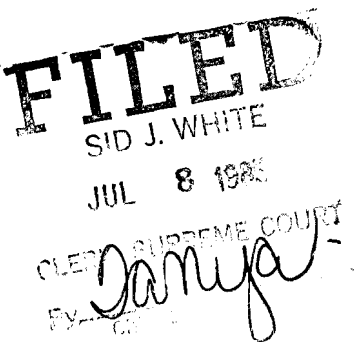
IN THE SUPREME COURT OF FLORIDA



JUAN ROBERTO MELENDEZ,

Appellant,

vs. Case No. 66,244

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

CANDANCE M. SUNDERLAND
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

OF COUNSEL FOR APPELLEE

CMS / cww

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

TABLE OF CITATIONS CONTINUED

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Juan Roberto Melendez will be referred to as "Appellant" in this brief. The State of Florida will be referred to as the "Appellee." The Record on Appeal will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE

The State accepts Appellant's Statement of the Case as a substantially accurate account of the proceedings below with such exceptions or additions as set forth in the Argument portion of this Brief.

STATEMENT OF THE FACTS

On the evening of September 13, 1983, police officers, responding to a call from the victim's sister discovered the body of Delbert Baker (a/k/a Mr. Del). (R 365) The officers discovered the body in a backroom of the school Mr. Del operated. Delbert Baker was lying on the floor which was covered with blood. (R 365) He had a pair of white socks and a pair of jockey shorts on. The rest of his clothing was not found. (R 369) Mr. Del's throat had been slashed and he had been shot in the head and shoulders several times.

There was substantial testimony, (R 255, 264) that Mr. Del normally wore alot of jewelry, including a wrist watch, a gold link bracelet, four diamond rings, and a diamond pendant. There was, however, no jewelry found on the body nor was it ever located. (R 371)

Several months later the Appellant, Juan Melendez, met with David Luna Falcon and confessed to the killing of Mr. Del. (R 439, 440) Falcon testified at trial that Melendez told him that he (Melendez) and two other guys had gone to Mr. Del's school. He left one of the guys, John, in the car and the other guy went in with him. (R 441) Melendez and his accomplice went inside where they robbed Mr. Del, cut his throat and shot him. (R 443) They then cleaned up any fingerprints they may have left, took the jewelry and the money and proceeded outside to meet the driver of the car John. (R 444) The accomplice then went to Delaware to sell the jewelry. (R 444)

This testimony was confirmed by John Berrien, the driver of the car. (R 295)

Berrien testified that Juan Melendez and George Berrien asked John to drive them to Auburndale to get their hair done and pick up some money. (R 305) Melendez had a bulge in the back of his pants that John suspected was a gun because he knew Melendez sometimes carried a .38. (R 311) According to John's testimony, George and Juan got out of the car and said to pick them up in about a hour and a half to two hours. (R 312) He picked them up two hours later. When Juan got in the car he had a towel in his hands with the two ends held together. (R 314) The next day George asked John to drive him to the train station because he planned to take a train to Willimington Delaware to check on his children. Melendez went with them to the train station. (R 320)

Numerous other witnesses were heard substantiating the State's theory as to the events surrounding the murder. The jury heard the evidence and found Appellant guilty of first degree murder and armed robbery. (R 764) Appellant received the death penalty for the murder conviction and a life sentence for the armed robbery. (R 803) This appeal followed.

SUMMARY OF THE ARGUMENT

ISSUE I

Appellant was not denied due process by the investigators' good faith failure to preserve and collect certain noncritical evidence, as the evidence at trial clearly established that Melendez was the perpetrator of the crime.

ISSUE II

In the instant case the trial judge found four aggravating circumstances and no mitigating circumstances. The record supports the finding of these aggravating circumstances beyond a reasonable doubt.

Appellant also questions the propriety of the instructions given to the jury regarding aggravating circumstances. Appellant claims that it was error for the trial court to only read the list of aggravating circumstances to the jury without defining or illustrating the technical meaning of any of the words. However, as Appellant did not raise this issue at trial he has procedurally defaulted the right to raise this issue on appeal.

