IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,~~951~~ 591

DONNIE GENE CRAIG,

Appellant,

vs.

STATE OF FLORIDA

Appellee,

FILED
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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Donnie Gene Craig, was the defendant in the trial court and the Appellant below, and will be referred to herein as "Appellant". The State of Florida, was the prosecution in the trial court and the Appellee below, and will be referred to herein as "Appellee".

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit of Florida, in and for Okeechobee County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Appellant's Initial Brief

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts as it appears at pages 1 through 10 of his initial brief, to the extent the statement represents an accurate, non-argumentative recitation of the proceedings below, and only to the extent necessary for the resolution of the issues raised on appeal. The state accepts the statement subject to the following emphasis and clarifications:

Shirley Johnson has known the victim, Clifton Ellis, for ten years. He was a man of regular habits. When he did not show up at the restaurant she began to worry. (R 497). When his car was not at the house she knew that he was not there. Nevertheless she still reported Ellis missing. (R 499).

Jack Dietz testified that Ellis' car was still at the house at 4:00 P.M. on March 30, 1987. (R 529-530).

George Miller, Detective with the Broward County Sheriff's Department, testified that the telephone lines in the living room and in the bed room were cut. Both drawers were open in the night stand. The bottom drawer was totally pulled out and the contents strewn around the body. (R 564,566). Underneath the body was found two live twenty-five caliber shell. (R 588,594,599).

The forensic detective testified that there was a bloody hand impression on the left pant leg of the victim. He described it as a transfer stain. (R 678,684,685). Based on the body position and remaining blood in the body the body had been moved after death. (R 697).

On March 31, 1987 a blue and white Oldsmobile was found at the Cricket Lounge.

Nathaniel Brice testified that he knows the Appellant as Baby Face. (R 874).

Laura Mayo testified that the Appellant never had a car. That he told her that he had bought the victim's car. (R 912,915). All of them sat down to smoke some rock and drink beer. (R 915).

Mayo testified that she and Wally found a check book in the back seat of car Appellant was driving, there was a gun and a box of bullets in the glove compartment and on the back floor there was an empty shell. (R 923). Mayo identified the checkbook, the pistol, the insurance policy and the car. (R 924,925). The Appellant made a phone call to someone. She heard him tell someone that he would be there about 11:00. (R 926,927). She does not remember when Appellant actually visited. She only remembers that it was the end of March. (R 935,936).

Brice sold the gun to Jamaica Red the next day. (R 980).

George Miller testified that on March 31st a vehicle was recovered which was later identified at belonging to Ellis. Tag number BMA 60D. There was a latent fingerprint recovered from the interior of the vehicle on the interior rear view mirror, upper right hand corner. There was a spent .25 caliber shell casing found in the car. The checkbook with Joseph C. Ellis' name on it was admitted into evidence. The

Latent print found on the interior rear view mirror, upper right hand corner of the mirror, was identified as belonging to the Appellant. (R 1040-1060).

George r. Miller was qualified as an expert in the identification of shoe prints. The court noted that he was a police officer with training and experience of some 21 years and does have expertise in the area of fingerprint analysis. The principals of the analysis of fingerprints and show prints are basically the same in that one compares the similarities and the dissimilarities. However, the trial court stated that the weight of the testimony is still up to the jury. (R 1161).

George Miller went on to testify to the unique characteristics of the shoe print left at Ellis' house and how those characteristics favorably compare with the shoes belonging to the Appellant. (R 1162-1177).

Dr. Leonard Walker is a pathologist who testified as to the wounds found on the body. There were ten knife stab wounds to the body. In addition, there was a combined stab slash wound and five knife slash wounds and several bruises. The slash wounds on the arm are defensive wounds of somebody trying to prevent somebody from stabbing him. The direct cause of death was the stab wound to the neck which severed the major carotid artery. Ellis would have been irretrievably brain dead in about 10 minutes. (R 1232,1237,1240,1241,1242). Walker testified that it is not probable that Ellis stabbed himself. (R 1266).

Eugene O'Neill testified that when the Appellant was at the police station his Miranda rights were read to him after he was advised that he was a suspect in the death of Mr. Ellis. (R 1276). The Appellant stated that he understood his Miranda rights. The appellant was then asked if he would answer some questions without the presence of an attorney. The Appellant said that he would. He signed the rights waiver form. Appellant then gave a statement to the police. (R 1278-1281). The police verified all dates that the Appellant gave to them in the statement. (R 1311).

O'Neill also secured from Dolores Andrews her telephone bill for March. He was particularly interested in the call that came from the pay phone outside Mayo's apartment. (R 1283-1285).

SUMMARY OF ARGUMENT

1. Evidence of other crimes may be admitted to establish the entire context out of which the criminal conduct arose. In the instant case the collateral crime evidence was so inextricably intertwined with the crimes charged that an intelligent account of the criminal episode could not have been given without reference to the other events.

