IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,436

HENRY JOSE ESPINOSA,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

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BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D.

TABLE OF CITATIONS CONT'D.

OTHER AUTHORITIES

INTRODUCTION

The Appellant, **Henry Jose Espinosa**, was the defendant below. **The State of Florida**, was the prosecution below. Since Appellant was tried with his codefendant, **Mauricio Beltran-Lopez**, the Appellant will be referred to as Espinosa the codefendant will be referred to as Beltran-Lopez, and the Appellee will be referred to as the State. The symbol RE will designate the record on appeal.

STATEMENT OF THE CASE AND FACTS

On July 30, 1986, Espinosa and Beltran-Lopez were indicted on two counts of first degree murder for the killing of Bernardo Rodriguez and his wife Teresa, one count of attempted first degree murder against their daughter Odanis Rodriguez, armed robbery and armed burglary. (RE.1-4a). Espinosa pled not guilty and demanded a jury trial.

Prior to trial, Espinosa moved to sever the attempted first degree murder count from the remaining counts on the ground that his defense to the attempted murder charge was materially different from his defense to the two murder charges. (RE.68-69). The trial court denied the motion. (RE.82-84; 517-519).

Espinosa then filed a motion to sever his trial from Beltran-Lopez[1] alleging irreconcilable defenses. (RE.138-142). Espinosa specifically alleged that his defense at trial would that Beltran-Lopez was a hundred percent responsible for the crimes, while he was zero percent criminally responsible. (RE.139). At the hearing thereon both Espinosa and Beltran-Lopez advised the trial court that they were going to testify at trial and place the entire blame on the other. (RE.678-679). The trial court denied the motion to sever. (RE.798).

Also pretrial, the State filed a Motion for Order in Limine seeking to prohibit testimony concerning the fact that the victim, Bernardo Rodriguez was convicted of or on parole from a conviction for marijuana trafficking. (RE.65). At the hearing thereon, the trial court reserved ruling. (RE.793). During trial, the court found the said evidence was irrelevant and granted the motion as to the convictions, but allowed evidence about the victim's involvement in drug trafficking. (RE.1071-1078; 1133-1135).

During Espinosa's opening statement, he wanted to inform the jury that Beltran-Lopez was, some ten years ago, involved in terrorist activities in Nicaragua. An objection thereto was

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[1] Beltran-Lopez also filed a motion alleging irreconcilable defenses. He claimed Espinosa was totally responsible and he was not going to accept any criminal responsibility.

sustained on the ground that such evidence was inadmissible since it only would show a propensity to commit crimes. (RE.1163-1164). The jury was cautioned to disregard the events that happened ten years ago in Nicaragua. (RE.1176).

Trial commenced on August 29, 1988. The State's first witness was Odanis Rodriguez.

Odanis Rodriguez, the daughter of the murder victims, Bernardo and Teresa Rodriguez, was eleven years old on the date of the incident. She lived with her parents and older sister, Odenia. (RE.1224-1225). On the night of the incident, the sisters went to bed around 10:00 P.M. Each girl had her own bedroom, which rooms were adjacent to each other. During the night, Odanis was awakened by a loud noise emanating from inside the house. Odanis then heard her mother's and Espinosa's voices. (RE.1226-1227). She recognized Espinosa's voice because they used to be neighbors. (RE.1232). Before she could react, the telephone in her room rang. Thereafter, a second man, later identified as Beltran-Lopez opened her bedroom door and pulled the telephone cord from the wall and left with the cord. (RE.1228-1229, 1266).

Odanis then heard talking, so she opened her door and saw her mother, Espinosa and Beltran-Lopez. She observed Espinosa holding a knife, while Beltran-Lopez was holding her mother.

Odanis, responding to her mother's signals, went into her room and locked the door. (RE.1230-1232). Odanis then heard her mother say to Espinosa, "Don't, Henry, don't." (RE.1233-1235). Espinosa then came to her bedroom door and told Odanis that her mother wanted to see her. As soon as Odanis opened the door, Beltran-Lopez grabbed her from behind and held her nose and mouth. Espinosa then started stabbing her. (RE.1236-1237).

The next thing Odanis remembered was that her sister and Maria Blanco dragged her out of the house and brought her to the hospital. While there, Odanis described Beltran-Lopez to the police as having black hair, an acne scarred face and chubby cheeks. (RE.1237-1238). While in the hospital, the police showed Odanis a photo line-up. Although she had tubes in her mouth, and was unable to speak, she picked Espinosa out of the line-up. She was shown a second photo line-up, whereat she picked Beltran-Lopez out as the man who held her mouth and nose while Espinosa stabbed her. (RE.1239-1241).

Maria Blanco, a family friend, was awakened that night by a telephone call from Odenia. Odenia told her something was happening and to come right over. She arrived at the Rodriguez' residence within twenty minutes and she found Odenia in her sister's room. She saw Bernardo on the floor between the kitchen and dining room and Teresa was on her bed with her feet dangling over the edge. Blood was everywhere. (RE.1280-1284). Odenia

told Blanco that her parents were dead, but Odanis was still alive. Blanco then took Odanis to the hospital. After staying at the hospital for some time, Blanco and Odenia were driven to Blanco's home by the police. There Odenia slept and later in the afternoon was questioned by police. (RE.1284-1287).

Officer Victor Perterman, of the Metro Dade Police Department, was the first officer on the scene. He observed a blood covered house, with Bernardo on the kitchen floor and Teresa on the bed with her legs dangling over the edge. He then secured the scene. (RE.1291-1296).

Roger Taaffe, a crime scene technician for the Metro Dade Police Department arrived on the scene at 6:10 A.M. He was the lead technician. (RE.1308-1310). Taaffe photographed and sketched the scene. The sketch showed 25 areas where blood was collected. A photograph showed a wooden knife holder with a knife missing therefrom. (RE.1319). A large quantity of blood with print or palm ridge patterns was found on the refrigerator door, and it was latent processed. (RE.1323). Blood with ridge patterns was also found on a plastic slip cover and it was removed so latent comparisons could be done. (RE.1324). Blood droplets and a blood soaked rag were located on the television and they were collected. (RE.1325). Teresa Rodriguez was located in the master bedroom with a pillow over her head and a phone cord off to the side. The pillow was collected. (RE.1328-1329).

The blood stains and items that contained blood were collected by Officer Ecott. (RE.1337). A total of 41 latents were lifted from the scene and sent to identification. (RE.1360-1361).