ISSUE III

There was no absolute necessity to declare a mistrial in the instant case because the testimony of Jim Reagan was not relevant to the issue at hand and because the essence of his testimony was presented to the jury by way of stipulation.

ISSUE IV

Appellant failed to object to the jury verdict form, therefore, he is precluded on appeal from questioning the validity

of sentencing for both first degree murder and armed robbery.

Further, it is well settled that when Appellant is indicted for premeditated murder, the jury was instructed on premeditated murder and the evidence supports a conviction of premeditated murder, it is not error to convict and sentence for both.

ISSUE I

WHETHER APPELLANT WAS DENIED DUE PROCESS BY THE INVESTIGATORS' FAILURE TO PRESERVE AND COLLECT CERTAIN NONCRITICAL EVIDENCE.

It is the contention of Appellant Melendez that certain evidence that was discovered during the course of the instant homicide investigation was negligently handled and, therefore, was not available for his defense. Melendez alleges that it "is fundamentally unfair, and a violation of due process to allow the negligent disposal or failure to recover, of critical evidence." (Brief of Appellant pg. 14)

To support this position, Appellant relies on Armstrong v. Collier, 536 F.2d 72 (5th Cir. 1978) and Johnston v. Pittman, 731 F.2d 1231 (5th Cir. 1984).

In these cases, the Fifth Circuit adopted a three-prong test for determining whether to excuse the State for failing to preserve evidence. The three factors to be reviewed include:

1) The State's bad faith or negligence,

2) The importance of the evidence

3) The other evidence of guilt adduced at trial.

This test has not been expressly adopted by Florida Courts. Cf. Johnson v. Bentley, 457 So.2d 507 (Fla. 2d DCA 1984); State v. Sobel, 363 So.2d 324 (Fla. 1978). Nevertheless, each of these factors are used by Florida courts in determining if a defendant has been prejudiced.

1) Bad faith:

> "Lack of knowledge resulting from bad faith would not relieve the State of its duty to disclose to the defense material that is otherwise unavailable to the defense."
>
> State v. Counce, 392 So.2d 1029 (Fla. 4th DCA 1981)

2) The importance of the evidence:

> "It would be fundamentally unfair, as well as a violation of rule 3.220, to allow the state to negligently dispose of critical evidence."
>
> State v. Ritter, 448 So.2d 512 (Fla. 5th DCA 1984)

3) The sufficiency of other evidence adduced at trial.

> "Because Counts I and II could have been proven without establishing the nature of the substance involved in the transaction, we think the trial court erred in dismissing these counts."
>
> State v. Ritter, supra.

Thus, while never having expressly adopted the test used in federal courts, the same criteria is relied on by Florida courts.

In the instant case, a review of these factors would most logically start with the second prong - the importance of the evidence - in light of the extensive list of allegedly mishandled evidence.

The evidence Appellant complains of having been lost, destroyed or not recovered consists of:

1) Blood sample taken from the scene.

2) Stain on the victim's car seat.

3) Vernon James' shoes

4) David Falcon's gun.

5) The shoes found beside the body.

6) The hunting knife found in a drawer in the beauty shop office.

7) Harold Landrum's shoes.

For the purpose of clarification each of these items will be addressed individually.

1. The Blood Sample

The blood sample to which Appellant refers was collected from the scene and never tested. (R 397) Sergeant John Knapp of the Auburndale Police Department testified that that sample was taken from the floor which was covered with the victim's blood. (R 369) Even had the blood sample been tested and found to belong to someone other than the defendant or the victim it would not have been sufficient to override the overwhelming evidence against Melendez because it was never a theory of the prosecution that Melendez was the only one present during the incident.

2. The Stain on the Victim's Car Seat

Sergeant John Knapp also testified that a white substance or wetness was found on the seat of the victim's car. (R 388) It was not tested because the condition in which the victim was found led to no conclusion other than that the victim was killed in the room where he was found. There was nothing to indicate that the murder was committed elsewhere and the body transported.

