IN THE SUPREME COURT OF FLORIDA

WALTER LEE BROWN,

~~Petitioner~~, Appellant

v.

Case No. 69,623

STATE OF FLORIDA,

~~Respondent~~, Appellee /

ON APPEAL FROM THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

RESPONDENT'S BRIEF OF THE MERITS

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's rendition of the procedural and factural history of the case, except to add the following information in a light most favorable to the jury verdict of guilt:

The prosecuting attorneys attempted to select a jury consisting of two black jurors, (T 863-867). Mr. Kunz informed the trial court that the state considered any non-racial exercise of peremptory challenges to comply with this court's opinion in State v. Neil, 457 So.2d 481 (Fla. 1984). Mr. Kunz stated he would strike any venire-person with an arrest record, regardless of race. (T 865-69).

James Clifford Coile, a resident of the apartment complex where the victim lived, observed the victim's car and the Monte Carlo leave the complex early on the morning of the murder. (T 1114-16; 1126-33). He described the person who left the Toyota (the victim's car), (T 1475), and ran to the Monte Carlo as " a young black male with . . . a razor-cut-type close crop hair-cut. . . with . . . a lighter complexion, and he had on jeans. He was neatly dressed. . . muscular, a firmly built young man. . . ." (T 1116-17). Mr. Coile observed the Monte Carlo leave the apartment building parking lot, followed by the small late model gray or off-white car. (T 1119-20).

Appellant claimed that he and co-defendant Roundtree put Mr. Bowden in the trunk of the Toyota. (T 1432). Appellant claimed that Roundtree drove the Toyota containing Mr. Bowden. (T 1478). Appellant admitted robbing the victim at gun-point. (T 1475-76). Appellant also admitted he participated in the decision to return to the apartments and drive away the vehicle containing Mr. Bowden. (T 1479). The appellant felt "there was a reason" to go back and get Mr. Bowden, still alive at the time, because Mr. Bowden had seen the appellant and Roundtree. (T 1482).

After Roundtree allegedly drove the car away and told Appellant to follow him, Appellant knew the man would be killed. (T 1481). Appellant admitted he drove the Monte Carlo during the time Mr. Bowden was killed, (T 1482-83).

Appellant claimed he did not hear any gunshots when Mr. Bowden was killed. Roundtree allegedly told Brown he "knocked off" the victim. Appellant denied participating in the killing. He stated he only knew Mr. Bowden was killed based upon Roundtree's statement. (T 1585). However, appellant later admitted to seeing the body of Mr. Bowden. (T 1509).

The Appellant and Roundtree went to the victim's apartments to steal another car, as the police had seen the Monte Carlo after appellant attempted to kidnap Mr. Hazelton. (T 1461-62; 1473, 1475). The Monte Carlo was stolen from the other

murder victim, Mr. Robert Davis (The subject of the collateral crime evidence. (T 1474).

Agent David Warniment testified as an expert firearms examiner. (T 1609). The weapon used to kill Mr. Bowden was a semi-automatic .22 caliber carbine rifle. (T 1612). He testified that the weapon's trigger must be pulled for each shot. (T 1618; SX 46).

Marvin Hazelton testified that he was assaulted by an armed black male described as "between five-five, five-six, short hair cut, young. A hundred and forty to a hundred and forty-five pounds." He did not have facial hair. (T 1628-29). The assailant told Hazelton to get into the Monte Carlo, used by appellant and Roundtree after the murder of Robert Davis. (T 1631-32). The driver of the car was "larger." (T 1629). Co-defendant Roundtree is larger than appellant, (T 2325, 2349), at six feet, two inches in height.

The jury found appellant guilty of murder in the first-degree as charged, after deliberating for an hour and a half. (T 2006-07; R 741). During the penalty phase, the Court restricted co-defendant Roundtree's presentation of evidence which might adversely reflect upon appellant. (T 2203-06). The State did not present further evidence except for Brown's prior conviction of armed robbery. (T 2222). Appellant's trial counsel cross-examined Dr. Krop, who testified for Roundtree. (T 2357).

During closing argument the State emphasized the defendants killed Francis Sheldon Bowden in a cruel and heinous manner, (T 2433-36), including a medical examiner's testimony that the first two shots did not kill Mr. Bowden or render him unconscious. The State also argued that five other aggravating factors applied, including that the defendants killed Francis Bowden in a cold and calculated manner. (T 2437-39). The State noted that the defendants returned to remove Mr. Bowden after having initially left the victim alive in the trunk of the car. The prosecutor cited to the firearms expert testimony that the murder weapon had to be shot by pulling the trigger once for each shot. Id.

Mr. Kunz cited to appellant's statement that he knew they were returning to kill Francis Bowden to eliminate him as a witness, (T 2430), demonstrating the murder was meant to avoid lawful arrest by "eliminating" Mr. Bowden as a witness. The State argued the evidence supported a finding that defendants murdered Mr. Bowden for pecuniary gain, (T 2431), that the murder occurred during the commission of robbery or kidnapping (T 2426), and appellant participated in the murder after previously being convicted of a felony involving the use of threat or violence. (T 2420). Counsel noted that both defendants shared in the criminal proceeds. (T 2446).

The Court allowed appellant to present non-statutory, mitigating evidence of remorse. (T 2398). The jury recommended a

sentence of death by a vote of 10-12 after 40 minutes of deliberation. (T 2522-2533). Appellant apologized for his participation in what happened to Mr. Bowden. (T 2545).

