IN THE SUPREME COURT OF FLORIDA

VERNON **AMOS,**

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 76,061

APPELLANT'S REPLY BRIEF

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I

THE TRIAL COURT ERRED IN PRECLUDING APPELLANT FROM CONSULTING WITH HIS COUNSEL DURING TRIAL WHICH VIOLATED APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Appellee contends that there has been no abuse of discretion in the trial court's ruling prohibiting Appellant from consulting with his attorney during a lunch recess during trial and prior to the state's cross-examination of Appellant.

Appellee contends that this denial of consultation is subject to harmless error analysis citing: Bova v. State, 410 So.2d 1343 (Fla. 1982) and Thompson v. State, 507 So.2d 1074 (Fla. 1987). While the doctrine of harmless error was applied in these cases, only Bova found the error harmless. There the defendant was denied consultation with his attorney during a 15 minute recess which was ordered by the court during the defendant's cross-examination and where the defense attorney had specifically stated that he wanted to discuss the testimony with his client. On appeal to the Eleventh Circuit Court of Appeals, the federal court held that the 15 minute recess was "sufficiently long to permit meaningful consultation." Bova v. Dugger, 858 F.2d 1539 at 1540 (11th Cir. 1988). The court based their decision for the most part on United States v. Conway, 632 F.2d 641 (5th Cir. Unit B 1980), reasoning that the issue must be resolved in favor of the right to the assistance of counsel as opposed to the possibility of improper coaching of a defendant's testimony. The court did not address harmless error review and decided the case upon the extent of time which would affect

"meaningful consultation."

In Thompson, supra, while the court applies harmless error analysis to a defendant's denial of his right to consult counsel throughout a 30 minute recess occurring prior to cross-examination of the defendant, it was held that the error was not harmless. This court stated:

> We are not in a position to say with any certainty that a consultation with his attorney at this juncture would have made any difference. Had the attorney-client consultation been allowed, defense counsel could have advised, calmed and reassured Thompson without violating the ethical rule against coaching witnesses.

Thompson, at 1075.

Additionally, Thompson sets forth the appropriate standard to be applied in harmless error review (citing State v. DiGuilio, 491 So.2d 1129 (Fla. 1986):

> The harmless error test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself far the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state.

Id. at 1075.

Appellee in its Answer Brief also contends, within its harmless error argument, that Appellant has not demonstrated an abuse of discretion by the denial of consultation. The law is clear that the burden to show the error is harmless rests with the state. Thompson, at 1075.

Appellee speculates that "there was no need" for Appellant to discuss strategy or witnesses with his attorney and that this trial was no different from the three preceding trials in this cause. Appellee neglects to mention a **key** witness, Edward Cain, called in rebuttal by the state and who had not testified in any of the former trials. This witness was the only witness to rebut Appellant's defense of duress and coercion by the co-defendant. Certainly, this witness' testimony made this trial different from the others. Regardless of this testimony, there is no basis upon which Appellee can rely to support their mere assumption that there was no need for Appellant to discuss strategy or witnesses with his attorney during the recess.

Moreover, the fact that in two of Appellant's three trials in this case, the juries could not reach a unanimous verdict, evinces the absence of overwhelming evidence by the state hence, the critical nature of the error.

Appellee argues that the recess in which Appellant could not confer with counsel, was "brief."

The record shows that the trial recessed on February 7, 1990 at 11:30 AM and reconvened at 12:38 PM. (R-Clerk's Notes, p. 146).

Again, case law has not defined what is meant by "brief", but courts have held: that a *30* minute recess taken to allow the state the opportunity to plan impeachment strategy of the defendant, where the defendant was not permitted to confer with counsel, denied the defendant the right to counsel. Thompson, supra; where the defendant was forbidden to consult counsel

during an overnight recess defendant was denied the right to counsel. Geders v. United States, 425 U.S. at 88, 96 S.Ct. at 1335, 47 L.Ed. 2d 592 (1976); and, defendant was denied effective assistance of counsel when ordered not to discuss the case with his attorney during a lunch break which interrupted his cross-examination. United States v. Conway, 632 F.2d 641 (5th Cir. Unit B 1980).