3. Vernon James' shoes

Detective Jerry Richardson, of the Auburndale Police

Department testified that Vernon James was picked up for questioning the day after the homicide. (R 523) His shoes were checked for blood and to see if they compared to the bloody shoeprints found at Mr. Del's Beauty Shop. (R 524) They were returned to him because they did not have blood on them and they did not compare at all to the impressions the officers had from the photo in Mr. Del's Beauty Shop. (R 485)

4. David Falcon's gun

At trial the defense attempted to produce evidence that David Falcon had been involved in a shooting that involved the use of a gun of the same type used on Mr. Del. Appellant contends that even though the victims in the Falcon shooting incident refused to press charges the police were somehow negligent for failing to obtain the gun. The defense proffered the testimony of a ballistics expert, Ed Bigler. He testified that the bullets from both incidents may have or may not have come from the same gun; there was no way of telling. (R 555)

Despite counsel's attempt to connect the two incidents there is absolutely no basis in fact for doing so. It is without question that David Falcon was not in the United States at the time of Mr. Del's murder. (R 436) Therefore, even if he had had possession of the same gun several months later it would not have any bearing on the Appellant's part in the murder of Mr. Del.

5. The shoes found beside the body

When Mr. Del's body was discovered he was wearing a pair of jockey shorts and a pair of socks. (R 369) Next to him were a pair of white shoes. (R 364) Appellant's contention that the

loss of these shoes was detrimental to the defense is without reason. Is Appellant arguing that possibly the "real" murderers came in, killed Mr. Del and then traded shoes with him? There is no logic to that hypothesis.

Rather, the obvious conclusion is that the shoes belonged to the shoeless corpse found next to them and, therefore, would not have any bearing on the defense.

6. The hunting knife found in the office drawer

Sergeant Carroll testified that he discovered a hunting knife in the drawer of the office desk. The knife did not appear to have been used and, therefore, it was not tested. (R 370)

Again, this point is without logic. It is not reasonable to suggest that the murderer, having slashed Mr. Del's throat, wiped the knife clean of blood and the office clean of fingerprints, left fingerprints on the knife and then returned it to its original place.

7. Harold Landrum's Shoes

Harold Landrum (Bobo) was eliminated as a suspect when his alibi was confirmed by his boss at Morrison's Cafeteria. (R 654) Therefore, there would have been no reason for the police to confiscate his shoes.

Thus, as this extensive analysis shows, the evidence supposedly mishandled was not critical evidence that would have had any bearing on the outcome of this case. Rather, this extensive list is merely an attempt by Appellant to obfuscate the fact that the evidence produced at trial was more than sufficient for the jury to conclude Appellant was guilty of first degree murder.

An analysis of the remaining two prongs confirms this conclusion. As for the first prong - the state's bad faith or negligence - it is apparent that the critical evidence was retrieved, stored and handled with the expected degree of professionalism. As for those items that were not processed, testimony showed that this evidence was felt to not be of any value in the investigation of the case.

> "The State has no duty to do for the defense work which the defense can do for itself. Such a principle is inherent in the following comment of the rules of criminal procedure by the Supreme Court in Cooper v. State, 336 So.2d 1133, 1138 (Fla. 1976):
>
> "[The rules] were not designed to eliminate the onerous burdens of trial practice. Their purpose was to avail the defense of evidence known to the state so that convictions would not be obtained by the suppression of evidence favorable to the defendant, or by surprise tactics in the courtroom."
>
> The foregoing statement of principle does not permit the State to evade the discovery rules by a wilful failure to learn that which is available to be learned in order to thwart the purpose of the rules; lack of knowledge resulting from bad faith would not relieve the State of its duty to disclose to the defense material that is otherwise unavailable to the defense. Cf. State v. Coney, 272 So.2d 550, 553 (Fla. 1st DCA 1973)."
>
> State v. Counce,
> 392 So.2d 1029 (Fla. 4th DCA 1981)

According to Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963), the Constitution requires the prosecution to reveal material evidence favorable to the defendant upon the defendant's request. Brady, however, does not

extend due process to the point of requiring the state to pursue every possible avenue of investigation and make the defendant's case for him. Cf. Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706, 713 (1972) ("no constitutional requirement that the prosecution make a complete and detailed accounting").