The Court imposed a sentence of death. (T 2545-63). It found no mitigating factors appicable to appellant, after considering statutory and non-statutory evidence. (T 2553-57). The Court found six aggravating circumstances applicable to appellant's crime. (T 2557-2562).

SUMMARY OF ARGUMENT

The trial court conducted an inquiry whether the state legitimately exercised its peremptory challenges. The prosecutor articulated specific, non-discriminatory grounds for excusing venirepersons.

The trial court properly instructed the jury to disregard the co-defendant's comments. The court did not abuse its discretion in denying the motion for mistrial.

The trial court properly admitted appellant's co-defendant's statement as it contained sufficient "indicia of reliability." Alternatively, any error was harmless as appellant's own confession admitted guilt of first-degree felony-murder. Furthermore, the trial court properly joined the trials in the interest of justice. Any error in denying the motion for severence was harmless.

The trial court properly refused to instruct the jury on "independent acts." No evidence supports appellant's claim he was not intricately involved in the robbery and murder.

The trial court did not reversibly err in denying appellant's motion to sever the penalty phase. The appellant was not prejudiced from the co-defendant's testimony or substantial influence where the jury heard of appellant's involvement in the murder of Francis Bowden. All aggravating circumstances found by

the court were properly attributed to appellant. Any error in sentencing was harmless where appellant does not challenge three aggravating circumstances and the trial court found no mitigating circumstances, leaving a finding of three aggravating circumstances and no mitigating circumstances.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL WHERE THE STATE EXERCISED ITS PEREMPTORY CHALLENGES IN A RACIALLY NEUTRAL MANNER. (Restated).

As noted by appellant, this court has held that when a party challenges the use of peremptory challenges for alleged racially discriminatory purposes, the challenged party need only demonstrate the "questioned challenges were not exercised solely because of the prospective juror's race." State v. Neil, 457 So.2d 481, 487 (Fla. 1984). The challenged party is not required to show entitlement to strike for cause. Id. Once the challenged party articulates reasons related to the case, "or characteristics of the challenged persons other than race," then the trial court terminates the inquiry into the use of peremptory challenges. Id.

Venirepersons Barnes, Grey, Boykins, Robinson, Gallmon, Abram Williams, Campbell, and Timothy Williams, were all legitimately excused by the state through peremptory challenges for valid reasons. Barnes (T 540-2) and Grey were excused for their expressed reservations against the death penalty. Engle v. State, 438 So.2d 803 (Fla. 1983). Boykins had never been employed. (T 546). Campbell had an undesirable employment record and was a plaintiff in a civil action. (T 548-9). Abram Williams

had a poor employment record. (T 658-61 . Timothy Williams had an unproven employment record and was too young. (T 660-63). Gallmon had failed to appear in court, previously demonstrating a lack of respect for the judicial system. (T 858-60). Robinson had been previously arrested, (T 965-68).

Other challenged venire-persons were also legitimately excused by the state through its peremptory challenges. Venire-person Tillman had not been employed for over five years before trial. (T 862-64). Venireperson Baldwin ambiguously answered the question whether she believed in the death penalty, after indicating a problem with her "duty" as a juror to convict in a capital case. (T 439-41). The state has a right to use peremptory challenges to strike venirepersons who might lean the wrong way. See Batson v. Kentucky, 476 U.S. ____, 106 S.Ct. 1712, 90 L.Ed.2d 69 at 88 (1986), where the Supreme Court recognized that the state's burden of persuasion in demonstrating the neutral exercise of challenging black jurors "need not rise to the level justifying exercise of a challenge for cause," but must "articulate a neutral explanation related to the particular case to be tried." Once the state provides a clear and reasonably specific explanation, the trial court's Neil inquiry is satisfied, and the trial court should deny a motion to strike the panel or motion for a mistrial. See Batson, 90 L.Ed.2d at 88-89, N. 20; Compare, Floyd v. State, 12 F.L.W. 2105 (Fla. 3d DCA Sept. 11, 1987) (stirking for "superstitious reason" held not constitu-

tional). Here, the prosecutor commendably articulated specific reasons for peremptory challenges, including prior arrests, reservations about the death penalty, poor employment records, and initiation of civil actions.

Any savvy attorney with trial experience understands that selecting a potential juror requires complex psychological analysis to identify potential bias. Unfortunately, on appeal, the reviewing court must examine only the cold record, without reference to hostile or partronizing gestures by venirepersons. See (T **970-983).** Consequently, the reviewing court must give great deference to a trial court's ruling that a party has expressed racially neutral reasons for peremptory challenges. Here, the prosecutor's reasons facially meet the test of Neil and Batson because every reason stated is legitimately related to the case. For example, a prosecutor does not want a potential juror who has sued his employer or another party in tort. This action indicates empathy for the individual and antipathy for authority figures, and rightly or wrongly, the net effect is the same: that juror is more likely to empathize with a criminal defendant rather than the state or an invisible murder victim.

Appellant was not entitled to a petit jury that reflects the composition of the community. Batson v. Kentucky, **90** L.Ed.2d at **80,** N.6; Taylor v. Louisiana, **419** U.S. 522, **95** S.Ct. **692, 42** L.Ed.2d **690 (1975).** The state indeed attempted to seat **two** black

jurors, which would have better reflected the racial composition of Jacksonville.

