuminated matters testified to on direct. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Once the defendant became a witness, "he could be examined the same as other witnesses on matters which illuminate the quality of his testimony." Randolph v. State, 463 So.2d 186 (Fla. 1984).

Any error was invited when defense counsel originally objected that the question was argumentative. Clearly, this directs the prosecutor to rephrase his question, which he did. Ferguson v. State, supra. Further, this occurred in the penalty phase, where the jury's only concern is whether to recommend life imprisonment or death. Matters pertinent to Provenzano's

chances for rehabilitation, including residual animosity with the justice system, are proper considerations for the jury. The closing argument by defense counsel contains numerous references to Provenzano's alleged mental illness. To rebut this, the state demonstrated several actions that were logical.

The issue that must be decided here is whether this single, isolated comment, if improper, deprived Provenzano of a fair trial. The defense counsel obviously thought the remark was trivial because they did not request a curative instruction. Ferguson v. State, supra. A motion for mistrial is addressed to the sound discretion of the court, and should be exercised with great care and caution, only in cases of absolute necessity. Salvatore v. State, 366 So.2d 745 (Fla. 1978). "No judgment should be reversed unless we are of the opinion that error was committed which injuriously affected the substantial rights of the defendant." Id. at 751. If this honorable court determines that the question is improper, the state urges that it did not injuriously affect the substantial rights of the defendant, or deny him a fair trial.

POINT VIII

APPELLANT RECEIVED A FAIR TRIAL BY AN IMPARTIAL JURY IN ACCORDANCE WITH HIS RIGHTS AS GUARANTEED BY THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF FLORIDA.

In his eighth allegation of error, appellant reiterates each of his previous arguments and asserts that their cumulative effect denied him of a fair trial by an impartial jury in violation of his federal and state constitutional rights. Appellee agrees that appellant is not entitled to a perfect trial, and asserts that he received a trial by a fair and impartial jury that was virtually error-free.

Appellee's examination of the litany of alleged errors reveals only two complaints that were not voiced in other portions of his argument (AB 57-59). Appellee will rely upon the arguments presented heretofore to dispute the majority of the alleged errors. The two new issues raised in this point VIII are contained in paragraphs four and five (AB 58). First, appellant contends that the court improperly limited the cross-examination of two lay witnesses concerning their opinion of Provenzano's insanity. Second, he complains that the jury was impermissibly prejudiced at the end of the state's closing argument when Wilkerson's relatives began crying as the tape recording of the shooting was replayed.

Appellant claims that during the rebuttal portion of the state's case, his counsel was prevented from questioning two lay witnesses concerning their expressed opinion that

he was perfectly sane. Appellee submits that review of the portions of the record cited by appellant reveal that his counsel was not restricted in his cross-examination of these witnesses (R 1594-1596, 1605-1607, 1610).

The first witness, Wayne Blecha, is the owner of Shoot Straight Gun Range in Apopka (R 1588). Three times during the first week of January, 1984, Provenzano came to Blecha's range for target practice with his assorted arsenal (R 1590, 1592). Based upon his three observations of Provenzano, Blecha opined that Provenzano was "perfectly normal" (R 1594). During the ensuing cross-examination, Blecha was asked if he and Provenzano had discussed his August, 1983 arrest, his belief that he was Jesus, and his beliefs that he was being poisoned (R 1595-1596). The state finally objected to a question which the court sustained (R 1596). Immediately thereafter, appellant's counsel announced that he had no further questions (R 1596). It is clear that appellant's cross-examination was limited only in the slightest regard, if at all.

Similarly, the second witness, Elizabeth Jones, was vigorously cross-examined. Defense counsel impeached her credibility to render an opinion of sanity by demonstrating that she did not possess sufficient facts to support her opinion (R 1605-1607). Indeed, cross-examination of this witness was not limited at all; one of the state's objections was overruled (R 1607), and even after a second objection was sustained on recross, defense counsel pursued and made his point in a non-objectional manner (R 1610).

Even if this honorable court concludes that appellant was limited in his cross-examination to some degree, in light of the overwhelming evidence of guilt any error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Murray, 443 So.2d 955 (Fla. 1984). The jury heard several experts testify as to their opinion concerning the appellant's sanity. Any error caused by the extremely slight limitation on cross-examination was harmless. Lewis v. State, 377 So.2d 640 (Fla. 1979); Mobley v. State 409 So.2d 1031 (Fla. 1982).

Secondly, appellant asserts that the trial court erred in denying his motion for mistrial when, at the end of the state's closing argument, Wilkerson's relatives began crying when the tape of the shooting was played for the jury. The tape was in evidence (R 509).

Although the motion for mistrial was not contemporaneous with the alleged incident, within minutes a motion was made (R 1966). When denying the motion, the court specifically stated that it did not observe the complained of behavior (R 1967). If the jury's reaction was as obvious as was asserted by counsel, the court would have undoubtedly observed it as well.

The harmless error doctrine has been applied to this situation in circumstances much worse than this incident. In Steinhorst v. State, 412 So.2d 332 (Fla. 1982), the mother of the victims testified that they were alive on the day before the murders. While testifying, the witness "broke down" and began crying. Id. at 335. Any error was found by this court

to be harmless. Here, the victim's relatives were in the audience, not the center of attention on the witness stand. The judge did not observe the behavior, so it must not have been obvious. Any error is harmless beyond a reasonable doubt.

The alleged cumulative error does not exist. Issues which are unconvincing individually are no more formidable in a group.

POINT IX

SECTION 921.141, FLORIDA STATUTES (1983), IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant contends that as applied, the Florida death penalty statute violates the sixth and fourteenth amendments to the United States Constitution because the jury does not make specific factual findings of the existing aggravating or mitigating circumstances. This argument has been previously considered and rejected by implication by this honorable court and federal courts. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796, rehearing denied, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667; Randolph v. State, 463 So.2d 186 (Fla. 1984); Medina v. State, 10 F.L.W. 101 (Fla. Jan 31, 1985).

CONCLUSION

Based upon the argument and authorities presented herein, appellee prays this honorable court will affirm the judgments and sentences in all respects.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Belle B. Turner

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished, by mail, to Larry B. Henderson, Assistant Public Defender for appellant, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 15th day of May, 1985.

Belle B. Turner

BELLE B. TURNER
COUNSEL FOR APPELLEE