2. There was substantial evidence presented at trial to prove premeditation. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict should not be reversed on appeal.

3. The record indicates that the Appellant's statement to the police was freely and voluntarily given after he was told that the police wanted to question him regarding the death of Ellis, that he was a suspect in that murder and his Miranda rights were read to him. The police did not coerce him to make a statement.

4. The Appellant's shoes that were seized at his residence when they were handed to the police officer voluntarily by the Appellant's mother. The police officer observed that the soles of the shoes matched the imprint found at the scene of the murder. The shoes were properly seized under the "plain view" doctrine.

5. Variance in an information is fatal only if the

record reveals a possibility that the defendant may have been misled or embarrassed in the preparation or presentation of his defense. The granting of a bill of particulars in a criminal case is within the sound discretion of the trial court. Where the indictment is sufficient in notifying the defendant of the time, date, and place of an alleged offense of homicide the trial court does not err in denying defendant's motion for a bill of particulars. Such is the case in this instance.

6. All the information that was testified to by those witnesses inadvertently left off the witness list or items left off the discovery list were provided to the Appellant long before the trial ever commenced. If there was any discovery violations they did not prevent the Appellant from presenting his case and/or they were trivial in nature.

7. The Appellant was a habitual offender with an escalating pattern of criminal activity. He had a long juvenile record. In one of his previous cases he had victimized Clifton Ellis. After this murder he went to West Palm Beach to murder a lawyer there. Where the facts known to the trial judge provide a reasonable basis for the imposition of the death sentence, despite a jury recommendation of life, the sentence should be upheld.

In addition, the jury was impermissibly influenced in favor of life by the defense portrayal of the victim as an aging homosexual who engaged in perverse activity with young males.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE WHICH WAS RELEVANT AND MATERIAL TO THE ESTABLISHMENT OF THE ENTIRE CONTEXT OUT OF WHICH THE CRIMINAL CONDUCT AROSE.

Prior to the trial the State filed with the court a notice of intent to use similar fact evidence. Several hearings were held on the type of information the State intended to use. The State repeatedly stated that it only filed the notice of intent to use similar fact evidence in an "abundance of caution". (R 471). This is a gray area and the State did not want to be accused of not following procedure.

The State argued that there was a continuous series of events occurring on the night of 3/30/87, and the early morning of 3/31/87 which are necessary to explain to the jury in order to give an intelligent account of the crime. Through a continuous series of acts the Appellant went to the home of Cliff Ellis and stabbed him to death with a butcher knife. He then took from Cliff Ellis a twenty-five caliber Raven automatic pistol. He also took Ellis' 1983 Oldsmobile Cutlass sedan. He drove that vehicle to West Palm Beach. He went to the home of Thomas Cisco, a lawyer, and murdered Mr. Cisco with the twenty-five caliber Raven automatic pistol which he had stolen from Ellis' house. From Cisco the Appellant took a very expensive Lucien Picard gold and

diamond watch and a money clip and lighter. Following the second murder he went to an apartment occupied by Nathaniel Brice, Laura Mayo, Cheri Mayo and Wallace Luttermoser. He attempted to trade Ellis' twenty-five caliber Raven automatic for crack cocaine. He told these people that he had a load of marijuana in the car. These people were allowed to use the car in question. Consequently they can, and did, identify the car. They searched the car for the marijuana Appellant claimed he had in the car hoping to steal the marijuana from him. They saw the pistol in the car. Later Appellant brought the pistol up to the apartment and attempted to trade it for cocaine rock. They also know the Appellant and can identify him. All this evidence is material and relevant to show the Appellant's motive, his intent, his purpose and his lack of mistake as to who murdered Ellis. It also negated any self-defense theory. (R 110-113, 471-486). The State sought to introduce this evidence on both or either grounds of similar fact evidence or just as relevant and material evidence under the rules of evidence. (R 473).

In Smith v. State, 365 So.2d 704, 707 (Fla. 1978), cert. den., 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979), the Supreme Court stated that "[a]moung the other purposes for which a collateral crime may be admitted under Williams is establishment of the entire context out of which the criminal conduct arose. The Smith opinion also reiterated that relevancy is the crucial factor in determining admissibility

of evidence. In Smith the defendant and two friends picked up a man for purposes of robbing him, which they did. They also murdered the man. After the murder, a disagreement broke out between the three men over how to divide the proceeds of the robbery. This resulted in the death of one of the men. The defendant's car was used throughout the criminal episode and the same ice pick was used in both murders. The Court in Smith held that evidence of the second murder was properly admitted to illustrate the criminal context of the first murder and was relevant to place the defendant at the scene of the first murder.

In Hall v. State, 403 So.2d 1321 (Fla. 1981) the Supreme Court held that collateral crime evidence with respect to another murder committed on the same evening by the defendant was admissible to prove identity because the weapon used in that murder was found underneath the body of the victim in the case at trial; and the collateral crime showed the general context in which the criminal action occurred.