Moreover, the United States Supreme Court has clarified the issue concerning the application of the prejudicial analysis doctrines to the denial of assistance of counsel. The Court stated:

> Actual or constructive denial of assistance of counsel altogether ...is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective.

Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594 at 600, 102 L.Ed. 2d 624 (1989) citing: Strickland v. Washington, 466 U.S. 668, 104 S.C. 2052, 80 L.Ed.2d 674 (1984).

The Perry court held:

> The Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes.

Perry, 109 S.Ct. at 602.

While the court found that the trial court's order directing the defendant not to consult his attorney during a 15 minute recess during the defendant's testimony, did not violate defendant's Sixth Amendment right, the Court stressed throughout the decision that the extent of time of the recess is the key

factor. Although there are no time requirements set by this decision, the Court in explaining its ruling states:

> It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

Id.

In the instant case, Appellant was not permitted to consult with his attorney for the entire lunch recess. Although the recess occurred just prior to cross-examination of Appellant, it cannot be assumed that "nothing but the testimony'' would be discussed. In any trial, the recess taken for lunch is often the longest break in the trial throughout a given day. It may be the only opportunity for an attorney to confer with his client on trial matters including decisions on calling witnesses, presenting evidence or jury instructions. Appellee's contention that because Appellant had rested his case following his testimony indicates that there was no need to confer with counsel is an unsupported conclusion. Appellee cannot speculate as to the trial strategy considered by Appellant and his counsel, and certainly the trial decisions noted above were still potential matters to discuss even at the end of Appellant's direct testimony. At the very least, should this court apply harmless error analysis, Appellee has not met his burden.

Appellee also suggests that this court change the law to

require the defense attorney to reveal to the court the nature of the desired consultation with the client when at issue during a defendant's testimony. Such a procedure directly conflicts with the principles of confidentiality between attorney and client. To this point, Appellee clouds the issue by stating that "this issue does not arise with any great regularity or frequency, so appellate courts will not be burdened by conducting a case by case analysis when such situations do arise.''

? See **(Answer brief** at page 15).

It should be noted that the United States Supreme Court granted certiorari in Perry, because "the question presented by this case is not only important, but also one that frequently arises." Perry v. Leeke, 109 S.Ct. at 598.

Finally, Appellee's entire argument is unsupported by the controlling case law and is based upon speculation and conclusion. Based upon the foregoing case law and facts of the instant case, Appellant's conviction should be reversed.

II

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT *TO* SILENCE BY ALLOWING THE PROSECUTOR TO COMMENT UPON APPELLANT'S FAILURE TO OFFER EXCULPATORY STATEMENTS PRIOR TO TRIAL.

Appellant's initial brief raises three issues within this argument. Appellee first argues that Appellant has waived the issue concerning the prosecutor's cross-examination on Appellant's failure to tell Detective Fitzgerald in a previous statement taken in 1986, that the gun had misfired. Appellee points out that no objection was made at trial to the state's questions. Appellant acknowledges this point however, Appellant submits that the error is fundamental and is hence, not waived.

Appellee's second argument contends that Appellant did not properly object to the state's cross-examination regarding Appellant's failure to tell Sergeant Dowdell, in a prior statement, that Appellant knew how to open a cash register and had intentionally jammed the drawer. Appellant submits that his objection based upon improper impeachment was sufficient and that regardless of the nature of the objection, the error is fundamental.

The last and most crucial issue addressed by the Appellee, concerns the comments made by the prosecutor during closing argument.

Appellee argues that there were no constitutional protections in effect a the time of Appellant's silence to which the prosecutor referred and cites the authority of Jenkins V. Anderson, 447 U.S. 231, 65 L.Ed 2d 86, 100 S.Ct. 2124 (1980). In

Jenkins, the petitioner had not been arrested until two weeks after the crime, when he surrendered to authorities. In the instant case, Appellant was being pursued by police at the time of the "silence" referred to by the prosecutor. Although Appellant had not been given Miranda warnings nor was he under arrest at the time, nonetheless, the "silence" was induced by governmental action which was not a factor in the Jenkins case and cannot be compared to the court's holding therein. (See: Jenkins, 65 L.Ed 2d at 96).