Florida appellate courts have recognized that the reasons expressed by the prosecutor below for exercising peremptory challenges are valid, non-discriminatory grounds for excusing potential jurors. Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985). Here, the prosecutor did not give the trial court evasive, unspecific reasons for exercising peremptory challenges.

The trial court below is to be commended for conducting an inquiry to ensure that no party used their peremptory challenges in an unconstitutional manner. Relying on Neil, supra, other Florida courts have held that pointing out the exclusion of a number of blacks is, by itself, insufficient to trigger an inquiry into a party's use of peremptories. See Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985) (nine prospective jurors excluded upon peremptory challenges were black, appellant faced all-white jury); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985) (record reflects exclusion of a number of blacks from jury, in almost each instance there was a valid basis for exclusion other than race); Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986) (prosecutor used peremptories to exclude five blacks and three whites from jury pool); Macklin v. State, 491 So.2d **1153** (Fla. **3d** DCA 1986); Rose v. State, 492 So.2d **1353** (Fla. 5th DCA 1986) (no error in trial court's exercise of discretion in

overruling defense objection that two blacks were excluded based on race); Koenig v. State, 497 So.2d 875 (Fla. 3d DCA 1986); Robinson v. State, 498 So.2d 636 (Fla. 1st DCA 1986), Thomas v. State, 502 So.2d 994 (Fla. 4th DCA 1987).

In Woods v. State, 490 So.2d 24 (Fla. 1986), cert. denied, 107 S.Ct. 446 (1986), this Court reaffirmed the principles established in Neil. In Woods, after the State had used ten peremptories, the defense objected contending six of those had been exercised against blacks and that the State had removed every black that was on the jury. The record actually showed that out of nine black prospective jurors, one was challenged for cause, five were excused by the State, and the remaining two were excused by defense, Citing to Neil's holding that the exclusion of a significant number of black potential jurors is insufficient to require an inquiry, this Court held that Woods had failed to demonstrate a substantial likelihood that the State exercised its peremptory challenges solely on the basis of race.

The facts sub judice are clearly distinguishable from Slappy v. State, 503 So.2d 350 (Fla. 3d DCA 1987). Judge Parsons required the state attorneys to specifically demonstrate their non-discriminatory grounds for excusing the venire-persons. The trial court even conducted a mini-Neil inquiry regarding venire-person Robinson to ensure she did have a prior criminal background (T965-970).

The State asserts that the prosecutor's peremptory challenges comply with the standards delineated in Slappy. However, the state alternatively asserts that the Third District's opinion in Slappy is irremediably flawed. That court relied heavily on California law, which this court specifically declined to adopt. State v. Neil, **457** So.2d at **485**; Slappy, **503** So.2d at **352-355.** Neither this court's decision in Neil or the Supreme Court's opinion in Batson v. Kentucky, mandate the Third District's ruling which essentially eliminates peremptory challenges and substitutes challenges for cause. Furthermore, both Batson and Neil accord great deference to the trial court's ability to discern discrimination in the exercise of peremptories, and Judge Parsons did not fail to properly ensure the legitimate use of peremtories.

This court has accepted review of Blackshear v. State, **504** So.2d **1330** (Fla. 1st DCA **1987)** in Case No. **70,513.** Counsel for appellant in that case argues that the holding in Batson v. Kentucky, supra, requires a more stringent examination of peremptory challenges by a party. The state of course relies upon its brief in that case, but notes that the court in Batson delineated the same test under the Equal Protection Clause: Whether a party's sole reason for excusing jurors is their race. The Third District's test in Slappy and Floyd expands the reasoning of Batson and Neil to require a party to show cause for the use of a peremptory challenge. All of the state's explana-

tions for excusing the venirepersons were legitimate. This court should affirm the trial court's thorough inquiry into the reason's proffered and that court's approval of the peremptory challenges. The trial court did not abuse its discretion in denying the motion for a mistrial.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PPELL NT'S MOTION FOR A MISTRIAL FOR THE CO-DEFENDANT'S BRIEF REMARK, WHICH THE COURT INSTRUCTED THE JURY TO DISREGARD.

The trial court instructed the jury to disregard the co-defendant's comment during opening argument that appellant was a car thief. (T 1025-29). Earlier the trial court instructed the jury that argument by counsel did not constitute evidence. (T 1002). It is presumed the jury will follow the court's instruction, Richardson v. Marsh, 481 U.S. ___ 95 L.Ed.2d 176, 188, 109 S.Ct. ___ (1987):

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accomodation of the interests of the state and the defendant in the criminal justice process.

It is ludicrous to argue that a co-defendant could guarantee a mistrial at any time by simply making an improper comment. Through no fault of the state all defendants could sabotage any trial by blurting out illicit statements. Here, of course, the comment was very brief and only occurred during opening statements.

To adopt appellant's argument would eliminate the practicality of joint trials. However, joint trials "play a

vital role in the criminal justice system." Richardson, 95 L.Ed.2d at 187. Furthermore, the brief comment at issue here was obviously harmless, as the state produced substantial evidence that appellant murdered Francis Bowden. See Rogers v. State, 12 F.L.W. 368 (Fla. July 17, 1987). The jury did not recommend executing appellant because the co-defendant's lawyer called appellant a car thief. See Greer v. Miller, 483 U.S. ____, 97 L.Ed.2d 618, 107 S.Ct. _____ (1987). Appellant has failed to demonstrate how the trial court abused its discretion in providing curative instructions to the jury to disregard the remark, See Darden v. State, 329 So.2d 287, 291 (Fla. 1976), cert. dismissed, 430 U.S. 704 (1977). This Court should affirm the trial court's ruling.