The record in the instant case contains no evidence of either bad faith or negligence. Police procedure entails the pursuit of legitimate leads and other sources of evidence. That the police department's normal procedure does not include pursuing fruitless leads, does not violate due process.

A review of the third and last prong - the other evidence adduced at trial - establishes that no error was committed. David Falcon testified that Melendez told him that he had gone to the victim's school for an appointment to have sex. (R 440) The appointment was made by some relative. Melendez told Falcon that he went to Mr. Del's with a black guy and a driver John. John stayed in the car while Melendez stated he and the black guy went inside. (R 441) Melendez claimed the other guy slashed Mr. Del's throat, Mr. Del begged to be taken to the hospital and then Melendez shot him. (R 443) According to Appellant's statement to Falcon, they then cleaned up any fingerprints they may have left and took Mr. Del's money and jewelry to sell in jewelry to sell in Delaware. (R 444) These minute facts were confirmed by the testimony of John Berrien and the medical examiner.

An examination of this testimony and the newspaper articles introduced as defense exhibits, (R 653, 654) belies Appellant's argument that nothing in Falcon's testimony was inside information. The articles relied on by the defense simply reiterated that Mr. Del had been murdered in the backroom of his shop, his jewelry was stolen, he was cut on the neck and shot in the head. (See attached, State's Exhibit A)

There was no reference to the later testimony of the medical examiner that the cut to the throat was made before the victim was shot in the head but Falcon was able to testify that Melendez said they cut Mr. Del's throat and then shot him. (R 443) The newspapers did not report that John Berrien admitted driving his brother George and Melendez to Mr. Del's shop, dropped them off and waited outside for them, but, nevertheless, Falcon knew these details. Falcon also knew that George Berrien had taken Mr. Del's jewelry to Delaware to sell even though the newspapers did not.

As defense counsel himself admitted, Falcon's testimony was of such intimate detail as to indicate that either Falcon was present during the murder or had spoken to someone who was. (R 828) Since Falcon was in Puerto Rico on the day of the murder, the more logical conclusion is that he spoke to someone who was present during the murder and that someone was Juan Melendez.

The evidence produced at trial was sufficient to satisfy all three prongs of the test and to establish that Appellant was not denied due process.

ISSUE II

WHETHER THERE WAS PROOF BEYOND A REASONABLE DOUBT TO SUPPORT THE TRIAL COURT'S FINDING OF AGGRAVATING CIRCUMSTANCES.

In the instant case the trial judge found four aggravating circumstances:

> "1. The defendant has been previously convicted of a felony involving the use or threat of violence to some person. A copy of the record of conviction of Robbery is attached hereto as Exhibit A.
>
> 2. The crime for which the defendant is to be sentenced was committed while he was engaged or an accomplice in the commission of the crime of robbery. The record in this case shows a conviction of robbery as alleged in Count 2 of the information. The evidence presented established that a large amount of body jewelry customarily worn by the deceased was missing from his body.
>
> 3. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel as shown by a portion of the trial testimony of David Luna Falcon attached as Exhibit B.
>
> 4. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification as shown by a portion of the trial testimony of David Luna Falcon attached as Exhibit B."
>
> (R 817, 818)

The Court did not find any mitigating circumstances. (R 818)

Appellant contends that the State failed to prove these aggravating circumstances beyond a reasonable doubt. Again, this contention is without basis in fact.