The Court in Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986) held that inseparable crimes evidence was admissible under Section 90.402 Florida Statutes simply as relevant evidence rather than being admitted under 90.402(2)(a), Williams Rule. In other words, evidence of offenses arising out of the same transaction or series of transactions as the charged offense is not considered evidence of an "extrinsic" offense within the proscription of Williams rule. This has been the view adopted by our federal

courts. See, United States v. Kloock, 652 F.2d 492 (5th Cir. 1981); United States v. Saintil, 753 F.2d 984 (11th Cir 1985); United States v. Leichtman, 742 F.2d 598 (11th Cir. 1984); United States v. Montes-Cardenas, 746 F.2d 771 (11th Cir. 1984).

After another hearing on the similar fact evidence the trial court erroneously excluded any testimony about the murder of Cisco. The trial court would only allow testimony about the shell casings found at Cisco's residence. (R 841).

In the instant case Appellant complains that certain evidence was admitted which was not necessary to the State's case in chief and was prejudicial to the Appellant. The following facts were adduced at trial:

Clifton Ellis, the victim, was a man of regular habits. He was so regular that when he did not show up for breakfast on March 31st at 7:30 A.M. Shirley Johnson knew something was wrong. She even went to Ellis' house. When she saw his car was not there she knew he was not there although she still worried that something had happened to him. (R 497, 499). Although she had been to Ellis's house at 10 A.M. the body of Ellis was not discovered until 2:30 P.M. on March 31st. (R 503).

Laura Mayo testified that at the end of March at about 11 P.M. or 12 A.M. the Appellant showed up at her place. She did not remember the exact day. She only remembered that it was the end of March. (R 936). He drove up in a car. This surprised her since he had never had a car before. (R 912).

He told her he bought the car. (R 915). She went into the car and saw a gun, a checkbook, some insurance papers and a spent shell. All of which she identified at trial. She also identified the car. (R 920-925). The car and the other items belonged to the victim, Clifton Ellis. The spent shell was later identified as coming from Ellis' pistol which the Appellant had traded for cocaine at Mayo's place. She also testified that the Appellant made a phone call from the pay phone outside here complex early in the morning.

The phone bill of Deloris Andrews was placed into evidence. It showed that the Appellant made a phone call from the public phone outside Mayo's complex to Deloris Andrews on March 31st at 1:30 A.M. (R 1285, 1301).

Jame Wilburn, West Palm Beach Police, identified three spent shells that were recovered from the residence located at 206 36th Street, West Palm Beach. The spent shells were taken from the residence on March 31, 1987. (R 1033). The spent shell found in the back seat of Ellis' car and the three spent shells found at the residence were fired from the Raven pistol which belonged to the victim and was taken by the Appellant during the incident. The Appellant traded that pistol at Mayo's place for cocaine.

Ellis was found on the floor of his house with the mattress pulled over him. (R 563). He was killed while sitting in his bed. (R 676). The body was moved after death. (R 697). Found underneath the body was two live twenty-five caliber shell rounds of ammunition. (R 588-599).

Ellis' car was found on March 31st at the Cricket Lounge in Ockeechobee at about 4:30 P.M. and 5 P.M. (R 771,787). Carol Carpenter told the offer who found the car that the car was there when she opened up the Cricket Lounge at about 9:30 in the morning. When she closed the lounge the evening of the 30th the car was not there. (R 814,815).

Based on these facts the following scenario can be pieced together. Ellis' car was in the garage at 4 P.M. on March 30th. Sometime between 4 P.M. and 11 P.M. the Appellant came into the house and cut the telephone wires. (R 564). Ellis was seated in his bed. He was stabbed to death while in bed. The Appellant got the pistol and the bullets. Some of the bullets fell to the ground. Ellis' body was moved to the ground and the mattress was pushed over it to conceal the body. Appellant then took Ellis' car to the residence in West Palm Beach. West Palm Beach is 61 miles from Okeechobee City according to a Department of Transportation map. It is a one and a half hour drive approximately. He went to the residence in West Palm Beach where the three spent shells were found. He fired the gun into the residence. He then went to Mayo's house. At Mayo's house the Appellant traded the gun for cocaine. The cocaine was shared by everyone there.

Mayo testified that she has been arrest for petit theft and prostitution, assault and battery with the intent to kill, uttering a forgery and uttering a stolen check. She uses heroin, cocaine, rock and alcohol. (R 909,910). When

the Appellant came to Mayo's place he had Mayo's daughter go get some cocaine. When her daughter returned they all sat down and smoked it. (R 913, 915). Nathaniel Brice, Cheri, Mayo's daughter, Mayo and Wally were present. (R 910).