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN JOINING APPELLANT'S TRIAL WITH HIS CO-DEFENDANT AS THEIR STATEMENTS WERE NOT INTRODUCED AS SUBSTANTIVE EVIDENCE AGAINST EACH OTHER, AND JOINT TRIALS SERVE THE INTERESTS OF JUSTICE BY ENSURING ACCURATE VERDICTS AND CONSERVING JUDICIAL RESOURCES; ALTERNATIVELY, ANY ERROR WAS HARMLESS. (Appellant's Issues III and IV restated).

The United States Supreme Court in Richardson v. Marsh, 481 U.S. ___, 95 L.Ed.2d 176, 109 S.Ct. ___ (1987) recognized:

> Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability-advantages which some time operate to the defendant's benefit.
>
> Even apart from the tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

The Court earlier explained:

> It would impair both the efficiency and the fairness of the criminal justice system to require, in. . . cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.

95 L.Ed.2d at 187. Although Richardson involved redacted confessions, the court's reasoning applies where the state here prosecuted each defendant under alternate theories of homicide. Under Richardson, the trial court here properly admitted each co-defendant's statement. However, the court in Richardson also strongly endorses the states use of joint trials, regardless of whether Brown's statement was properly admitted here.

In Florida, joint-trials are permissable, and a co-defendant's admitted confession is harmless where his own confession demonstrates guilt of the charged crime. Puatti v. State, 495 So.2d 128, 131 (Fla. 1986); Whitfield v. State, 479 So.2d 128 (Fla. 4th DCA 1985); Damon v. State, 397 So.2d 1224 (Fla. 3d DCA 1981). See also Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986) (Proper for trial court to conduct joint penalty proceeding where joint trial properly conducted). In Damon v. State, 397 So.2d at 1226, the court addressed the exact same situation presented here: The defendant's own confession "in and of itself showed him to be guilty of felony-murder." The court stated the only reason Damon was not so convicted "can only be ascribed either to a misunderstanding of the felony-murder instructions or to a jury pardon." Id. at fn. five. Although the court relied on Parker v. Randolph, 442 U.S. 62 (1979) plurality, it expressly recognized the "non-testifying co-defendant's confession is harmless." The court found the Parker analysis and harmless error analysis to be equally applicable. 397 So.2d

1227. This court should also affirm either because the trial court properly joined the trial, or because any error was harmless as appellant's own confession demonstrates his guilt of felony-murder. Jackson v. State, 502 So.2d 409 (Fla. 1986).

A. The Trial Court Properly Admitted The Co-defendant's Confession As It Contained Sufficient Indicia Of Reliability As To Its Truthfulness As To Be Admissible Against Appellant: Alternatively, Any Error Was Harmless As Appellant's Own Confession Admitted Guild Of First-Degree Felony Murder.

In Cruz v. New York, 481 U.S. ____, 95 L.Ed.2d 162, 109 S.Ct. ____ (1987), decided after the trial below, the Court held that a defendant's confession "may be considered at trial in assessing whether his co-defendant's statements are supported by sufficient indicia of reliability to be directly admissable against" the Appellant. 95 L.Ed.2d at 172; See Lee v. Illinois, 476 U.S. ____, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986). The Court thus held that if both defendant's confessions demonstrate the requisite signs of truthfulness, the co-defendant's statements, are directly admissable at trial against appellant. No violation of the Confrontation Clause occurs if the co-defendant's statement is reliable. Roundtree's statement was reliable as an admission of guilt of felony murder. See United States v. Harris, 403 U.S. 573 (1971). (T 1417, 1283).

As stated, however, appellant here conclusively confessed to guilt of felony-murder in the first-degree. See Jackson v. State, 502 So.2d 409, 412-13 (Fla. 1986); White v. State, 403 So.2d 331 (Fla. 1981), cert. denied, 463 U.S. 1229 (1981); White v. Wainwright, 809 F.2d 1478 (11th Cir. 1987), Damon v. State, 397 So.2d 1224 (Fla. 3d DCA 1981). Appellant's confession to felony murder is corroborated by other evidence.

Appellant admitted he accosted and robbed Francis Bowden the morning of Ocotber 10, 1985 in University Square Apartments. (T 1477-78). Appellant obviously used a weapon, as he and Roundtree had earlier assaulted Marvin Hazelton with weapons. (T 1473). To avoid identification, appellant and Roundtree forced the victim Francis Bowden into the car trunk. (T 1477). After leaving the victim trapped in the car trunk, appellant and Roundtree drove back to retrieve the victim, to eliminate the victim. (T 1479). Because Mr. Bowden had witnessed his own robbery, he had to be killed. Id.

Appellant thus confessed to first-degree felony-murder, as appellant was a major participant in the robbery and killing of Francis Sheldon Bowden. See Johnson v. State, 486 So.2d 657 (Fla. 4th DCA 1986); White v. State, supra. The state prosecuted appellant under alternate theories of premeditated murder or felony-murder. (T 1981). See Adams v. State, 412 So.2d 850 (Fla. 1982), cert. denied, 459 U.S. 882 (1982); (T 1980-82). The facts

of appellant's confession were corroborated by fingerprint evidence. His prints were lifted off both cars, so appellant was necessarily connected to the car carrying the victim on the death ride. (T 1475-80; 1536-39; 1584-97). Appellant possessed the victim's car keys. (T 1205, 1218). Appellant was guilty of felony first-degree murder. Section 782.04(1)(a)(2), Florida Statutes (1985).