There is no argument that the first aggravating circumstance - a previous conviction of a felony involving the use or threat of violence - was proven beyond a reasonable doubt. A copy of the record of conviction was attached to the trial courts' findings. (R 817) (Brief of Appellant pg. 15)

As for proof of the robbery, in the penalty phase of the trial the jury found Appellant guilty beyond a reasonable doubt This conviction was the basis of the judge's findings. (R 817) See also testimony of David Falcon, and John Berrien. (R 434-467, 295-358)

Paragraph three of the court's findings state that the crime was especially wicked, evil, atrocious or cruel" as shown by the testimony of David Falcon. Contrary to Appellant's claim, Falcon testified that Appellant told him they had cut Mr. Del's throat and Mr. Del fell on the floor and started throwing blood at them. While Mr. Del was begging them to take him to a hospital, Melendez shot him several times in the head and shoulders. (R 443, 344) This version of the incident was confirmed by the autopsy and the testimony of Francis Drake, the medical examiner. (R 337) It was the examiner's opinion that the bullet wounds were sustained after the injury to the neck. He was certain that the only potentially fatal shot was received after the throat was cut. (R 351) Based on the amount of blood found at the scene, it was obvious that Mr. Del was still very much alive and his heart was pumping vigorously when his throat was slashed. (R 352)

Thus, Appellant is simply wrong when he states that Mr.

Del's was not a slow, lingering, cruel expiration. Therefore, the trial court's finding should not be disturbed. Squires v. State, 450 So.2d 208 (Fla. 1984); Combs v. State infra; State v. White, No. 64,791 (April 25, 1985) [10 F.L.W. 247].

Paragraph four of the trial court's findings states that the killing was done in a cold, calculated and a premeditated manner. Appellant's claim that there was no evidence of premeditation is not supported by the record. The record shows that Mr. Del's throat was slashed and then he was shot in the head and shoulders several times. (R 344, 347-350) Where a person strikes another with a deadly weapon and inflicts a mortal would, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. See Rhodes v. State, 104 Fla. 520, 140 So. 309, 310 (1932); Buford v. State, 403 So.2d 943, 949 (1981). Premeditation may be inferred from the circumstances surrounding the homicide. Hill v. State, 133 So.2d 68 (Fla. 1961).

Ample evidence in the record supports the finding that the murder was committed in a cold, calculated and premeditated fashion. Rose v. State, No. 64,484 (May 16, 1985) [10 F.L.W. 280]; Squires v. State, 450 So.2d 208 (Fla. 1984); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982); Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, ___U.S.___, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984).

Further, assuming arguendo, that even if the evidence was insufficient to support one aggravating circumstance where there are other valid aggravating circumstances and no mitigating circumstances, reversal of the sentence is not warranted. Bundy v. State, No. 59,128 (May 9, 1985) [10 F.L.W. 269]; Clark v. State, 443 So.2d 973 (Fla. 1983); Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Shriner v. State, 386 So.2d 525 (Fla. 1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981); Elledge v. State, 346 So.2d 998 (Fla. 1977)

Lastly, Appellant questions for the first time on appeal the propriety of the instructions given to the jury regarding aggravating circumstances. Appellant claims that it was error for the trial court to only read the list of aggravating circumstances to the jury without defining or illustrating the technical meaning of any of the words.

Appellant's counsel failed to raise this objection to the jury instructions at trial as required by Florida Rule of Criminal Procedure 3.390 in order to preserve this point for appeal. Nor did he seek in any way to have the presently challenged jury instruction modified. Therefore, as Appellant has procedurally defaulted the right to raise this issue on appeal, this Court should not now reach the merits of this issue. To do so at this stage would defeat the purposes of Florida's contemporaneous objection rule and allow for federal review of this issue at a later date. Jackson v. State, 438 So.2d 4 (Fla.

1983); Barclay v. State, No. 64,765 (Fla. May 30, 1985) [10 F.L.W. 299]; Peavy v. State, 442 So.2d 200 (Fla. 1983); Routly v. State, 440 So.2d 1257 (Fla. 1983), cert. denied, 104 S.Ct. 3591 (1984); Ray v. State, 403 So.2d 956 (Fla. 1981), Cf. Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981); McKinney v. Estelle, 657 F.2d 740 (5th Cir. 1981); Clark v. Blackburn, 632 F.2d 531 (5th Cir. 1980).