On July 12, 1986, Taaffe photographed and processed for prints a silver colored Toyota. (RE.1337-1338). A 38 caliber cartridge was found in the trunk as well as blood stained clothing. (RE.1339-1340). Prior to dealing with the Toyota, Taaffe photographed Espinosa, which showed he had a scratch on his face. At that time Espinosa's watch was impounded since blood was found on its face. (RE.1356, 1362).

Odenia Rodriguez was 12 years old at the time of the incident. She confirmed that she lived with her parents and her younger sister Odanis and that her room was adjacent to her sister's. (RE.1399-1401). During the night, she was wakened by her mother's screams. She opened her bedroom door and saw her father on the kitchen floor in a pool of blood. Although she did not see her mother, she heard her mother say, "Odenia, Odenis, don't open the door." Odenia went back in her room, locked the door, and called Maria Blanco. (RE.1402-1403). Odenia then heard her mother tell Espinosa that if he would leave she would not call the police. She then heard Espinosa go to her sister's room and tell her sister to come out because her mother wanted to see her. Odenia recognized Espinosa's voice since she spoke to him often when they were neighbors. (RE.1404-1406). Shortly

thereafter, Maria Blanco arrived and they took Odanis to the hospital. Once at the hospital, Odenia gave the police a statement, but she did not tell them that she recognized Espinosa's voice because she was confused. However, later that afternoon, after she slept at Blanco's house, she told the police that she recognized Espinosa's voice. Subsequently, she was shown a photo line-up and she picked out Espinosa. (RE.1407-1412).

Detective Pasquale Diaz, of the Metro Dade Police Department, was assigned to the homicide team investigating the incident. (RE.1424-1426). Diaz responded to the hospital in order to speak with Odanis. He first spoke with her doctor concerning her condition and was advised that she suffered multiple stab wounds and was in the operating room. (RE.1425-1428). Diaz then spoke with Odenia, who was upset and crying. Later that afternoon he responded to Blanco's residence and spoke with Odenia. At that time, she told Diaz that Espinosa killer her mother, because she recognized his voice as the one she heard in the house. (RE.1425-1430). Diaz then transported Blanco and Odenia to the homicide office. Once there, Odenia was shown a photo line-up, whereat she picked out Espinosa as the man whose voice she recognized. Odenia explained to Diaz that the reason she did not tell him about the voice before was out of fear Espinosa might return. (RE.1430-1434). On July 14, 1986 Diaz returned to the hospital in order to show Odanis a photo line-up.

Although she was unable to speak, she was alert and pointed to Beltran-Lopez as one of the men involved. (RE.1435-1437).

Richard Ecott, a crime scene technician for the Metro Dade Police Department, was part of Officer Taaffe's crime scene team. (RE.1458-1459). He first responded to the hospital to secure Odanis' nightgown. He then responded to the scene where he was directed to collect blood samples. (RE.1460-1461). Ecott collected blood samples by either taking the item the blood was on or scrapping dried blood off of the item. (RE.1467). Samples were taken from floor tiles, the rag on top of the television, flakes of blood from a living room chair, kitchen tiles, a throw rug found near Bernardo Rodriguez, the tablecloth from the dining room table, the front door doorknob, bedroom floor tiles from Odanis' room, carpet from the master bedroom, the telephone from the master bedroom, flakes from the living room table, the doorknobs from the girls' bedrooms, the pillow case covering Teresa's face, Teresa's panties, the plastic cover on the dining room chair, and the freezer door. All blood samples were sent to serology. (RE.1470-1501).

Michael Fisten, a homicide detective for the Metro Dade Police Department, was a member of the homicide team. (RE.1520-1521). He was given the task to locate the perpetrators. In accordance therewith, on July 10, 1986 in the evening hours he responded to the hospital to show Odanis a photo lineup. Prior

to dealing with Odanis, Detective Fisten spoke with her doctors to determine if she was coherent. After being advised that Odanis was alert and coherent, Detective Fisten spoke with Odanis. Although intubated and unable to speak, Odanis nodded that she understood what was occurring. When asked if she knew who did it, she nodded in affirmative. Detective then presented her with the photo line-up and she nodded in the affirmative when shown Espinosa's picture. (RE.1523-1532).

On July 12, 1986, Diaz arrested Espinosa in a parking lot in Hialeah. After the arrest, Espinosa's silver Toyota was impounded and searched. As a result of the search, a 38 caliber bullet was seized. (RE.1533-1535). Diaz then proceeded to Espinosa's residence and there he found a medical prescription with Beltran-Lopez' name. Diaz also learnt where Beltran-Lopez lived. (RE.1535-1536).

On July 14, 1986, around 10:00 A.M. Detective Fisten returned to the hospital. Odanis told him that there was another man involved, who she did not know but who was Nicaraguan. Detective Fisten then left to obtain another photo line-up. He returned to the hospital in the late afternoon and presented Odanis with the second photo line-up. Odanis immediately picked out Beltran-Lopez as the second man. (RE.1537-1542). Immediately thereafter an arrest warrant was obtained for Beltran-Lopez and he was arrested at the Lanza's residence. At the time of the

arrest, Beltran-Lopez had a wound on his left hand between his index finger and thumb. (RE.1542-1543). After the arrest, the Lanza's residence was searched, and a pouch with Beltran-Lopez' identification and money was found in a garbage can outside the residence. (RE.1550-1551). There was $5,310 in the pouch and the money had blood on it. The bloody bills were then sent to serology. (RE.1552).

Alba Luz Lanza, at the time of the incident, knew Beltran-Lopez for two years and Espinosa for one month. (RE.1569-1572). In July, 1986, she was aware that Beltran-Lopez and Espinosa were sharing an apartment. Early in that month, both men came to her home. Beltran-Lopez had a wound on his hand between the thumb and forefinger. The wound was recent and it did not look as if it received medical treatment. Beltran-Lopez stated that he received the wound while working on his car. (RE.1573-1574). While in Lanza's house, Beltran-Lopez, who was carrying a small briefcase, asked Lanza to hold it for him. Beltran Lopez opened the bag and revealed that money was inside. Beltran-Lopez told her he got the money as a loan from his boss and that she should not tell anyone about it. They then left and returned later in the afternoon. Beltran-Lopez then spent the next couple of nights while Espinosa departed. (RE.1575-1578). During Beltran-Lopez' stay at the Lanza's, Espinosa was arrested and Alba Lanza became aware of the incident. Lanza asked Beltran-Lopez if he was involved, but he initially denied involvement. Lanza

confronted Beltran-Lopez again, and this time he admitted that he went to the Rodriguez' residence to make a drug deal and that Espinosa assisted him. (RE.1586,1591,1595). Thereafter, the police came to her house and arrested Beltran-Lopez. After the arrest, Lanza threw the briefcase with the money in the trash. (RE.1576).