The testimony of Mayo and her friend, Nathanial Brice, where necessary to establish the whereabout of the Appellant and to show motive, intent, state of mind, any lack of mistake and identity. These facts were necessary in order to give an intelligent account of the events of March 30 and 31st. The evidence relating to the smoking of cocaine at Mayo's place, the trading of the watches for cocaine, and the spent shells found at the residence in West Palm Beach is so inextricably intertwined with the crime charged that an intelligent account of the criminal episode could not have been given without reference to them. Austin v. State 500 So.2d 262 (Fla. 1st DCA 1986); Feldman v. State, 212 So.2d 21 (Fla. 3rd DCA 1968); Brown v. State, 250 So.2d 13 (Fla. 3rd DCA 1971). Evidence of collateral crimes may be admitted to establish the entire context out of which the criminal conduct arose. Jameson v. Wainwright, 719 F.2d 1125 (1983). The Supreme Court of Florida has found no problem with the admission of collateral murders. Ashley v. State, 265 So.2d 685 (Fla. 1972).

Furthermore, it should be pointed out that there was no evidence that the watches that the Appellant traded were stolen. It is mere speculation as to why the Appellant had the watches. It is not a crime to trade property.

There is also no evidence that there was an assault with a firearm at the residence where the three shell casings were found. The only evidence that the court allowed was that the shell casings were found at the residence. Anything else is mere speculation. Speculation goes both ways.

Finally the use of the rock cocaine was not limited to him. Everyone at Mayo's place smoked the cocaine.

None of this evidence was submitted to prove the bad character or the criminal propensity of the Appellant. The evidence was submitted to prove motive, opportunity, intent, to show the Appellant's state of mind, to prove identity, and to negate any self-defense claim. Relevant evidence is not excluded merely because it points to commission of separate crimes. McCrae v. State, 395 So.2d 1145, 1152 (Fla. 1980) cert. den. 454 U.S. 1041 (1981).

In conclusion the evidence was relevant and its probative value outweighted any improper prejudicial effect. This evidence was admitted for the same reason any other piece of evidence is admitted. It is a part of the "res gestae". In other words it is necessary to admit the evidence to adequately describe the deed. The Appellant's conviction and sentence should be affirmed.

POINT II

THE TRIAL COURT DID NOT ERR IN NOT GRANTING APPELLANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL

Appellant challenges his conviction of first-degree felony murder on the ground that there was insufficient evidence to prove premeditation. He argues that the state's circumstantial evidence on the element of premeditation was not legally sufficient because it did not exclude the hypothesis of an unpremeditated murder or suicide. Although the Appellant was charged and tried on the crime of premeditated murder, the jury convicted him of felony murder robbery. Thus, it there was any error, it was harmless beyond a reasonable doubt.

In order to prove a fact by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977). Where the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference. Wilson v. State, 493 So.2d 1019 (Fla. 1986).

But the question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and where there is substantial, competent evidence to support the jury verdict, the verdict will not be reversed on appeal. Heiney v. State, 447 So.2d 210, 212

(Fla.), cert. denied, 469 U.S. 920 (1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). The circumstantial evidence standard does not require the jury to believe the defense version of facts on which the state has produced conflicting evidence, and the state, as Appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict. Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985), review dismissed, 504 So.2d 762 (Fla. 1987).

One point the Appellant makes is that the evidence shows that the death was a suicide and that the wounds were not indicative of the fully formed conscious purpose to kill. (AB 24). The medical examiner stated that it was not probable that Ellis stabbed himself. (R 1266). He testified that there were 10 stab wounds on the neck, chest and left arm and both hands. In addition, there was a combined stab slash wound and five knife slash wounds and several bruises on the right lower lip and head. (R 1232). The slash wounds are defensive wounds of somebody trying to prevent somebody from stabbing them. (R 1240). The direct cause of death was the stab wound to the neck which severed the major artery. (R 1241-1242).

The forensic detective, Detective Charles Edel, testified that the victim was sitting in his bed at the time he was stabbed. (R 676).

The wounds indicate that the Appellant meant to murder Ellis even as Ellis put his hands up to stop the assault.

There is no evidence that the wounds were self-inflicted. In addition, there was no evidence that there was a struggle. The victim was sitting in bed when he was brutally stabbed to death. Taking the evidence as the appellant would want this Court to accept it, there was no ransacking of Ellis' room. Consequently, there was no evidence of a struggle.

Appellant went to Laura Mayo's place in Ellis' car. He told Mayo that he had bought the car. He told the police that he had never driven Ellis' car. Although the defendant's fingerprint found in Ellis' car cannot be specifically narrowed to any particular period of time, Mayo saw Appellant with Ellis' car the night of the murder. Whereas the Appellant produced no evidence that he had been in Ellis' car some time before. The fact remains that the Appellant was seen with Ellis' car the night of the murder which contradicts the Appellant's statement to the police. Since Ellis had the car at 4 P.M. and the Appellant had the car at 11 P.M. then the Appellant had to be at Ellis' house between 4 P.M. and 9:30 P.M. since it takes an hour and a half to get to West Palm Beach from Ockeechobee City.