Moreover, the Jenkins court held that impeachment through the use of prearrest silence is an issue to be decided by state courts and that jurisdictions are "free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial". Jenkins, supra: 65 L.Ed 2d at 96. Appellant asserts his claim under the protections of the Fifth Amendment to the Federal Constitution and the due process protection of the Florida Constitution. Appellant's initial brief cites both state and federal law and is not limited to federal review as Appellee suggests.

III

THE ERRONEOUS EXCLUSION OF PROSPECTIVE JURORS FOR CAUSE ON THE BASIS OF THEIR OBJECTIONS TO THE DEATH PENALTY, VIOLATED APPELLANT'S RIGHT TO A FAIR AND IMPARTIAL JURY GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

The law is clear that the exclusion of a juror for cause who is not "irrevocably committed" to vote against the death penalty, regardless of the circumstances, is reversible, constitutional error and not subject to harmless error analysis. Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987).

Appellee claims that juror Mr. Emmer "equivocated" in responding to questions about the case and his views on the death penalty. Nonetheless, the record clearly reflects Emmer's statements that he could put aside any possible bias or prejudice in reaching a decision on the case. Any equivocation by Mr. Emmer suggested only that it would not be an easy decision for him to make. The trial court reasoned in excluding Emmer for cause that he "shilly-shallied on the death penalty." Neither Appellee's argument that Emmer "equivocated" nor the court's reasoning that he "shilly-shallied" approach the standard of being "irrevocably committed." Even the standard noted by Appellee citing the case of Trotter v. State, 576 So.2d 691 (Fla. 1990), has not been met. First, the party seeking exclusion must demonstrate, through questioning, that a potential juror lacks impartiality. The record does not reflect that Emmer lacked impartiality. The court must then determine whether the juror's lack of impartiality would prevent or substantially impair him from applying the law. Again, Emmer's equivocation in his

answers reflected only his lack of a firm position or attitude toward the death penalty and his concern that any decision would not be easy to make. Many people are undecided or have mixed feelings about the death penalty, but this should not suggest that they lack the ability to be impartial. Further, such a decision, whether in the penalty phase or in reaching a verdict, should not be an easy one especially in a capital case.

The juror Mr. Vers also indicated his lack of a solid position on the death penalty issue. As Appellee points out, Vers stated that he didn't think he could recornmend the death penalty. However, he thought he could in the case of an "outrageous" crime. While there may be reason to question Vers ability to follow the law, in this case there is insufficient information regarding Juror Vers upon which to excuse him for cause.

As to Juror Fitzsimmons, while he at first was not sure whether or not he could recommend death, he concluded by saying that under certain circumstances it was possible that he could. Appellee contends that this does not indicate a clear ability to follow the law. Appellee has not however, demonstrated that the juror lacked the ability to be impartial. Trotter, supra.

Accordingly, Appellant's conviction should be reversed.

IV

THE TRIAL COURT'S DENTAL OF APPELLANT'S MOTION TO STRIKE A GROUP OF TEN PROSPECTIVE JURORS WAS REVERSIBLE ERROR AND DENIED APPELLANT HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

Appellee contends that Appellant has not demonstrated error or prejudice. Appellant has in fact shown that the error was fundamental (See United States v. Howard, 506 F.2d 865; 5th Cir. 1975) and the potential prejudice involved cannot be underestimated as in two of three former trials on the case sub-judice resulted in a hung jury. Appellant submits that reversal is required.

V

THE TRIAL COURT ERRED WHEN, DURING JURY SELECTION, IT MISSTATED THE LAW ON FELONY MURDER

While appellant concedes that defense counsel below did not make a clear objection to the trial court's explanation to the jury of Phase II considerations, Appellant submits that the court's confusing and misleading comments to the jury were so prejudicial as to amount to fundamental error. Thus, there is the exception to the rule requiring contemporaneous objection. *See* Ryan v. State, 457 So.2d 1084 (Fla 4th DCA 1984) rev. den: 462 So.2d 1108 (Fla. 1984).