Roger Mittleman, the associate medical examiner involved in the case, responded to the scene. He found Bernardo lying in the kitchen area in a pool of blood and Teresa in the master bedroom. Both had stab wounds, while only Bernardo had a gunshot wound. Teresa was lying across the bed with her feet dangling over the edge. She had a pillow over her face and her nightgown was ripped. She had stab wounds on her abdomen, across her neck and the imprint of two necklaces was also evident across her neck. She also had petechial hemorrhages in her eyes. (RE.1604-1606). Petechial hemorrhages are indicative of strangulation. (RE.1615). Dr. Mittleman performed autopsies on both victims. The autopsy of Bernardo revealed six stab wounds, two of which caused considerable bleeding. It also revealed a gunshot wound in the left lower chest. The bullet went through the diaphram, liver, spleen and exited through the ribs. The bullet fragment was recovered. The cause of death was gunshot wound to the chest associated with stab wounds. (RE.1620-1639). The autopsy of Teresa revealed abrasions on her face that were consistent with being smothered by a pillow. (RE.1630-1631). She had petechial

hemorrhages, which indicated that she was alive when she was being strangled. (RE.1632-1633). She was stabbed six times, and was alive while she was being stabbed. The autopsy also revealed that the stab wounds were defensive wounds. (RE.1640-1643, 1663). The cause of death was multiple stab wounds associated with strangulation. (RE.1645). The wound to Beltran-Lopez' hand was consistent with knife slippage. (RE.1649).

Tracey Lowe, a fingerprint examiner for the Metro Dade Police Department, compared latents lifted from the scene with Beltran-Lopez' and Espinosa's standard prints. Espinosa's latent was found in blood on the top portion of the refrigerator door. (RE.1713). The bloody palm print on the refrigerator door was Beltran Lopez'. (RE.1720). The palm print and fingerprint on the plastic seat cover were Beltran-Lopez'. (RE.1722-1723).

Kathleen Nelson, a serologist for the Metro Dade County Police Department, responded to the scene. (RE.1748). During her investigation she received tubes of blood from the victims and from Beltran-Lopez and Espinosa. From these tubes of blood she was able to determine the respective blood types. (RE.1750-1764). Based on her analysis the blood on the refrigerator, the bloody palm print and the dining room chair contained a mixture of Bernardo Rodriguez' and Beltran-Lopez' blood. The spatter on the dining room chair was consistent with an injured Beltran-Lopez stabbing Bernardo. The mixture of blood was inconsistent with a

violent struggle. (RE.1769-1774, 1792-1793, 1813). The bloody rag on the television also contained a mixture of Bernardo's and Beltran-Lopez' blood. (RE.1376). The pillow case that was found over Teresa's face contained her blood and Bernardo's. Bernardo's blood stain on the pillow case was as a result of blood transfer. (RE.1781-1782). Bernardo's blood was transferred from the bloody rag found on the television, which rag contained a mixture of Bernardo's blood and Beltran-Lopez' blood. Bernardo's blood transfer stain on the pillow case was consistent with someone wearing that rag around their hand and pressing that rag against the pillow case which is on the pillow, and which is over Teresa's face. It was not only consistent because of the transfer patterns, but because the ends of fingers were also observable on the pillowcase. The blood stains left by the fingers were more intense than that left by the transfer stain, because it was the fingers that made the direct contact. (RE.1794-1798). The blood spatter found on Espinosa's red bathing suit was consistent with Teresa or Odanis Rodriguez' blood. The spatter was of medium velocity, indicative of a beating or stabbing. (RE.1801).

The State then rested. (RE.1887). Espinosa then moved for a judgment of acquittal on the grounds that the circumstantial evidence did not refute all reasonable hypothesis of innocence. This motion went to the two first degree murder counts, and the armed robbery and armed burglary count. Espinosa conceded the

sufficiency of evidence for the attempted first degree murder count. Beltran-Lopez joined in said motions. (RE.1943-1945).

Espinosa then put on his case. (RE.1889). Roland J. Vas, a homicide detective for the Metro Dade Police Department, was a member of the team investigating the incident. (RE.1889-1890). Pursuant to his investigation, he learnt that a car located in the victims' driveway belonged to Maria Castellanos. He responsed to her residence and saw some activity inside the house. He observed an armed latin male bolt from the house and run away. (RE.1903-1906). Vas eventually entered the residence and smelled marijuana. He also observed drug paraphernalia and a large amount of suspect marijuana. (RE.1911-1915). A beeper was located which had the same number as a beeper found in the victims' residence. (RE.1922). The suspect marijuana turned out to be bogus. (RE.1923).

Tracey Lowe was recalled on behalf of Espinosa. (RE.1951). Based on her investigation, Bernardo Rodriguez' prints were found in Castellanos' car and residence. (RE.1952-1954).

Espinosa then testified in his own behalf. (RE.1959-2146). In 1976 Espinosa lived in Nicaragua and worked for the Somoza regime and upon its fall in 1979, he fled to Guatemala. He met Beltran-Lopez, for the first time, in Guatemala. (RE.1961-1967). In 1979, both he and Beltran-Lopez came to Miami and they became good friends. (RE.1984-1988).

In 1983, Espinosa became neighbors with the victims. During their relationship, Bernardo Rodriguez told Espinosa that he needed money, so he was going to start dealing marijuana. Espinosa told Bernardo that he did not want to get involved. (RE.1988-1993). A couple of months before the incident in question, Bernardo told him he was selling marijuana and offered him a legal job driving trucks. (RE.1995-1997). Espinosa then contacted Bernardo regarding the truck driving job. After being advised that the job was managing the hauling away of concrete by three trucks, Espinosa accepted the job. (RE.2002-2007).