The Federal courts have acknowledged that this Honorable Court enforces its procedural default policy. Hall v. Wainwright, 73 F.2d 766 (11th Cir. 1984); Francois v. Wainwright, 741 F.2d 1275 (11th Cir. 1984); Booker v. Wainwright, ___F.2d___ (11th Cir. Case No. 84-3306, opinion filed June 21, 1985).*

---

[1] In Booker, supra, the court rejected a similar claim as presented here that constitutional error was committed in the charge on heinous, atrocious or cruel.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED MOTION FOR MISTRIAL WHEN TWO NON-SUBPOENAED DEFENSE WITNESSES REFUSAL TO APPEAL TO TESTIFY AS TO AN UNRELATED INCIDENT.

At trial, it was apparently a theory of the defense that evidence of the May 1984 assault on an Auburndale family, James and Rita Reagan, by the State's witness David Falcon would in some way prove exculpatory for Melendez. The defense planned to introduce the testimony of James and Rita Reagan concerning the incident and their subsequent dismissal of the charges against Falcon. The Reagans', however, were not subpoenaed and according to defense counsel refused to return from out of state to testify. (R 420)

The defense moved for a mistrial based upon the Reagans' failure to appear. (R 420) The prosecutor countered that even though he believed the Reagans' testimony was inadmissible because it was irrelevant and immaterial to any issue before the Court, he would, nevertheless, agree to a stipulation as to what their testimony would be if the court found it to be admissible. (R 422) The content of Mr. Reagan's testimony as stipulated to, was read to the jury. (R 557-558)

On appeal Melendez is once again trying to infer some connection between the Reagan incident in May of 1984 and the brutal murder of Mr. Del in September of 1983; even to the point of suggesting that if the jury had heard this testimony they may have even believed that Melendez was the sort of person who would

commit the subject crime. (Brief of Appellant, pg. 17).

There is absolutely no basis for this insinuation. The evidence clearly showed, and was confirmed by Melendez himself, that Falcon did not arrive in the United States until September 24, 1983. Mr. Del was murdered on September 13, 1983. (R 670, 700, 369) In any event, Florida case law clearly states that a motion for a declaration of a mistrial is addressed to the sound discretion of the trial judge. Strawn v. State ex rel. Anderberg, 332 So.2d 601 (Fla. 1976); Paramore v. State, 229 So.2d 855 (Fla. 1969); modified on other grounds, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972); Tate v. Gray, 292 So.2d 618 (Fla. 2d DCA 1984); Warren v. State, 221 So.2d 423 (Fla. 2d DCA 1969); Prokos v. State, 209 So.2d 484 (Fla. 3d DCA 1968); Baisden v. State, 203 So.2d 194 (Fla. 4th DCA 1967); Garcia v. State, 142 So.2d 318 (Fla. 2d DCA 1962). In this State the rule has been long established and continuously adhered to that the power to declare a mistrial and discharge the jury should be exercised with great care and caution and should be done only in cases of absolute necessity. State ex rel. Wilson v. Lewis, 55 So.2d 118 (Fla. 1951); State ex rel. Alcala v. Grayson, 156 Fla. 435, 23 So.2d 484 (1945); King v. State, 258 So.2d 21 (Fla. 2d DCA 1972); Warren, supra; Kelly v. State, 202 So.2d 901 (Fla. 2d DCA 1967); Salvatore v. State, 366 So.2d 750 (Fla. 1978)

There was no absolute necessity to declare a mistrial in the instant case because the testimony of Jim Reagan was not relevant to the issue and because the essence of his testimony was

presented to the jury by way of stipulation.

Appellant also refers to the alleged misconduct of Officer Glisson in handling the Reagan/Falcon incident. This claim is not supported by the record. While this issue has been addressed thoroughly in Issue I, it should be noted that Officer Glisson's investigation was only dropped after the Reagans voluntarily dismissed the charges against Falcon. There was no misconduct and there was no prejudice to the defendant.