VI

THE TRIAL COURT ERRED BY LIMITING APPELLANT'S RE-DIRECT EXAMINATION ON A MATTER RAISED BY THE STATE DURING RE-CROSS EXAMINATION

Appellee argues that the question asked of Appellant during his re-direct testimony was beyond the scope of re-cross because it did not qualify, explain or limit matters raised on re-cross. The question asked of Appellant during re-cross was if Appellant had a complete opportunity to make a statement on tape and if there was anything he wanted to add to the statement. The only purpose to this line of questioning was to attack Appellant's credibility by suggesting that certain statements made on direct were not made in Appellant's recorded statement to police and therefore, were suspect. Testimony that Appellant had the opportunity to make a complete statement on tape serves only to bolster the attack on his credibility. Yet, Appellee claims that the questions on re-cross were asked in order to qualify Appellant's re-direct testimony that there were many questions and statements made during the detective's interview that were not recorded. That the opportunity was there for Appellant to add to the taped Statement does little to qualify the fact that much of the lengthy interview was unrecorded. Defense counsel never made it an issue that Appellant may not have been offered an opportunity to make additional statements on tape, *so* there was no reason for the prosecutor to attempt to refute this. The state sought only to lead the jury to believe that Appellant's direct testimony concerning statements he in fact made to detectives, was not truthful because the challenged statements

were not evident from the tape and, according to the state, the taped statement was complete.

Defense counsel, on re-direct, sought to clarify the prejudicial suggestion raised by the state through testimony revealing the extent of, or number of hours of interview by detectives that were not in fact recorded. Had this evidence been allowed, defense counsel could have explained why certain statements were made by Appellant during trial were absent from his recorded statement.

Appellee contends that any error is harmless because the evidence sought by defense counsel, had previously been brought before the jury. As support, Appellee points to portions of Appellant's testimony regarding the prior statements (R-5630-31, 5595, 5625). However, only an assertion that the interview lasted "a while" and that not all statements were recorded, is indicated by the record and the reference to the length of time of the police interview is unclear. Appellant's response on re-cross, that he was given the opportunity to make a complete statement on tape, without further explanation, leads the jury to believe Appellant never told certain things to detectives that he now claims were said. Defense counsel should have been allowed to pursue his questioning in order to rebut such an inference and the trial court's preclusion of the testimony was an abuse of discretion. Accordingly, the conviction must be reversed.

VII

THE COURT ERRED IN FAILING TO CONDUCT AN INQUIRY INTO THE COMPETENCY OF A STATE WITNESS

Appellee claims that Appellant has confused this issue of witness competency with that of witness credibility and asserts that the questioned competency of state witness, Edward Cain, is a matter of credibility for the jury. Appellee fails however, to address how this conclusion is reached by the court given that the trial judge refused to even remotely inquire into the facts and circumstances of the witness' competency or lack thereof. Appellee, in support of his contention, takes it upon himself to review Cain's testimony and reaches a conclusion which is unsupported by the record. The absence of an appropriate inquiry by the court leaves the record insufficient for any reliable conclusion that the witness is competent. Such an inquiry is required where the basis and impact are significant. Sinclair v. Wainwright, 814 F.2d 1516 (11th Cir. 1987).

As to Appellee's argument that competency is at issue when a witness testifies and not when the events testified to occurred, Appellant points out only that his competency claim is in fact concerned with the witness' capacity to testify. In a deposition of Edward Cain, the witness stated that he experiences hallucinations even when he is not under the influence of cocaine rock. (R-5690-91, 5685). Appellee, however, has not addressed this point and instead defends the fact that the witness' competency is not an issue when it relates to the time of the events witnessed.

Defense counsel makes it clear to the trial judge that the competency of the witness is in question and states the basis upon which a hearing is requested, This was sufficient to put the matter to an inquiry where the basis of the allegations and the capacity of the witness could be reviewed. The record is devoid of any such inquiry.

Further, Appellant emphasizes that his claim requires application of principles of due process and fundamental fairness. ***See:*** Sinclair, supra. Although Appellee neglects to address the due process issue, it should be stressed that these principles become even more important when the challenged testimony is significant. Sinclair, supra. Cain's testimony was the only evidence that rebutted Appellant's defense of duress and coercion. As such, this cause should be remanded for a determination on the record by the trial court of the competency of witness Cain.