Two weeks before the incident, Espinosa hired Beltran-Lopez to help him drive the trucks. Beltran-Lopez then moved in with Espinosa. (RE.2011-2014). On the night of the incident, Espinosa and Beltran Lopez arrived at the victims' house to pick up the trucks. When they entered the house, Bernardo asked Espinosa to haul some marijuana for him. Espinosa refused, but Beltran-Lopez agreed. Bernardo then threatened Espinosa in order to force him to transport the drugs. Teresa brought out her 38 caliber gun and pointed it at Espinosa. Beltran-Lopez then grabbed the gun and Bernardo grabbed a knife and attempted to stab Beltran-Lopez. Beltran-Lopez avoided the knife and then shot Bernardo. Beltran-Lopez and Bernardo then started fighting. Espinosa moved away from the action and bumped into Teresa. Odanis then opened her bedroom door and Espinosa told her to close and lock it. Teresa

then told Espinosa to stop because she did not want the police involved. Beltran-Lopez and Bernardo were still struggling and Beltran-Lopez was getting the better of him. He started kicking and stabbing Bernardo. After Beltran-Lopez finished with Bernardo, he turned his attention to Teresa. He pushed her on the bed and started stabbing her. At this time, Espinosa tried to separate Beltran-Lopez from Teresa and was successful. At this time Teresa was still alive. Beltran-Lopez then wanted to kill Odanis because she saw him and could be a witness. Beltran-Lopez called her out of the room. She opened her door, and Beltran-Lopez gave the knife to Espinosa and told him to kill her. Beltran-Lopez covered her nose and mouth and ordered Espinosa to kill the girl. Out of fear for his life Espinosa stabbed Odanis once. Beltran-Lopez was then distracted by the telephone ringing and Espinosa left Odanis alive. Beltran-Lopez returned with a telephone cord and proceeded to strangle Teresa. Beltran-Lopez then returned to the girl's room and Espinosa told him she was dead. Espinosa then started to leave, but Beltran-Lopez did not follow. Espinosa got into his car and when Beltran-Lopez arrived he told him that he went back to kill the girl that Espinosa left alive. (RE.2022-2069). The reason Espinosa did not go to the police was because Beltran-Lopez threatened to kill his family and Espinosa believed him. (RE.2080).

At the conclusion of Espinosa's testimony, he rested his case. (RE.2141). Beltran-Lopez rested his case without presenting any evidence. (RE.2144). Espinosa and Beltran-Lopez then moved for judgments of acquittal, which were denied. (RE.2154-2168). After closing arguments, the jury was instructed and the jury subsequently returned verdicts finding both Espinosa and Beltran-Lopez guilty of the first degree murder of Teresa Rodriguez, second degree murder of Bernardo Rodriguez, attempted first degree murder of Odanis Rodriguez, grand theft and armed burglary. (RE.2469-2470).

On August 30, 1988, during trial, the parties were advised by the trial court regarding its policy concerning the commencement of the penalty phase proceedings if there is a first degree murder conviction. The court's policy was to start the penalty phase within two hours after conviction or the next day. Espinosa's counsel agreed with this policy. (RE.1303). Thereafter on September 6, 1989, the parties agreed that if the jury came back with a first degree murder verdict, all parties would be prepared to proceed with the penalty phase on September 9, 1988. (RE.2461-2464).

On September 9, 1988, when the trial court reconvened to start the penalty phase Espinosa filed a Motion requesting that a special anti death penalty attorney from Texas be substituted for defense counsel and a continuance of the penalty proceeding until

substitute counsel could obtain Espinosa's family from Guatemala so they could testify on his behalf. (RE.405-409). During the hearing, defense counsel admitted that he advised Espinosa of the trial court's policy regarding commencement of the penalty phase. (RE.2481). The reason for the continuance was for the first time Espinosa told defense counsel of his history of child abuse and only his family could so testify. (RE.2488). Defense counsel advised the court that he did not bring this up sooner because Espinosa only told him about the abuse after he was convicted of first degree murder. (RE.2493-2494). The trial court denied the motion. (RE.2497).

At the penalty phase, the State presented Roger Mittleman, the associate medical examiner who performed the autopsy on Teresa Rodriguez. It was his opinion that she was alive when she was being stabbed and when she was being suffocated and strangled. Her death was agonizing. She had defensive wounds from the stabbing and was conscious during the attack. (RE.2539-2546).

Espinosa presented several witnesses during the penalty phase. However, the trial court excluded a witness, Espinosa's former public defender since she was formerly part of the defense team. Her testimony was proffered and it would have been that during her representation Espinosa was a nice person. (RE.2571-2574).

Flor De Marti Sandoval knew Espinosa for eight years. During that time he was a respectful man, who treated his wife and son well. (RE.2559-2564).

Reverend Fernando Paulino met Espinosa while he was in jail awaiting trial. Espinosa studied the bible with him and the Reverend felt that Espinosa was a nice man. (RE.2575-2578).

Aurora Duque met Espinosa while he was in jail. During that time, her opinion of Espinosa was that he was a good person, decent and respectful. (RE.2581-2583).

Maria Isabel Arolega met Espinosa in May of 1986. She felt that he was good with children and was a decent man. (RE.2584-2587).

Eugenia Diaz met Espinosa while he was in jail and is in love with him. She felt that Espinosa was a good person. (RE.2590-2594).

Espinosa spoke to the jury on his own behalf. (RE.2596-2607). Thereafter Espinosa rested.

Beltran-Lopez then presented his case. Elodia Lopez-Espinosa, his mother, testified that Beltran-Lopez was a good

son, who had never been in trouble with the law before. (RE.2608-2610).

Beltran-Lopez then spoke to the jury on his own behalf. He stated that he came to Miami three or four weeks before the incident to help the Lanza's move here. He was friends with Espinosa and was living with him at the time of the incident. Beltran-Lopez, before the incident, did not know Teresa Rodriguez, but had met Bernardo Rodriguez once before. He met him while with Espinosa. On the night of the incident, he was with Espinosa and Espinosa told he had to take care of some business that was pending for quite awhile. He had no idea that the business involved the victims. After he was arrested, Beltran-Lopez gave a statement to the police. He told the police that on the night of the incident Espinosa drove to the victims' house and they both exited. Espinosa rang the bell and Bernardo opened the door. After Espinosa and Bernardo exchanged greetings, Espinosa went inside while Beltran-Lopez remained outside. After awhile, Beltran-Lopez, upon hearing noises, entered the residence. He saw Bernardo with a knife and Espinosa holding him up. Beltran-Lopez tried to pull them apart and when Espinosa let go of Bernardo's arm, the knife fell and cut Beltran-Lopez' hand. Beltran-Lopez then saw Teresa come out of her room with a gun. At this time, she pointed it at Espinosa and told him to leave and she would not call the police. Espinosa then grabbed the gun from her and shot Bernardo.

Beltran-Lopez denied ever going into the master bedroom and stabbing Teresa. After Espinosa shot Bernardo, Beltran-Lopez ran out of the house. He eventually returned and saw Teresa on her bed being beaten with a pistol by Espinosa. Beltran-Lopez remained outside the bedroom and watched as Espinosa stabbed Teresa. He denied ever pushing a pillow over Teresa's face. He admitted taking the money. He admitted holding Odanis while Espinosa was stabbing her. He also stated that he talked Espinosa out of killing Odenia. (RE.2610-2127).