In Jackson v. State, 502 So.2d 409, this court recognized similar participation in a murder as justifying the imposition of the supreme penalty. Compare Enmund v. Florida, 458 U.S. 782 (1982). This court stated:

> The threshold issue is whether an Enmund assessment can be made upon the record before us. . . the next step. . . must focus on whether the defendant killed or attempted to kill or intended or contemplated that life would be taken.
>
> Appellant knew his brother had a firearm. . . indeed the two brothers' criminal plan required that one of them hold the victim at bay by gunpoint. . . In short, both appellant and his brother were major participants in this crime, each playing an integral role. . . to ensure the sucess of their unlawful scheme. Under these facts the only reasonable conclusion that can be drawn is that appellant contemplated or intended that lethal force would be used. . . .

502 So.2d at 412. See Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Appellant's admitted participation in the robbery and murder was substantial, as he actively engaged

in the robbery, and helped Brown return to the crime to kill the victim. See Jackson, supra. Appellant did not indicate whatsoever that he objected to the murder, attempted to dissuade Roundtree, or attempted to physically stop him. This court should make the required finding that appellant killed, attempted to kill, or intended to kill." Bullock, 88 L.Ed.2d at 717.

Thus, although the state asserts under Cruz v. New York, that Roundtree's statement was admissible, against appellant, this court need not agree to uphold the conviction and sentence below. See Schneble v. Florida, 405 U.S. 427 (1972); Rogers v. State, 12 F.L.W. 368 (Fla. July 17, 1987). Roundtree's statement was merely cumulative as the state specifically prosecuted on alternate theories of premeditated or felony-murder. Any alleged error by the trial court was patently harmless as appellant confessed to felony-murder. See State v. Digullio 491 So.2d 1129 (Fla. 1986). There is no possibility whatsoever that the jury would have aquitted appellant absent Roundtree's statement. Appellee's confidence that the record demonstrates both defendant's guilt, absent each co-defendant's confession, is reflected by the the state's strict disregard of each co-defendant's evidence against the other in the answer briefs. The state does not rely upon Roundtree's statement in any manner to support the judgment below. As this court recently recognized, a co-defendant's admitted confession is not harmful where appellant's own confession "clearly shows him guilty of the crime with which he

is charged." Puatti v. State, 495 So.2d 128 (Fla. 1986). This court should affirm.

The state notes that it did not introduce appellant's co-defendant's confession as substantive evidence of appellant's guilt. (R 223-39). Furthermore, unlike in Lee v. Illinois, 476 U.S. ____, 90 L.Ed.2d 514, 106 S.Ct. ____ (1986), the state here presented evidence regarding the underlying felony. The record supports the charge that appellant's confession itself renders him subject to a conviction of felony murder. In Lee the defendant Lee's statement demonstrated only self-defense, manslaughter, or second-degree murder. The state of Illnois did not prosecute under alternate theories of homicide, but rather it specifically relied upon the co-defendant's statement as the substantive evidence of appellant's guilt of first-degree murder. Thus Lee is easily distinguished.

In Rose v. Clark, 478 U.S. ____, 92 L.Ed.2d, 106 S.Ct. (1986) the Supreme Court held harmless an error that violated the defendant's due process rights. Here, the trial court's admission of Roundtree's statement complied with Parker v. Randolph, 442 U.S. 62 (1979), but that decision was modified as the court adopted Justice Blackman's concurring opinon applying harmless error analysis. That analysis regarding federal constitutional errors requires this court "to consider the trial record as a whole. . . ." United States v. Hastings, 461 U.S.

499, 509 (1983). See Hansbrough v. State, 12 F.L.W. 305 (Fla. June 26, 1987). And see Greer v. Miller, 483 U.S. ____, 97 L.Ed.2d 618, 107 S.Ct. ____ (1987). This court should reject appellant's argument and affirm the conviction. See Tison v. Arizona, 481 U.S. ____, 95 L.Ed.2d 127, 109 S.Ct. ____ (1987). Unlike Cruz, appellant did confess to a crime of first-degree felony-murder where Francis Bowden was murdered during appellant's commission of a robbery.

The state notes that there was sufficient evidence from appellant's confession that he was guilty of premeditated murder, See Breedlove v. State, 413 So.2d 1 (Fla. 1982). The appellant, like Breedlove, was armed when he approached the victim. Furthermore, premeditated murder may be proven by circumstantial evidence. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1975). Under either theory, appellant's statement admitted guilt, and the jury could not have decided otherwise even absent Roundtree's statement, See Harrington v. California, 395 U.S. 250 (1969). In Harrington the court expressly applied harmless error analysis where its ruling in Bruton v. United States, 391 U.S. 123 (1968) had been violated. Here, the harmlessness of any error in admitting Roundtree's statement is evident where appellant admitted to participating in every facet of the crime.

B. During Penalty Phase, The Trial Court's Admission Of Appellant's Co-defendant's Statement Was Proper; Alternatively, Any Error Was Harmless As Appellant's Own Confession Admitted Guilt Of Felony-Murder And All Findings Regarding The Killing Of Francis Bowden Were Attributable To Appellant.