VIII

THE TRIAL COURT ERRED BY NOT PERMITTING APPELLANT'S DEFENSE ATTORNEY TO COMMENT, DURING CLOSING ARGUMENT, ON THE PROSECUTION'S FAILURE TO CALL A WITNESS WHERE APPELLANT HAD IN FACT CALLED THE WITNESS ON DIRECT EXAMINATION DURING APPELLANT'S CASE IN CHIEF.

Appellee argues that as a general rule, no comments should be made or inferences drawn from a party's failure to call a witness when that witness is equally available to both parties. Appellant agrees with this point as the Initial Brief reflects. However, Appellee's application of these principles to the facts of the instant case is in dispute.

Appellee agrees that the witness Joseph Batchelor was available to both the state and defense. (See: Answer Brief, at p. 32). Appellant, however, did in fact call this eyewitness in his case in chief, making an adverse inference from the state's failure to call the witness, justifiable. Such a comment becomes prejudicial when one party leads the jury to believe that the absence of a particular witness, who is available to both sides, is the fault of the other party. The suggestion that the witness was not called because the testimony would hurt the opposing party's case is improper because the jury cannot speculate on matters not before them unless the objecting party opens the door.

However, when one party in fact calls the equally available witness, the testimony is then before the jury, removing potential unfair suggestion. The party calling the witness should then be allowed to argue why the objecting party did not

present the witness (as long as the testimony would elucidate the issues).

While the appropriate legal analysis of this issue has not been clarified, Florida courts have at least stated that when a comment on a party's failure to call a witness is permissible, where the witness is available, competent and the testimony is relevant, the comment must be limited to what the opponent's state of mind must be in not calling the witness. Comment concerning the content of the missing testimony is not allowed, See: Williamson v. State, 459 So.2d 1125 (Fla. 3d DCA 1984); Cook v. State, 362 So.2d 1391 (Fla. 1st DCA 1980); and ~~Romero v.~~ State, 435 So.2d 318 (Fla. 4th DCA 1983).

Obviously, the rule was intended to prevent negative inference on a party's failure to call a witness where the witness may be unavailable, incompetent or the testimony irrelevant ok redundant, When these reasons are not in question, the potential for unfair suggestion is removed and argument as to the failure to call a particular witness is justifiable. No reason exists to prohibit such comment when the potential misleading circumstances noted above are not at issue, making a suggestion that a witness was not called by the opposition because the testimony was unfavorable, proper. See: Romero, supra.

In the instant case, the comment on the prosecution's failure to call witness Batchelor, was intended by the defense as a suggestion to the jury that the state "decided to tailor the evidence". The danger of potential misleading suggestion was

removed by the fact that the witness in fact testified.

Finally, Appellee contends that the witness Batchelor added nothing to the case. It should be noted that Batchelor was the only eyewitness to the Bragman shooting whose testimony supported the defense theory.

IX

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO OFFER INTO EVIDENCE SEVERAL GRUESOME PHOTOGRAPHS AND SLIDES OF THE VICTIMS WHERE THE PREJUDICIAL EFFECT OUTWEIGHED ANY PROBATIVE VALUE

Appellee points out that the test of admissability of photographs is relevancy and to this Appellant agrees. However, Appellee's conclusion that all of the photographic evidence is relevant to a specific point is a matter of contention.

Foremost is the introduction into evidence of certain slides through their projection and enlargement on the courtroom wall. Appellant questions the relevance of two slides introduced for the purpose of establishing the victim's (Bragman) identity. **(R** - 5411-12). Pet, identification was not in issue and was stipulated to by the defense. While the slides were relevant and corroborative in the technical sense, they were not probative to identity. Several other slides were claimed to be presented for the purpose of showing the presence of residue, soot or a gray material on the victim's body in order to establish the victim's position when shot. (R - 5412-20). However, the state witness testified he **did** not in fact know what the gray substance was because it was never tested. (R - 5426). As such, these particular slides did nothing to aid the witness' explanation of the events surrounding the victim's death. Additionally, photographs which were duplicitous both of other photographs and of diagrams previously introduced, (R - 5403) offered little probative value to what had already been established.

Given the lack of probative value of the particular slides and photographs noted herein, any relevance of this evidence is outweighed by the unfair prejudice inherent in evidence of this nature and their admission into evidence was an abuse of discretion.