The jury then returned to consider its recommendation. The jury recommended the death penalty by a vote of eleven to one for Espinosa and eight to four for Beltran-Lopez. (RE.29).

On November 4, 1988, the trial court, following the jury's recommendation, imposed the death penalty on Espinosa. (RE.410). The trial court found the following aggravating circumstances: the defendant was previously convicted of a felony involving the use of violence to the person; the defendant was engaged in the commission of an armed burglary; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and that the capital felony was especially heinous, atrocious and cruel. The trial court found the statutory mitigating circumstance that the defendant did not have a significant history of prior criminal activity and the nonstatutory mitigating circumstance that he was a good man. (RE.416-425).

Espinosa was sentenced to life imprisonment with a three year minimum mandatory term for the second degree murder conviction; life imprisonment for the attempted first degree murder conviction; five years for the grand theft conviction; and life imprisonment with a three year minimum mandatory term for the armed burglary conviction. All sentences to run concurrently. (RE.410-414).

This appeal followed.

POINTS INVOLVED ON APPEAL

I.

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SEVER DEFENDANTS.

II.

WHETHER THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE OF THE VICTIM, BERNARDO RODRIGUEZ PRIOR CONVICTION FOR DRUG TRAFFICKING AND PRECLUDING EVIDENCE OF BELTRAN-LOPEZ' BACKGROUND.

III.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEVER COUNT III FROM THE REMAINING COUNTS, THEREBY VIOLATING ESPINOSA'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

IV.

WHETHER THE TRIAL COURT ERRED IN SENTENCING ESPINOSA TO DEATH.

V.

WHETHER THE TRIAL COURT ERRED IN DENYING ESPINOSA'S MOTIONS FOR EXPERT WITNESSES, HIS MOTION TO EXCLUDE STATISTICAL BLOOD EVIDENCE AND HIS REQUEST FOR JURY INSTRUCTIONS.

VI.

WHETHER ESPINOSA RECEIVED A FAIR AND IMPARTIAL TRIAL.

SUMMARY OF THE ARGUMENT

I.

The contention that the trial court erred in refusing to sever defendant is meritless. Here both defendants knew well before trial that they were blaming the other for the crime. Therefore Espinosa was not prejudiced in preparing his defense. Further, no prejudicial evidence was entered against him as a result of the joint trial.

II.

The trial court properly excluded the evidence of the victims prior conviction as irrelevant. The evidence of Beltran Lopez' background was also properly excluded since it was too remote and therefore also irrelevant.

III.

The trial court did not err in refusing to sever the attempted first degree murder charge from the remaining counts since it was part of the criminal episode. Said evidence would have been admitted in this case even if the count had been severed.

IV.

The trial court properly denied the continuance of the penalty phase since Espinosa failed to show that he could not have gotten his witnesses earlier. The death penalty was

properly imposed on Espinosa since the facts established that Teresa Rodriguez was stabbed and strangled in order to avoid arrest for the murder of her husband. The evidence established the four valid aggravating circumstances of heinous, atrocious and cruel; the murder was committed to avoid arrest; the murder was committed during a burglary; and he had a prior violent felony conviction. These circumstances clearly outweighed the statutory mitigating circumstance of no previous criminal history and the nonstatutory mitigating circumstance of being a good man.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO SEVER DEFENDANTS.

Espinosa contends that the trial court erred in denying the motion to sever defendants since they could not receive a fair trial based on the fact that the defenses were antagonistic and mutually exclusive. Based on the facts of this case, Espinosa was not entitled to severance.

In McCray v. State, 416 So.2d 804 (Fla. 1982) this Court stated the law as it pertains to severance of defendants:

> Rule 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendants ...." As we stated in *Menedez v. State*, 368 So.2d 1278 (Fla. 1979), and in *Crum v. State*, 398 So.2d 810 (Fla. 1981), this rule is consistent with the American Bar Association standards relating to joinder and severance in criminal trials. The object of the rule is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish

the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants. A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In situations less obviously prejudicial than the *Bruton* circumstance, the question of whether severance should be granted must necessarily be answered on a case by case basis. Some general rules have, however, been established. Specifically, the fact that the defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to a severance. *United States v. Cravero,* 545 F.2d 406 (5th Cir. 1976), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977); *United States v. Perez,* 489 F.2d 51 (5th Cir. 1973), *cert. denied,* 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). Nor is hostility among defendants, or an attempt by one defendant to escape punishment by throwing the blame on a codefendant, a sufficient reason, by itself, to require severance. *United States v. Herring,* 602 F.2d 1220 (5th Cir.), *cert. denied,* 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 732 (1979); *United*

> *States v. Ehrlichman,* 546 F.2d 910 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977); *Perez; Hawkins v. State,* 199 So.2d 276 (Fla. 1967), *vacated on other grounds,* 408 U.S. 941, 92 S.Ct. 2857, 33 L.Ed.2d 765 (1972). If the defendants engage in a swearing match as to who did what, the jury should resolve the conflicts and determine the truth of the matter. As in this case, the defendants are confronting each other and are subject to cross-examination upon testifying, thus affording the jury access to all relevant facts.

Id. at 806 (footnotes omitted).

In the instant case, Espinosa was not prejudiced by the introduction of Beltran-Lopez' confession, since the State did not introduce it into evidence (RE.456). Therefore, Espinosa was not faced with a Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) circumstance and severance was not required. Nor can Espinosa complain that his decision to testify and Beltran-Lopez's decision not to testify, required severance, since the decision to testify is irrelevant to severance. Dean v. State, 478 So.2d 38 (Fla. 1985); O'Callaghan v. State, 429 So.2d 691 (Fla. 1983).

Espinosa's reliance on Crum v. State, 398 So.2d 810 (Fla. 1981) is distinguishable for the same reason this Court distinguished Crum in McCray v. State, supra.

> Appellant relies heavily on the decision in *Crum v. State* to support his asserted right to a severance. *Crum* is distinguishable. In that case, two brothers, Preston and Marvin Crum, were charged with murder. Prior to trial, counsel for appellant Preston obtained a statement from codefendant Marvin which was in total accord with Preston's version of the incident. After the jury was sworn, Preston learned that Marvin had changed his story and intended to accuse Preston, at trial, of committing the murder. Marvin was not required to give the statement, but once he did so, Preston was entitled to rely on that statement. When codefendant Marvin changed his story *after the jury was sworn,* we determined that, on a proper motion, severance was necessary because Preston was, under these circumstances, denied a fair trial. The problem in *Crum* was not simply that the codefendants had antagonistic defenses. The problem was that one codefendant induced the other to believe that their defenses would be completely consistent and then, after jeopardy attached, decided to change his story, thereby prejudicing the proper preparation of the case for trial. The circumstances would have been different had there been no prior statement or had there been sufficient notice before trial of the change in Marvin's position.