The United States Supreme Court has held that appellant's admitted participation in the killing of Francis Bowden may constitutionally render him liable for the death penalty. Tison v. Arizona, 481 U.S. ___, 95 L.Ed.2d 127, 109 S.Ct. ____ (1987). The State asserts Roundtree's statement was admissible under Cruz during the penalty phase, as it had numerous accurate details and itself constituted guilt of felony-murder, and was thus reliable as an admission against penal interest. United States v. Harris, 403 U.S. 573 (1971). However, should this court disagree, it should find the trial court's admission of the statement harmless where appellant confessed to first degree felony murder, and the trial court's determination of aggravating circumstances were properly applied to appellant. See Jackson, supra; Rogers, supra; White v. State, 403 So.2d 331 (Fla. 1981). This court should thus reject appellant's argument as there is no reasonable possibility the jury would have recommended life imprisonment had the trial court excluded the statement or severed the penalty phase. See Engle v. State, 12 F.L.W. 314 (Fla. June 26, 1987). Thus, the state demonstrates that any error was harmless beyond a reasonable doubt.

This court's holding in Engle v. State, 438 So.2d 803 (Fla. 1983) is distinguishable as there the trial court admitted another person's confession "that was not introduced during the guilt phase" of trial. Id. at 813. Here, both co-defendant's statements were admitted during the guilt determination. Thus, in Engle, none of the analysis delineated in Parker v. Randolph, 442 U.S. 62 (1979), or Cruz v. New York, supra, was applicable. However, regardless of whether the trial court erred, such error was harmless. The United States Supreme Court has held that Confrontation Clause violations may constitute harmless error. Cruz, supra: Parker, supra. This is especially true here.

The jury heard appellant's confession to robbing Francis Bowden and returning to retrieve Mr. Bowden. (T 1471-1520). The jury heard how Mr. Bowden was shot with his arms raised and did not lose consciousness until he lay wounded on the ground and was shot twice in the head. (T 1642-70). The jury heard how the victim had been driven 3.2 miles in the trunk of a car, obviously aware of his impending fate as he already been robbed. The jury received state's evidence during the penalty phase, demonstrating appellant's previous conviction for armed robbery in another matter, (T 2214-16). However, the state presented no further evidence or exhibits during the penalty phase. All of the evidence was sufficient for a conviction of felony-murder. See O'Callaghn v. State, 429 So.2d 691 (Fla. 1983).

Despite all of appellant's mitigation evidence, and the state's lack of any additional testimony, except as noted, the jury voted overwhelmingly to recommend death by a 10-2 vote. The appellant's confession no doubt persuaded the jury that he deserved death.

The state specifically told the jury during closing argument that it need not determine who actually shot the victim.

> I want to remind you of one thing the court is not going to instruct you, . . ., or that ya'll have to determine, who actually pulled the trigger . . . to . . . murder Mr. Bowden.

(T 2420). The state did not claim that appellant actually shot the victim, as the state proceeded on alternate theories. Adams, supra. The jury had more than sufficient evidence from appellant himself to recommend death for the murder of Mr. Bowden. The prosecutor noted that "the state has proven beyond a reasonable doubt. . . that his murder occurred while each defendant was involved in the commission of . . . the robbery . . . ." (T 2426). Thus the jury recommended death not on Roundtree's statement, but on appellant's, and the recommendation was sound. See Jackson v. State, 502 So.2d 409 (1987); White v. State, supra. Any error in allowing the jury to receive the co-defendant's statement was harmless as the record demonstrates beyond a reasonable doubt that the jury recommended death for appellant based on his status as a felony murderer. See White v. v. State, supra; Schneble,

supra; Chapman v. California, 386 U.S. 18, 24 (1967); Rogers v. State, 12 F.L.W. 368 (Fla. July 17, 1987). This court should affirm.

ISSUE IV

THE TRIAL COURT DID NOT REVERSIBLY ERR IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION OF INDEPENDENT ACT WHERE THE RECORD CONTAINS NO EVIDENCE WHICH WOULD REQUIRE THE INSTRUCTION. (Restated).

A defendant is not entitled to an instruction on the independent act of a co-felon where the "murder was a natural and foreseeable culmination of the motivations for the original" felony. Parker v. State, 458 So.2d 750 (Fla. 1984), cert. denied, 470 U.S. 1088 (1985). This court in Parker addressed an extremely similar murder to the instant case: There were multiple defendants and Parker "was, at the very least, aware that [the victim] Padgett was being driven to the woods against his will. . . ." 458 So.2d at 753. Here, appellant admitted that he knew Francis Bowden would be killed, at the very least, "after [Roundtree] pulled the car off the lot and told me to follow him." (T 1479). Furthermore, appellant confessed to participating in forcing the victim into the trunk of the car. (T 14178).

There is absolutely no evidence to support appellant's bald claim that Roundtree "independently" kidnapped Bowden. Appellant's brief, p. 54. In fact, the state notes that both defendants returned to the apartment complex to retrieve the victim and mercilessly murder him. (T 1116-20). Appellant himself stated he went back to the complex, although he claims he

did not contemplate the fate of Mr. Bowden. Such a claim does not require the trial court to provide independent act instructions. Parker v. State, supra. Thus, this case is distinguishable from Bryant v. State, **412** So.2d **347** (Fla. **1982).** Appellant's expressed goal in approaching the victim was to obtain a car not associated with any crime, and the resultant "witness elimination" of Bowden was part of appellant's scheme to rob Bowden without a chance for identification.