ISSUE IV

IF A DEFENDANT IS FOUND GUILTY OF FIRST DEGREE MURDER AND ARMED ROBBERY, ALL OF WHICH WAS ONE TRANSACTION IS IT IMPROPER TO SENTENCE HIM FOR BOTH OFFENSES.

Appellant claims the trial court erred in sentencing him separately for the robbery and the first degree murder because he claims the first degree murder charge may have been based on the felony murder theory, there being no specific finding of premeditation. It should be noted at the outset that while this issue was presented to the trial court in Appellant's motion for new trial, (R 815) there was no contemporaneous objection (R 839) and therefore, because Appellant failed to timely raise this issue before the trial court, he is precluded from raising this issue on appeal. Jackson v. State, 438 So.2d 4 (Fla. 1983); Barclay v. State, No. 64,765 (Fla. May 30, 1985) [10 F.L.W. 290]; Ray v. State, 403 So.2d 956 (Fla. 1981).

Further, as this Honorable Court noted in Blanco v. State, 452 So.2d 520 (1984), where the Appellant is indicted for premeditated murder, the jury was instructed on premeditated murder and the evidence supports a conviction of premeditated murder, it is not error to convict and sentence for both.

> "Appellant claims the trial court erred in sentencing him separately for the burglary, because the first-degree murder conviction was based on the felony murder theory, there being no premeditation. This argument is meritless. Appellant was indicted for premeditated murder, the jury was instructed on premeditated murder, and the evidence supported premeditated murder. It is not

> error to convict and sentence a defendant for both premeditated murder and burglary when both have been charged and the state has introduced sufficient evidence of premeditation to support the murder conviction even had the jury not returned the burglary conviction. Breedlove v. State, 413 So.2d 1, 8 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982)."
>
> Id at 525

In the instant case Appellant was charged in a two-count indictment with premeditated murder and robbery. (R 2-3) The jury returned a guilty verdict on each count. (R 811) The instant record contains ample support for the conclusion that Appellant committed premeditated murder.

Premeditation is fully formed and conscious desire to take a human life, which must be formed after reflection and deliberation. Such premeditation may exist for only a few moments before the offense. McCutchen v. State, 96 So.2d 152 (Fla. 1957). It may be inferred from the circumstances surrounding the homicide and may be established by circumstantial evidence. Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958); Weaver v. State, 220 So.2d 52 (Fla. 2d DCA 1969) and Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965). Where a person strikes another with a deadly weapon and inflicts a mortal wound, the very act of striking such person with such weapon in such manner is sufficient to warrant a jury in finding that the person striking the blow intended the result which followed. See Rhodes v. State, 104 Fla. 520, 140 So. 309, 310 (1932); Buford v. State, 403 So.2d 943, 949 (1981)

The record in the instant case reflects that Appellant shot the victim several times in the head, neck and shoulder. (R 344, 347-350) Further, the evidence showed the shots were to finish the victim off after a potentially fatal slash to his throat. (R 351-353)

The entire circumstances of the crime support the conclusion that the jury verdict could be based on the rational belief that Appellant was guilty of premeditated murder and therefore, Appellant could properly be sentenced for both burglary and murder. Griffin v. State, No. 62,819 (May 2, 1985) [10 F.L.W. 264].

Further, F.S. 775.021(4) permits separate sentences for separate criminal offenses and offenses are separate if each offense requires proof of an element that the other does not, without regard to the pleading or proof. As we all know, first degree murder requires the killing of a human being which the offense of robbery does not require. And a robbery requires the forceful taking of property which first degree murder does not.

Appellant's claim is without merit.

CONCLUSION

Based on the foregoing argument and citations of authority, the Appellee submits that the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

CANDANCE M. SUNDERLAND
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Marshall G. Slaughter, Esq., P.O. Box 226, 245 So. Central Avenue, Bartow, Florida 33830 this 3rd day of July, 1985.

OF COUNSEL FOR APPELLEE.