McCray at 807. (Emphasis in original). In the instant case, both defendants advised the Court during pretrial proceedings that they were going to testify and place the blame on the other. (RE.672-680). Therefore, Espinosa was able to prepare for trial without prejudice.

Finally, Espinosa contends he was unable to defend himself in a joint trial because he was precluded from introducing evidence concerning Beltran-Lopez' 10 year old past history in Nicaragua. No error occurred here since said testimony was too remote in time and therefore inadmissible in either a joint or separate trial. Hitchcock v. State, 413 So.2d 741 (Fla. 1982) cert. denied, 103 S.Ct. 274 (1982).

II.

THE TRIAL COURT DID NOT ERR IN PRECLUDING EVIDENCE OF THE VICTIM BERNARDO RODRIGUEZ' PRIOR CONVICTION FOR DRUG TRAFFICKING AND PRECLUDING EVIDENCE OF BELTRAN-LOPEZ' BACKGROUND.

Espinosa's theory of defense was that the victim Bernardo Rodriguez was trafficking in marijuana and the incident occurred because Bernardo and Teresa Rodriguez attempted to force Espinosa to transport marijuana for them. To this end, Espinosa was permitted to present evidence through Detective Vas that a car left at the victims' residence belonged to Maria Castellanos and that a search of her residence yielded a marijuana packaging and distribution center. Vas also found a beeper in the residence whose number matched the victims' beeper. (RE.1903-1922). Tracey Lowe, the State fingerprint expert, stated that she found Bernardo Rodriguez' prints in Castellanos' car and residence. (RE.1952-1954). Espinosa testified extensively about the victims dealings in marijuana. (RE.1995-2007). He then testified as to his version of the incident, including the fact that the victims tried to force him to transport marijuana and how Beltran-Lopez went wild when Espinosa refused. (RE.2011-2080).

The only area that the trial court precluded Espinosa from bringing out was the fact that Bernardo Rodriguez was on

probation for a federal conviction for marijuana trafficking. (RE.1131-1135). Espinosa contends that the trial court abused its discretion in preventing him from presenting this evidence since it was the only hard evidence that Bernardo was a drug dealer and without said evidence his defense was emasculated.

The trial court did not err in precluding Espinosa from exposing the jury to Bernardo's prior marijuana conviction since the evidence was irrelevant and therefore inadmissible. United States v. Bifield, 702 F.2d 342 (2nd Cir. 1983), cert. denied, 103 S.Ct. 2095 (1983) (Criminal defendant's right to present full defense and to receive a fair trial does not entitle him to place before the jury inadmissible evidence). The evidence of Bernardo's prior conviction was irrelevant because specific acts of a deceased are only admissible when offered by the defendant in support of a defense of self defense. Rolle v. State, 314 So.2d 167 (Fla. 3 DCA 1975); Webster v. State, 500 So.2d 285 (Fla. 1 DCA 1986) (Only reputation testimony permissible to show victim acted in conformance with a character trait).

Assuming arguendo that the conviction was admissible, any error in precluding its admission was harmless beyond a reasonable doubt. It was harmless since Espinosa was clearly allowed to introduce the evidence necessary to support his defense that the victims were drug smugglers who forced him to get involved in the trade and that Beltran-Lopez then went wild

and did the killings. United States v. Muelbe, 739 F.2d 1175 (7th Cir. 1984) cert. denied, 105 S.Ct. 388 (1984) (In prosecution for conspiracy to distribute drugs, court could properly limit cross examination of witness regarding witness prior drug dealings, based on Federal Rule of Evidence precluding admissibility of other crimes, wrongs or acts to prove character, even though defendant, rather than attempting to impeach witness, was attempting to show that witness and parties other than defendant had a long-standing successful relationship in dealing drugs making defendant's entry into the conspiracy unlikely).

Espinosa also contends that the trial courts preclusion of Beltran-Lopez ten year old background was also error. As discussed in point I supra, said evidence is too remote in time to be relevant and therefore its exclusion whether in a severed trial or a joint trial was proper. Hitchcock v. State, supra.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SEVER COUNT III FROM THE REMAINING COUNTS THEREBY VIOLATING ESPINOSA'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

The granting or denying of a motion for severance of counts is within the trial court's discretion and will be reversed only upon a showing of abuse of discretion. Menendez v. State, 368 So.2d 1278 (Fla. 1979). Offenses are properly charged in a single indictment when they are connected in an episodic sense. Paul v. State, 385 So.2d 1371 (Fla. 1980). Crimes occurring during the same criminal conduct and charged within the same indictment are entitled to be severed only when a consolidated trial is necessary to achieve a fair determination of guilt or innocence on all charges. Crum v. State, 398 So.2d 810 (Fla. 1981).

Against this legal background, Espinosa contends that the trial court abused its discretion by refusing to sever the attempted first degree murder count of Odanis Rodriguez from the remaining counts. He contends that this was error since his defense to this count was different from all others.

This contention is belied by the facts. Espinosa's defense to the entire criminal episode was that he acted under the control and domination of his codefendant, Beltran-Lopez. Only

out of fear from Beltran-Lopez did Espinosa get involve in the entire incident. He testified that the only reason he stabbed Odanis was out of fear for his life from Beltran-Lopez. (RE.2022-2069). Clearly severance of the counts was not required since his defenses to all the crimes was the same. Furthermore, even if the charges had been severed, Odanis would still have been called as part of the evidence of the other charges placing Espinosa at the scene of the crime and her testimony would have entailed the attempt against her life since it was part of the res gestae of the criminal episode. Smith v. State, 365 So.2d 704 (Fla. 1978) cert. denied, 100 S.Ct. 177 (1979).

Espinosa next claims that the real prejudice arose at the penalty phase because the jury was so inflamed over the attempted murder, that they refused to follow the law and imposed the death penalty for Teresa Rodriguez' death solely on the facts surrounding the attempted murder. Since a jury is presumed to follow the law, this unsupported contention must be dismissed as mere conjecture. Finally, even if the a new jury was empaneled for the penalty phase, Odanis would have had to testify therein in order for the jury to be fully informed in order to make a sentencing recommendation. Such testimony, as indicated above would have been about the complete incident, as part of the res gestae of the criminal episode.

IV.

THE TRIAL COURT DID NOT ERR IN SENTENCING ESPINOSA TO DEATH.