Appellant's thorough analysis of Bryant v. State, supra demonstrates the significant differences between that case and appellant's participation in the murder sub judice. In Bryant the victim was already bound. He did not meet his co-felon until two days later to split the proceeds from the burglary. Appellant participated in imprisoning Francis Bowden in the trunk of the car, and appellant specifically robbed the victim.

Furthermore, the homosexual rape and murder in Bryant was not logically connected to a burglary. Sub judice, the murders intended to eliminate Francis Bowden as he had the defendant's description, in keeping with the defendant's fear of identification:

> Q. Okay, who asked him about the money? Did you. . .?
>
> A. Right.
> . . . .
>
> A. . . . And I walked out the apartment. . . so he told the guy to

> get in the trunk of the car and . . . we drove back out the apartment on the side road and went down to some street . . .
>
> Q. Why was he told to get in the trunk of the car.
>
> A. I guess because, you know, we had got his money and he had got the description, you know, of us. . .
>
> and then we drove down the road and he turned the car and gold me to go back. And we went back. . .
>
> Q. Okay, why did you go back and pick up the Toyota?
>
> A. Re just, you know--like the guy in the trunk and we left the keys in the trunk. And the guy was in there.

(T 1476-79). Later appellant confessed he knew Mr. Bowden would be killed after Roundtree allegedly pulled one of the two cars off the road. (T 1481).

Appellant's own confession however strongly implicates him as the triggerman. **(T 1486).** In attempting to explain how he knew the Francis Bowden had been killed, appellant stumbled over the details:

> Q. While ya'll were riding around or any time previous to that, . . . from the time he [Roundtree] left the building where the man was no longer with him until--have ya'll discussed the murder of the man. . .?
>
> A. No, we didn't even talk about it.
>
> Q. . . . Did you know that he [Bowden] had been murdered?

A. Well, the guy wasn't in the car so, you know, I figured he was gone.

Q. Did you hear any gunshots when you were sitting down the street?

A. No I was too far down.

Q. You did not say anything about the man being dead to Roundtree and Roundtree did not say anything to you in any way about this man being dead?

A. Well, he had told me when we got back to the house that he had knocked him off.

Apart from the inconsistent explanations regarding whether he and Roundtree discussed to death, appellant later made a more serious mistake in his attempt to exonerate himself: He admitted he had seen the body:

Q. Do you know who killed Mr. Bowden?

A. Robert.

Q. How do you know Robert killed Mr. Bowden?

A. [Same explanation as above].

(T 1505). Appellant then caught himself in his lie:

Q. Now, why is he telling us you did it and you're telling us he did it. Yet, any evidence at the scene shows that the Toyota was not the vehicle that was in there. It was the Monte Carlo that was in there. (Appellant claimed they did not take the victim's Toyota initially).

A. Well, the Toyota that I drove down and after we took the toyota to the house, we had already parked the Monte

> Carlo in the apartment and when we came back, he was talking about, you know, he was going to burn the body up, you know. . . because it was right behind the buidling and anybody would have spotted it.
>
> *Q.* How do you know it was behind the building?

(T 1507). Obviously, appellant attempted to extricate himself from a murder he was intimately involved with as he knew details about the shooting. Appellant lied initially to exculpate himself, but later made incriminating, contradicting statements.

This record cannot support an instruction for "independent act" as appellant either committed the act or participated in every grisly step of the murder. See Parker (J.B.) V. State, 476 So.2d 134, 139 (Fla. 1985); And see, United States V. Costello, 760 F.2d 1123, 1127 (11th Cir. 1985). The trial court properly denied the requested instruction and this court should reject appellant's argument.

ISSUE V

THE TRIAL COURT DID NOT REVERSIBLY ERR IN ALLOWING APPELLANT'S CO-DEFENDANT TO PRESENT NON-STATUTORY MITIGATING EVIDENCE. (Appellant's Issue VI Restated).

Appellant asks this court to remand for another penalty phase because the trial court admitted the co-defendant's non-statutory mitigating evidence of Roundtree's alleged "impressionable" record. Once again, the state notes that Brown's confessed participation in the brutal murder of Francis Bowden renders the co-defendant's testimony harmless. ~~See Cruz~~, supra; Parker, supra: Delaware V. VanArsdall, **475** U.S. ____, 89 L.Ed.2d **674, 106** S.Ct. _____ (1986). Furthermore, the trial court expressly rejected Roundtree's mitigating evidence that appellant dominated him:

> FACT
> A partnership to murder Francis Sheldon Bowden was created between Robert Wright Roundtree and Walter Lee Brown.
>
> The murder weapn itself was passed back and forth between Robert Wright Roundtree and Walter Lee Brown with each having possession of it at various stages of the crime.
>
> Robert Wright Roundtree and Walter Lee Brown each drove the vehicles involved
> . . . .
>
> CONCLUSION
> There is no mitigating circumstances under this paragraph.

(Supplemental Record, 15-16). Therefore, the testimony presented by Roundtree did not affect the ultimate sentencing authority. See Craig v. State, 12 F.L.W. 269 (Fla. June 5, 1987).

Dr. Krop specifically did not testify that appellant exercised influence over Roundtree through duress, threats or "fear of physical harm." (T 2335). He merely testified that Roundtree needed "to be accepted by another person." (T 2336). Finally, the state notes that the trial court expressly rejected Dr. Krop's testimony that Roundtree could be rehabilitated. (T 2337; Supp. R 18). In short, appellant suffered no prejudice during the penalty phase as the trial court ultimately imposed death, which was amply supported by the record. Craig, supra. All of appellant's arguments regarding the penalty phase ignore that the prosecutor told the jury to focus on appellant's own confession, and the trial court found overwhelming reasons to impose deth on appellant. See Chapman v. California, 386 U.S. 18 (1967). This court should affirm.