X

THE TRIAL COURT ERRED IN FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION ON MERE PRESENCE.

Appellee contends that it is not error to fail to give an instruction on presence when the standard "principals" instruction is given. In support, Appellee cites Driver v. State, 46 So.2d 718 (Fla. 1950); Williams v. State, 492 So.2d 1388 (Fla. 1st DCA 1986); and Wolack v. State, 464 So.2d 587 (Fla 4th DCA 1985). Appellee, however, does not address the more recent decision of this Court, which supports Appellant's point that the inference of his innocent presence at the scene, which could have been reached from the same evidence presented at trial, was precluded or at the very least diminished by the court's failure to instruct on mere presence. This Court has held that "neither knowledge that the offense is being committed nor mere presence at the scene nor a display of questionable behavior after the fact is equivalent to participation with criminal intent." Staten v. State, 519 So.2d 622, 624 (Fla. 1988). In the instant case, the state could not present any evidence of intent to participate in the robbery and, at most, only circumstantial evidence was presented in attempting to prove that Appellant had knowledge of the offense and assisted the co-defendant, Spencer. The facts are nonetheless consistent with a reasonable hypothesis of mere presence at the scene.

The "principals" instruction which Appellee relies on, falls short of defining what is or is not sufficient to establish the requisite intent therein when the evidence also supports mere

presence at the scene, knowledge that the offense is being committed or some questionable behavior following the criminal act. Where any one of these circumstances is presented in a given case, there is a direct bearing on the issue of intent. This Court held in Staten that these circumstances do not equate to participation with criminal intent. However, the instruction as to principals in no way reflects this. The purpose of the "mere presence" instruction is to explain the import of mere presence as it relates to criminal intent. The jury should be instructed on the legal significance and permissible inferences of such evidence,

Appellee urges that a finding of guilt based upon a mere presence scenario would be protected by the principals instruction. The issue however is not one of protection but of direction to be given to a jury to insure that the evidence is given the proper interpretation. In the instant case, Appellant's jury was not informed of the proper consideration to be given to evidence of mere presence, i.e. that mere presence at the scene of a crime or a display of questionable behavior after the fact is insufficient to establish intent to participate or an act of participation. Although the "principals" instruction establishes the requisite findings that "the defendant knew what was going to happen, intended to participate actively or by sharing in an expected benefit and actually did something by which he intended to help commit and/or attempt to commit the crime," there is no mention of, or guidance provided, on the question of intent. The instruction does not encompass what is

or is not sufficient to establish intent. Where the law is established as to what evidence is or is not sufficient, as is the case regarding mere presence, the jury must be instructed on the law.

Appellant submits that the failure to so instruct in light of the evidence, requires reversal as there need only be a "reasonable possibility that the error affected the verdict." State v. DiGuilio, 491 So.2d 1129, at 1139 (Fla. 1986).

XI

THE TRIAL COURT ERRED BY FAILING TO GIVE APPELLANT'S REQUESTED INSTRUCTION ON THE LIMITED USE OF REBUTTAL EVIDENCE

Although Appellant did not submit a written proposed instruction on the limited use of rebuttal testimony, a specific instruction was in fact orally requested. Defense counsel below advised the court that he was asking for a special instruction that: "rebuttal witnesses cannot be used to prove the elements of the case. They are to rebut earlier testimony in terms of credibility." (R- 5728). Perhaps counsel could have improved the phrasing of his requested instruction however, he did in fact request a specific instruction and as such, the issue is not waived as Appellee contends.

Appellee further asserts that the facts of the instant case are distinguishable from the general rule governing rebuttal evidence. Appellee notes that "rebuttal evidence explains or contradicts material evidence offered by a defendant" (Answer, at p. 37), and suggests that since the state could have presented the rebuttal witness, Edward Caine in its case in chief, the testimony is not impeachment or rebuttal; implying that the evidence is substantive.