Espinosa contends that the trial court, on the day the penalty phase was to start, abused his discretion by denying Espinosa's motion for continuance of the penalty phase in order for him to have a new counsel appointed and to have time to get his parents flown in from Guatemala. He contends the trial court's denial improperly limited his presentation of mitigating evidence. The contention, as the record reflects, is meritless inasmuch as it was the defendant himself who limited his presentation.

Espinosa was arrested in July, 1986 and the indictment charging him with first degree murder was filed shortly thereafter. (RE.1). All times thereafter, Espinosa was provided with counsel and counsel knew that Espinosa was facing the death penalty. In March of 1988, defense counsel who tried the case was appointed and it is clear from the motions he filed that defense counsel knew Espinosa was facing the death penalty. (RE.143-145). On August 30, 1988, during the first day of trial, the trial court advised the parties that it was its policy, in the event of a conviction for first degree murder, to start the penalty phase two hours after the guilty verdict is returned. Espinosa and his counsel were present and his counsel

agreed to the procedure. (RE.1303). On September 2, 1988 during the fourth day of trial, the trial court reiterated the foregoing policy and Espinosa once again did not object. (RE.2154). On September 6, 1988, the Tuesday after the Labor Day weekend and during the fifth day of trial, the trial court once again brought the penalty phase procedure to the attention of all parties. While the jury was deliberating guilt or innocence, the parties all agreed that in the event a penalty phase was required it would begin on Friday, September 9, 1988. Espinosa's defense counsel stated that it would be a good time since it would give him time to prepare for the penalty phase. (RE.2461-2462). The jury returned first degree murder verdicts on September 7, 1988 at 11:00 A.M.. (RE.2468). Just prior to the penalty phase, on September 9, 1988, Espinosa filed the motions in question. During the hearing, defense counsel admitted that during trial he had advised Espinosa of the trial court's policy regarding penalty phases. (RE.2481). The trial court then found the motions to be untimely and denied it. (RE.2493).

Based on the foregoing facts, it is clear that the trial court did not abuse its discretion in denying the continuance in question. Rose v. State, 461 So.2d 84 (Fla. 1985). Defense counsel had been aware, since his appointment six months before trial, that Espinosa was facing the death penalty. Espinosa failed to demonstrate why he could not have secured the presence

of his parents earlier. His failure to use due diligence was fatal to the motion, since it clearly showed the motion was not made in good faith and was for delay only. Williams v. State, 438 So.2d 781 (Fla. 1983), cert. denied, 104 S.Ct. 1617 (1984). This was a situation, not where the trial court improperly limited the presentation of witnesses, but where Espinosa himself chose to limit his defense in mitigation. Hitchcock v. State, supra.

Espinosa next challenges the aggravating circumstance of a prior conviction of a violent felony on the ground that the contemporaneous conviction for the second degree murder of Bernardo Rodriguez was improper. This court has rejected the argument since a second victim is involved. Le Croy v. State, 533 So.2d 750 (Fla. 1985).

He next contends that the evidence does not support the aggravating circumstance that Teresa's murder was committed for the purpose of preventing an lawful arrest. In order for this circumstance to be invoked when the victim is not a law enforcement officer, proof of the requisite intent to avoid arrest and detection must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1979). In the instant case Teresa was killed after Beltran-Lopez and Espinosa first killed her husband. She begged them to leave and told them she would not call the police. Teresa knew her assailants and could positively

identify them. (RE.1233-1235). This strong evidence certainly supports the aggravating factor in question Correll v. State, 523 So.2d 502 (Fla. 1988) (Evidence supported finding of aggravating factor that murder was committed for purpose of avoiding arrest where one murder was of defendant's daughter who was a witness to murders and there was no reason to kill her except to eliminate her as a witness.) Harvey v. State, 529 So.2d 1083 (Fla. 1988) (Murders were committed for purpose of avoiding arrest, supporting imposition of the death sentence, where the defendant was known to the victims, and they were killed to avoid victims identifying defendant in robbery of victims' home) Hooper v. State, 476 So.2d 1253 (Fla. 1985) (Evidence in prosecution for murder of nine year old girl, including fact that defendant, prior to killing girl, had killed her mother in her presence, was sufficient to support aggravating circumstance that murder was committed to avoid lawful arrest.)

Espinosa next contends the aggravating circumstance of heinous, atrocious and cruel was erroneously given since under Maynard v. Cartwright, ___ U.S. ___ 108 S.Ct. 1853, 100 S.Ct. 372 (1988), said circumstance is unconstitutional because it provides no guidance to the jury as to what heinous, atrocious and cruel means. This Court has rejected this argument in Smalley v. State, 546 So.2d 720 (Fla. 1989).

He next contends that the aggravating circumstance of heinous, atrocious and cruel is not supported by the record. The point also is meritless. In order for this aggravating circumstance to apply, the murder must be accompanied by additional acts that make the crime pitiless and unnecessarily torturous to the victim. Dixon v. State, 283 So.2d 1 (Fla. 1973) cert. denied, 94 S.Ct. 1950 (1974). The mind set or mental anguish of the victim is an important factor in determining whether this aggravating circumstance applies. Phillips v. State, 476 So.2d 194 (Fla. 1985). In the instant case, Roger Mittleman, the associate medical examiner who performed the autopsy on Teresa Rodriguez, testified that she was alive when she was being stabbed, and some of the stab wounds were defensive wounds. Teresa was also alive while she was being suffocated and strangled. Her death was agonizing. (RE.2539-2546). These facts clearly establish that her death was unnecessarily torturous and therefore this aggravating circumstance applies. Perry v. State, 522 So.2d 817 (Fla. 1988) (Finding of aggravating circumstance that killing was especially heinous, atrocious, and cruel was supported by evidence that defendant tried and tried again to kill the victim, that she was brutally beaten in the head and face, that she was choked and repeatedly stabbed in the chest and breast as she attempted to ward off the knife, that she died of strangulation associated with stab wounds, and that the attack occurred within the supposed safety of her own home). Thompkins v. State, 502 So.2d

415 (Fla. 1986) (Finding that murder was especially heinous, atrocious, or cruel was supported by evidence that victims' death was caused by strangulation and medical examiner's testimony that death by strangulation is not instantaneous, and evidence that victim was not only conscious but struggling and fighting to get away when defendant strangled her). Hansbrough v. State, 509 So.2d 1081 (Fla. 1981) (Finding that murder was heinous, atrocious and cruel was sufficiently supported by evidence that some of victim's 30 or more stab wounds were defensive wounds, indicating she was aware of what was happening to her and that she did not necessarily lose consciousness immediately). Nibert v. State, 508 So.2d 1 (Fla. 1987) (Finding that murder was heinous, atrocious and cruel was supported by evidence that victim was stabbed 17 times, that some of the victim's wounds were defensive wounds, and that victim remained conscious throughout stabbing).