The shoe impression further substantiates the presence of the Appellant at Ellis' house. George R. Miller was qualified as an expert by the trial court. (R 1161). After examining the shoe impression left at Ellis' house and more than 75 Reebok shoes or shoes similar in kind George Miller identified that shoe impression as belonging to the Appellant's shoe. (R 1176). Appellant stated that he never

let any one wear his shoes. (R 1281). Therefore, the show impressions and the testimony of the State's expert does place the Appellant at the scene of the murder at or near the time of the incident.

Appellant makes a blanket statement that the Appellant's possession of the victim's pistol does not go to prove premeditation. Appellant claims that the pistol could have been sold to him by the victim. However, in light of the violent death of the victim, the live bullets found under the victim, the spent shells found at a resident in West Palm Beach, and the possession of the victim's car and pistol by the Appellant all go to prove that the death of the victim was premeditated. Furthermore, the Appellant's possession of the pistol does go to prove that the Appellant was there in the house at the time of Ellis' death; especially, when taken with all the other facts adduced at trial.

Appellant also states that there was no testimony that Ellis was missing anything. This is completely false. There was a suggestion that some money was missing in the wallet since there was no money in the wallet. However, it is undisputable that the Appellant stole Ellis' gun and car.

Although the State tried to prove that the murder was premeditated, the State's alternative theory was felony murder robbery. It is abundantly clear that the jury found that the evidence supported the felony murder charge more that it supported the premeditated murder charge. This is the jury's responsibility to weight the evidence and the

credibility of each witness and apply the law as given by the trial judge to those facts. The fact that the jury found the Appellant guilty of felony murder does not prove that he was prejudice by the reading of the jury instructions on premeditated murder. To buy that theory would be to say that every defendant found guilty of a lesser included offense was prejudiced by the reading of the greater offense. This is not the state of the law.

In addition, the jury did find the Appellant guilty of felony murder which indicated that they found that there was sufficient evidence presented to show that the Appellant was present in the house when the victim was killed and that he was the one that murdered the victim.

The Appellant's conviction and sentence should be affirmed.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENT

The Fifth Amendment guarantees that the government may not force any citizen to be a witness against himself. Remembering that the Miranda rule demonstrates a judicial concern over police misconduct and abuse, neither Miranda, nor the Fifth Amendment values which it protects, may be read as prohibiting confessions where there is no police coercion. Sound policy dictates that, absent police exploitation of a known mental susceptibility, there can be no violation of Miranda of the Fifth Amendment. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed 2d 424 (1977). If the evidence shows that the Appellant was promised nothing in return for the statement, voluntarily waived his Miranda rights, did not appear to be in pain or intoxicated and the Appellant states that he understood that he know what he is doing, the confession should not be suppressed. Parker v. State, 456 So.2d 436 (Fla. 1984).

In the instant case the Appellant was arrest on two outstanding warrants. At one point he was told that Officer Eugene O'Neill wanted to talk to him about the death of Clifton Ellis. The Appellant was advised that he was a suspect in that death. (R 70, 1276). Appellant was advised of his rights and he signed a rights waiver form. He said he understood his rights. Appellant did not asked for an attorney. (R 70-73, 79). Appellant was not threatened in

any manner nor was he handcuffed. (R 74).

Appellant stated that he had been back in Okeechobee since around the 16th of March. That he had stayed with Delores Andrews until the 25th or 26th. He then returned home to his parents. He currently was working at the Flying G Dairy and had been for about three weeks. He had been working seven nights a week except for Friday, March 10th, 1987. He stated that he had last seen Ellis about a month and a half ago. He had never driven Ellis' car, but he had ridden in the car about a year and a half ago. He knew nothing about the death of Clifton Ellis. He also stated that he had bought his shoes about two months ago in West Palm Beach and that he had never loaned his shoes to any one. (R 74,75). Appellant was arrested for the murder of Clifton Ellis some time after making his statement.

The trial court noted that the Appellant was not a newcomer to the criminal justice system inasmuch as he was on probation at the time of this particular incident. This is not the Appellant's first brush with the law. He does have some familiarity with the criminal justice system. Furthermore the testimony supports the fact that he was appraised of his Miranda Warnings. The trial court then denied the motion to suppress.

Appellant notes that there was some minor change in the Miranda rights form which the Appellant signed. This is not part of the record. Nor is it mentioned in the record or a part of any objection by the Appellant. This is the first

time Appellee is made aware of any change. The rights waiver form is not a part of the record so the truth of this statement cannot be verified.