This court's language in Dougan v. State, 470 So.2d 697 (Fla. 1985), relied upon by appellant, that "we cannot tell how this improper evidence may have affected the jury, "is not the court's test for harmless error. See Bruton v. United States, 391 U.S. 123, 136-7, (1968). No one can ever absolutely know how a jury regarded certain evidence later held inadmissable. The test is whether the reviewing court can determine beyond a

reasonable doubt whether the jury would have recommended the death penalty for appellant, See, Cruz v. New York, 95 L.Ed.2d at 172; Chapman, supra; Harrington v. California, 395 U.S. 250 (1969). Considering the state urged the jury to consider only appellant's statement, and the self-confessed culpability of appellant proves guilt of first-degree felony murder, any error was harmless.

ISSUE VI

THE TRIAL COURT PROPERLY FOUND THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION AND WAS HEINOUS ATROCIOUS AND CRUEL. (Restated).

The record contains ample support for the trial court's finding that Francis Bowden was murdered in a cold and calculated manner without any pretense of moral or legal justification and was heinous, atrocious and cruel. Jennings v. State, 12 F.L.W. 434 (Fla. August 28, 1987); Koon v. State, 12 F.L.W. 428 (Fla. August 21, 1987). He was marched into an isolated area, after being driven 3.2 miles in the trunk of a car, and shot with his arms raised. (T 1664). Mr. Bowden was still conscious after being shot twice. (T 1665). He was then murdered execution style. (T 1663). Appellant's own confession admitted to participating in forcing the victim into the trunk, and driving his co-defendant back to the victim to murder him. (T 1472-1520), and justified the findings of these factors. Ruffin v. State, 420 So.2d 591, 594 (Fla. 1982).

The trial court was imminently correct in finding these aggravating factors applied to Appellant. Craig v. State, 12 F.L.W. 269 (Fla. June 5, 1987); Troedel v. State, 462 So.2d 392 (1984); Stano v. State, 460 So.2d 890 (1984), cert. denied, 471 U.S. 1111 (1984); Parker v. State, 456 So.2d 436 (1984). However, even should this court find these aggravating factors

invalid, it was harmless where the trial court found four other aggravating circumstances and no mitigating circumstances. Randolph v. State, 463 U.S. 186 (1985), cert. denied, 473 U.S. 907 (1985); Justus v. State, 438 So.2d 358 (Fla. 1983); Sims v. State, 444 So.2d 922 (1984), cert. denied, 467 U.S. 1256 (1984); State v. Diguillio, 491 So.2d 1129 (Fla. 1986); Straight v. State, 397 So.2d 903 (1981), cert. denied, 454 U.S. 1022 (1981). Appellant does not challenge other aggravating factors. His sentence should be upheld. Appellee has sufficiently addressed appellant's argument that his conviction and sentence were "tainted" by Roundtree's statement. The State notes that this Court in White v. State, 403 So.2d 331, supra held that the status as a "non-triggerman" was not sufficient mitigation. Even assuming arguendo that appellant's confession is true and Roundtree pulled the trigger, this Court should affirm the sentence. However, the State asserts it is far more likely Appellant pulled the trigger.

Both co-defendant's confessions stated they went to the victim's residence to obtain another vehicle, as the Monte Carlo was associated with the murder of Robert Davis and attempted kidnapping of Marvin Hazelton. (T 1282, 1417) Appellant's claim that they left the victim in the Toyota does not ring true as the defendants' obviously wanted to steal the Toyota and leave the Monte Carlo. Of course, appellant's prints were lifted from the Toyota and he had the Toyota keys when arrested. (T 1215-19;

1536-39; 1584; 1595-97). The trial court properly found the aggravating circumstances applied to appellant. See Routley v. State, 440 So.2d 1257 (Fla. 1983), cert.denied, 168 U.S. 1220 (1984).

In conclusion, appellee notes that the circumstantial nature of evidence is not required to be considered as a mitigating factor. Mareu v. State, 492 So.2d 1055 (Fla. 1986). The trial court's findings should be affirmed.

ISSUE VII

THE FIRST DISTRICT'S DECISION IN APPELLANT'S ARMED ROBBERY APPEAL WILL HAVE NO IMPACT ON THE TRIAL COURT'S IMPOSITION OF THE DEATH PENALTY. (Issue VIII Restated).

The trial court found six aggravating circumstances applied to appellant's conviction of first-degree murder of Francis Bowden and no mitigating factors. If the District Court reverses appellant's conviction for armed robbery, it would eliminate only one aggravating factor. This would have no impact whatsoever as five aggravating factors would still apply and no mitigating factors. See Randolph; Justus, supra. Even if appellant pursuaded this Court to reject the only contested aggravating factors, this Court should uphold the death penalty. See Craig v. State, supra; Jackson v. State, 502 So.2d 409, 413 (Fla. 1986). This Court should affirm the sentence imposed as the jury recommended death and the trial court found six aggravating factors of which appellant challenges only three.

CONCLUSION

This Court should affirm the conviction and sentence below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished by hand delivery to Paula Saunders, Public Defender, Post Office Box 671, Tallahassee, Florida 32301 this 5th day of October, 1987.

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