Espinosa did not challenge the validity of the remaining aggravating circumstance; that the capital felony occurred during the commission of a burglary. This is valid since Espinosa's conviction for burglary supports this finding.

Espinosa next contends that his ability to present evidence to support the mitigating factors that the crime was committed under the influence of extreme, mental or emotional disturbance and that he did not appreciate the criminality of his conduct

was negated by the trial courts denial of his motion for continuance. However, as evidenced hereinbefore, it was Espinosa himself who negated the ability to present evidence on these matters and therefore no error occurred herein.

His next contention that jury was not properly instructed on its advising role under Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) has already been rejected by this Court. This Court has held that the present jury instructions are not erroneous statements of law and that Caldwell only applies if the jury receives erroneous information that denigrates its role. Banda v. State, 536 So.2d 221 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988).

He next contends that the trial court erred in disallowing a mitigation witness, his former attorney, who would have testified that Espinosa was a kind human being. The trial court did not err since Espinosa presented five other character witness who all stated that he was a good person. Muehleman v. State, 503 So.2d 310 (Fla. 1987).

Espinosa next complains that error occurred when he was precluded from rearguing his innocence to the jury during the penalty phase. This position has been rejected by this Court in Sireci v. State, 399 So.2d 964 (Fla. 1981), wherein it was held that a further repetition of evidence pointing to guilt or

innocence would be repetitive and pointless in the sentencing phase.

He next complains that his codefendant, Beltran-Lopez' confession was introduced into evidence. However, no error occurred since Beltran-Lopez testified and was subject to extensive cross-examination by Espinosa's defense counsel. Walton v. State, 481 So.2d 1197 (Fla. 1985). (Admission in penalty phase of codefendants statement inculpating defendant, without codefendant being available for cross examination, deprived defendant of his right to confront witnesses, requiring a new penalty trial).

Espinosa contends the sentencing jury was tainted because it heard the evidence on the attempted first degree murder of Odanis Rodriguez. No error occurred since the jury properly heard this evidence because it was part of the criminal episode. Paul v. State, supra.

His next contention, that the death penalty is unconstitutional has been rejected in Profitc v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 915 (1976) and Copeland v. State, 457 So.2d 1012 (Fla. 1984), cert. denied, 105 S.Ct. 2051 (1985).

As evidenced herein before, the trial court properly found four aggravating circumstances. When weighed the statutory mitigating circumstance of no significant criminal history and the nonstatutory mitigating circumstance that he was a good man, the death sentence was properly imposed. Furthermore, based on the nature of the crimes, it was porportionately correct. See Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986) and the cases cited therein.

V.

THE TRIAL COURT DID NOT ERR IN DENYING ESPINOSA'S MOTIONS FOR EXPERT AND WITNESSES, HIS MOTION TO EXCLUDE STATISTICAL BLOOD EVIDENCE AND HIS REQUEST FOR JURY INSTRUCTIONS.

Espinosa contends that the cummulative effect of the trial court's denial of his motions for experts, to exclude statistical blood evidence and his request for jury instruction is so egregious that reversal is mandated. This position contains no merit whatsoever, since trial court correctly denied each motion and if any one ruling was erroneous it was harmless.

Espinosa contends that the trial court erred when it denied his request for the appointment of experts in the fields of fingerprint comparisons, serology and forensic pathology. In order to prevail on this contention, Espinosa must demonstrate something more than a mere possibility of assistance from the requested experts, but rather he must show that there existed a reasonable probability both that the experts would have been of assistance to the defense and that the denial of the experts assistance resulted in a fundamentally unfair trial. Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987) cert. denied, 107 S.Ct. 2192 (1987). Espinosa has not met this standard since he only alleges that experts could possibly help his defense. Further he only claims that a fingerprint expert possibly could have

helped by possibly showing that Espinosa's prints were not in fact found in the residence in question or that they were placed there fraudulently. He makes no claims regarding the serologist or the pathologist. Therefore, the trial court correctly denied this motion.

Espinosa also contends that the denial of his motion for an eyewitness expert was error since the eyewitness identification was being made by an eleven year old. In order to prevail, Espinosa must show that the trial court's exclusion of an eyewitness expert was an abuse of discretion. Johnson v. State, 393 So.2d 1069 (Fla. 1980). Expert testimony should be excluded when the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form its conclusions. Since a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross examination and cautionary instructions, without the aid of an expert, no abuse of discretion can be demonstrated. Johnson v. State, 438 So.2d 774 (Fla. 1983) cert. denied, 104 S.Ct. 1329 (1984).

Espinosa claims error in admitting into evidence statistical blood evidence on the grounds that the statistics were not conclusive. This point is meritless since the serologist regardless of the statistics testified that blood found on Espinosa was consistent with the victims' blood.

Amazon v. State, 487 So.2d 8 (Fla. 1986), cert. denied, 107 S.Ct. 314 (1986).

Espinosa finally contends that it was error not to give the old circumstantial evidence instruction and a special instruction on specific intent. The trial court in its discretion denied the request for the circumstantial evidence instruction finding it was unnecessary in this case. (RE.2202). See In the Matter of the Use By the Trial Courts of the Standard Jury Instruction in Criminal Cases, 431 So.2d 594 (Fla. 1981) as modified, 431 So.2d 599 (Fla. 1981). He also contends the denial of his specific intent instruction was also error. However, this instruction is covered by the standard jury instructions defining the individual offenses and therefore no abuse of discretion occurred by the trial court's refusal to give the special instruction of specific intent. Perkins v. State, 463 So.2d 481 (Fla. 2 DCA 1985).

VI.

ESPINOSA RECEIVED A FAIR AND IMPARTIAL TRIAL.

Epinosa contends, in this catchall point, that the total effect of all the alleged errors deprived him of a fair trial. Since, as established in points one through five his allegations of error are unfounded. Espinosa was not denied a fair and impartial trial. Although some of the complaints might be viewed as errors, they are harmless. A defendant is only entitled to a fundamentally fair trial, not a perfect one. Corn v. Zant, 708 F.2d 549, 560 (11th Cir. 1983) cert. denied, 104 S.Ct. 2670 (1984).

CONCLUSION

Based on the foregoing points and authorities, the State respectfully prays that the judgment and sentences, including the death sentence, of the lower court should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **SHERYL J. LOWENTHAL**, Attorney for Appellant Espinosa, Suite 206, 2550 Douglas Road, Coral Gables, Florida 33134 on this 8 day of January, 1990.

MICHAEL J. NEIMAND
Assistant Attorney General

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