Second, Appellant claims that Detective O'Neill denied making any promises of leniency at trial but in a late statement retracted that statement. (AB 30). Appellant then cites to evidence not in the record but relating to another trial. This allegation by the Appellant is completely bogus in that he admits that Detective O'Neill testified that no promises were made to the Appellant. Citing to something not in the record is not prove of anything. Appellant should not be allowed to make blanket allegations in order to bog this Court down in endless supplements of records which are not pertinent to this trial. Furthermore, the record cites that the Appellant refers to does not support this blanket allegation. Detective O'Neill consistently maintains that no threats and no promises were made to the Appellant.

The fact that the Appellant later refused to make a taped statement does not invalidate his previous statement. Defendants are free to invoke their right to counsel at any time. Further a voluntary and intelligent waiver does not depend on whether or not the Appellant knows that he is being charged with a crime. Appellant knows how the criminal justice system works. He was advised that the police wanted to talk to him about the death of Clifton Ellis, that he was a suspect in the case, and that anything he says could be used against him.

The courts have never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates the voluntary nature of the confession. Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 1297, 84 L.Ed. 2d 222 (1985). Thus, where the record reveals evidence to support the trial court's findings, the reviewing court must accept these findings. State v. Spurling, 385 So.2d 672 (Fla. 2nd DCA, 1985). Here there was ample evidence to support the trial court's order denying the motion to suppress.

POINT IV

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

When a police officer lawfully arrests a suspect he may, for the dual purposes of protection and preventing the destruction of evidence, conduct an incidental search of the suspect and the area within the suspect's immediate control, and seize any incriminating evidence. Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Newton v. State, 378 So.2d 297 (Fla. 4th DCA 1979). This will be so regardless of whether the arrest was undertaken pursuant to a warrant. See Range v. State, 156 So.2d 534 (Fla. 2d DCA 1963).

Under the rule of Chimel v. California, 395 U.S. 752 (1969), an officer is not allowed to search any other areas of the premises except the limited area in which the defendant was arrested. There may, however, be circumstances justifying an officer's visit to other areas to merely observe. For example, an officer, for his own protection, may look in other rooms to search for other persons. Also, he may find it necessary to go through other rooms in leaving the premises. These movements of the law enforcement officer are not considered searches because the officer is not looking for weapons or incriminating evidence. Nevertheless, if an officer observes such evidence lying open to view, he may seize it, and it will be admissible in court under the "plain view" or "open view" doctrines.

In the instant case Detective Eugene O'Neill was the lead detective in the investigation of Clifton Ellis' death. He arrest the Appellant at Appellant's house. (R 11). At the time the police went to the Appellant's house the Appellant was a suspect in the murder of Ellis. A fingerprint that had been found on the rearview mirror of Ellis' car had been identified as belonging to the Appellant. (R 18,19).

As Appellant was getting dressed Officer LaFlam was standing at the bedroom door. Officer LaFlam was well aware of the type of shoe impression that the police were trying to find. Detective Miller had shown Officer LaFlam the type of shoe track or print that was left at the scene of Ellis' murder. (R 29). As the Appellant was getting dressed he asked for his shoes from his mother. His mother had just washed the shoes. The fact that the shoes were wet aroused the suspicions of Officer LaFlam. (R 33). The Appellant's mother handed the shoes to Officer LaFlam in order to hand them to the Appellant. No objections were made. Officer LaFlam turned the shoes over and saw the familiar track marks or impression. (R 33). Officer LaFlam explained to the Appellant that he was going to hold onto the shoes as possible evidence. The Appellant said okay. (R 29). When LaFlam was given the shoes by Appellant's mother, and after viewing the soles he showed the shoes to Detective O'Neill. (R 12).

Both Detective O'Neill and Officer LaFlam testified that

the shoes were handed to LaFlam by the Appellant's mother. (R 20). The shoes were seized because the pattern on the soles were similar to the pattern of the shoe impression left at the scene of the murder.

In United States v. Titus, 445 F.2d 577 (2d Cir. 1971), cert. denied, 404 U.S. 940 (1971), the defendant was arrested in his girl friend's apartment regarding a bank robbery. At the time of the arrest, the apartment was dark and the defendant was nude. One of the officers went to get clothing for the defendant and found two jackets of the type that had been described as having been worn by the bank robbers. On the way out of the apartment, one of the officers turned on the kitchen light so he could see his way. On the floor was money from the robbery. The court held that both jackets and the money were admissible in evidence. All the items were properly seized under the "plain view" doctrine.

In this case the shoes were also properly seized under the plain view doctrine. The shoes were handed to the police officer who recognized the pattern on the soles of the shoes. The shoes were not found as part of any search conducted by the police officers. The officers had a right to be where they were due to the arrest warrant. Furthermore, the officers knew that they were looking for a shoe that would match the impression found in Ellis' room. The shoes were not seized due to idle curiosity. They were seized because they soles of the shoes matched the impression found at the victim's house. The shoes were properly admitted into

evidence. The trial court did not err in denying the Appellant's motion to suppress. The Appellant's conviction and sentence should be affirmed.

POINT V

TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR STATEMENT OF PARTICULARS.

When the indictment or information upon which a defendant fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense the defendant may motion the court for a statement of particulars. Fla.R.Crim.P. 3.140(n). Where variance between the allegations in an information and proof is not such as to have misled defendant or subject him to substantial possibility of reprosecution for the same offense, the variance is immaterial and does not preclude conviction. A variance in an information is fatal only if the record reveals a possibility that the defendant may have been misled or embarrassed in the preparation or presentation of his defense. Grissom v. State, 405 So.2d 291 (Fla. 1st DCA 1981) "Variance" between indictment and proof at trial occurs when evidence at trial proves facts different from those alleged in indictment, as opposed to facts which, although not specifically mentioned in indictment are entirely consistent with its allegation. U.S. v. Caporale, 806 F.2d 1487 (C.A. 11th Cir. 1987).

In the instant case the indictment did state that the death of Clifton Ellis occurred on March 31, 1987. Whereas the evidence adduced at trial indicate that he probably was killed on March 30, 1987. However this variance is not so great as to prejudice the Appellant and it would not subject

him to reprosecution. Further, it is clear that he was not misled and prejudiced in his defense.

Appellant knew the victim, Clifton Ellis. So he knows whose death he is charged with. From the deposition of Deitz, the railroad man, the defense attorney knew that the body was discovered on March 31, 1987. Appellant also knew that Deitz came to Ellis' house on March 31, 1987 at 7:30 A.M. and that Ellis' car was not there. (R 1565,1569,1670). Appellant also knew that Detective Sergeant was called to the scene of the murder on March 31st. (R 1683). These were made on July 27th and 20th respectively. The depositions of Detective Eugene F. O'Neill (R 1735-1805) given on July 20, 1987, Charles Edel (R 18061830) given on April 12, 1988, Dr. Leonard Walker (R 1831-1850) given on February 16, 1988 and Laura Mayo (R 1892-1925) given on May 16, 1988 all reveal that the Appellant was apprised of all the facts of this case. All of these people testified in their depostions to essentially the same facts as they did at trial. Based on Appellant's questioning at trial and in the depositions he knew that the sequence of events ran from March 30th to March 31st. In additions there were other motions and pretrial hearings which informed Appellant of the evidence against him. Appellant was not surprised or ambushed at trial by any of the evidenced adduced against him nor was he prevented in preparing his defense.

The indictment in this case gave the Appellant adequate notice of the charge he is expected to meet. The granting of

a bill of particulars in a criminal case is not founded upon a legal right but is a matter resting within the sound discretion of the trial court,and depends entirely upon the nature and circumstances of each particular case. The trial court did not err in denying Appellant's motion for a bill of particulars seeking date, time and place of alleged offense where the place and date were stated in the indictment and the exact time was not known. Winslow v. State 45 So.2d 339 (Fla. 1949); Williams v. State, 344 So.2d 927 (Fla. 3rd DCA 1977).

Based on the foregoing arguments the Appellants conviction and sentence should be affirmed.

POINT VI

THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY OF THE WITNESSES AND INTRODUCTION OF DOCUMENTS NOT VIOLATIVE OF DISCOVERY F.R.CRIM.P. 3.220

According to Richardson v. State, 246 So.2d 771 (Fla. 1971), a trial court's inquiry into the circumstances surrounding a violation of a discovery rule should, at least, cover such questions as whether the violation was inadvertent or willful, whether the violation was trivial or substantial, and whether the violation caused any prejudice or harm to the other party. A Richardson inquiry is designed to ferret out procedural prejudice occasioned by a party's discovery violation. In ascertaining whether this type of prejudice exists in a given case, a trial court must be cognizant of two separate but interrelated aspects. First, the judge must decide whether the discovery violation prevented the aggrieved party from properly preparing for trial. Second, the judge must determine the appropriate sanction to invoke for the violation. Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Desjardins v. State, 507 So.2d 733 (Fla. 4th DCA 1987).

Although it is within a trial court's discretion to order exclusion of a witness as a sanction for violation of a discovery order, the courts have consistently found exclusion to be an extreme remedy which should be invoked only under the most compelling circumstances, and only after the trial court has conducted an adequate inquiry to determine whether

any other reasonable alternatives might be used to overcome or mitigate possible prejudice. Wikerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985). Moreover, the discovery violation inquiry contains enormous flexibility by providing a full panoply of remedies which a judge may apply if a discovery violation has occurred, including, if the evidence warrants, finding no prejudice or "harmless error" and proceeding with the trial.

The first discovery violation claimed by the Appellant has to do with the testimony of Officer James Wilburn of the West Palm Beach Police Department. Appellant objected to Officer Wilburn's testimony on the basis that his testimony was not relevant and that he was not on the witness list. (R 1024). Officer Wilburn testified as to the three spent shells that were found in the West Palm Beach house that came from the victim's pistol which the Appellant traded later that evening. Appellant concedes that he did have the police report of Officer Wilburn and, therefore, he knew the contents of Officer Wilburn's testimony. Furthermore there were numerous Similar Fact Evidence Hearings which discussed the crime that occurred in West Palm Beach with this pistol. The Appellant knew that the events were intertwined and knew that the State sought to introduce that three spent shells discovered at the residence in West Palm Beach to establish motive and intent in taking the pistol and the show the chain of events. (R 1026,1029). The defense counsel would not answer the trial court as to whether or not the Appellant had

been furnished with the three spent shells. Consequently, the trial court denied the Appellant's objection to Wilburn's testimony. Based on the Appellant's own confession it can hardly be said the he was prejudiced in his defense, or caught unawares by Wilburn's testimony. In fact, the Appellant benefited from the erroneous ruling of the trial court in refusing to allow into evidence the second murder at the West Palm Beach residence as part of the res gestae. Clearly the two deaths were intertwined. Nevertheless, the Appellant was not prevented from properly preparing for trial. Any violation was harmless beyond a reasonable doubt.

Defense counsel also objected to Officer McMillan's testimony because Officer McMillan was not on the witness list and that the officer's report on the recovering of the gun was not disclosed by the State. As conceded by the Appellant, the State did not have McMillan's police report and did not even know of its existence until the day it disclosed such to Appellant. The State pointed out to the trial court that there were at least two other reports in the file given Appellant, one by McMillan's co-officers detailing what happened and a summary report by Sgt. Perez in his overall report detailing Officer McMillan's testimony. Consequently, the information was received by the Appellant. (R 844-847).

In addition, the trial court gave Appellant time to talk to McMillan and to review the report. (R 855, 847). In view of the court's dislike for barring pertinent witness'

testimony this was a reasonable alternative to mitigate any prejudice to the Appellant. However, State maintains that there was no prejudice to the Appellant since he already had the information. Any error was clearly harmless.

The same is true of the photographic identification of Oswald Jones. The State did not have a photograph of Oswald Jones and did not know that one existed. When the State had the photo it advised defense counsel of its intention to use the photograph for identification purposes. The testimony of Nathanial Brice and Officer McMillan as it relates to Oswald Jones would have been the same with or without the photograph. No error inured to the Appellant and any error was clearly harmless. The photograph was not even published to the jury.

Finally, the Appellant complains, as he did at trial, that the vehicle registration form submitted into evidence to prove the ownership of the victim's car was a discovery violation. Appellant claims that he was prevented from preparing his case adequately because he did not know about the vehicle registration form before the trial although he did know all about the car and had the information months before the trial.

The ownership of the vehicle in question has never been in dispute. Everything that was ever known about the car was given to the Appellant. In addition, the Appellant reviewed the FCIC signal teletype in Deputy O'Neill's notes in response to a subpeona duces tecum which contained all of the

information that the vehicle registration form contained. The Appellant never denies that he had the information only that the vehicle registration form was inadvertently left off any discovery list. (R 789-793). The court noted that the ownership of the automobile was no surprise to anyone. The information in the teletype provided the identical information articulated in the vehicle registration. The trial court then specifically found that any violation was trivial in nature and would have little if any impact. (R 794). The Appellee maintains that this is the correct position. The ownership of the car was never in question and any prejudice that inured to the Appellant was miniscule to say the least.

Appellant's conviction and sentence should be affirmed.

POINT VII

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY ADVISORY OPINION OF LIFE BY IMPOSING A SENTENCE OF DEATH

The trial judge is entrusted by the legislature with the awesome responsibility to impose sentence in death penalty cases. Section 921.141(3), Fla. Stat. (1987). The jury's responsibility, likewise imposed by the legislature, is to make a nonbinding recommendation. Section 921.141(2), Fla. Stat. (1987). To treat the jury recommendation as binding would violate the eighth amendment as interpreted in Furman v. Georgia, 408 U.S. 238 (1972); Spaziano v. State, 433 So.2d 508 (Fla. 1983), aff'd, 468 U.S. 447 (1984).

In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court held that to impose a death sentence where the jury has recommended life imprisonment rather than death, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder requires that the jury's life recommendation be followed if there is a reasonable basis for it in the evidence. But the reasonableness of the jury's recommendation should be evaluated in light of all the evidence considered. Hoy v. State, 353 So.2d 826, 832 (Fla. 1977), cert. denied, 439 U.S. 920 (1978). The totality of the circumstances includes that information which is not available to the jury but which provide a reasonable basis for his override of the jury recommendation. Spaziano v. State, supra; Porter v. State, 429 So.2d 293 (Fla.), cert.