In an attempt to offer an alternative reason to present Caines' testimony, Appellee reasons that this testimony was necessary only after Appellant's testimony raised the issues of duress and coercion and the state found it necessary "to present additional evidence to meet and rebut his claims." (Answer

Brief, at p. 37). Appellee would like this Court to treat this issue as merely a case where the state had reopened its case to present other evidence. It is quite clear however, that the testimony of Caine was offered as rebuttal. (R - 5652). Moreover, there was never any mention or request by the prosecutor to have the state's case reopened and Appellee cannot now claim that this was the case.

XII

THE TRIAL COURT ERRED IN FAILING TO DIRECT A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE AND AT THE CLOSE OF THE DEFENSE CASE BASED UPON THE INSUFFICIENCY OF THE EVIDENCE.

Appellee's answer reviews the evidence presented below and necessitates at least a brief response by Appellant to certain versions of the facts. (A) Appellee describes Terry Howard's testimony about the events at the Mr. Grocer, (the McAnich murder), but taints the facts in an attempt to show Appellant's involvement or participation in the crime. Appellee cites portions of Howard's testimony where the witness describes the events in general terms and does not indicate which defendant did what, using words such as "they" or "the men". Appellee tailors the evidence to suggest that "they [both defendants] pulled his [Howard's] keys off, took his wallet from his back pocket, and shot him in his arm..." (Answer Brief, at p. 39). Appellee omits those portions of Howard's testimony wherein the witness clarifies by stating that he does not know which man took his keys or wallet, and that he never saw Appellant Amos with a gun. (R - 4987).

The only evidence presented by the state to prove Amos' participation was that both men were seen running out of the store, getting into Howard's car and driving away. Negative evidence that the witness' did not actually see signs of duress or coercion by Spencer upon Amos was heavily relied on by the state. However, this circumstantial evidence and the lack of any direct evidence, does not show that Amos' version is false and,

as such, must be believed. *See:* McArthur v. State, 351 So.2d 972 (Fla. 1977).

As to the Bragman murders, there also was no direct evidence of intent to participate in the crime or of an act assisting in its commission. Only the taller black male, Spencer, was seen struggling with the victim. Appellee claims that Appellant's hand was "around the face of the white male", suggesting that Appellant was touching or grabbing Bragman. (Answer brief at p. 40). However, the only testimony on this point suggested only the position of the shorter black males hand which was "up around this side of the face of the white male" (indicating). There was no evidence that the shorter black male was even touching the victim.

Appellee relies on the evidence that both men ran from the scene as proof of guilt. A display of questionable behavior after the fact, however, has been held not to be equivalent to participation in the crime. Stalen v. State, 519 So.2d 622 (Fla. 1988).

Also, Appellee notes that the medical examiner, Dr. Benz, was of the opinion that Bragman's shooter was the shorter man if Bragman was face to face with the taller man. It is important to point out however, that Dr. Benz also concluded that the evidence of blood drops was consistent with the taller black male (Spencer), as the shooter.

As there was no evidence establishing Appellant's intent, nor sufficient evidence of an act assisting in the commission of the crime, a conviction cannot be sustained under the law.

Where circumstantial evidence is susceptible to an inference indicating innocence, even when the state produces evidence that suggests a strong probability of guilt, a conviction cannot stand. A.D. v. State, 512 So.2d 347 (Fla. 2nd DCA 1988).

XIII

THE TRIAL JUDGE ERRED BY NOT GRANTING APPELLANT'S PRO SE MOTION FOR DISQUALIFICATION.

Appellee argues that Appellant's motion *to* disqualify was untimely pursuant to Florida Rule of Criminal Procedure 3.230 and that good cause was not shown in order to extend the filing deadline. The matter of "good cause" however, was not addressed by the court as Appellee admits and cannot be raised now.

XIV

FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL.

Appellant rests on his Initial Brief.

XV

THE TRIAL COURT ERRED IN FINDING IMPROPER AGGRAVATING CIRCUMSTANCES IN ITS SENTENCE OF DEATH.

A. THE DEATH SENTENCE MUST BE VACATED BECAUSE THE EVIDENCE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST,

Appellee contends that the facts of the case clearly demonstrate that Robert Bragman was murdered *so* that Appellant could avoid arrest and cites only the case of Ziegler v. State, **580 So.2d 127 (Fla. 1991)** in its support on the issue of extent of proof necessary to show that the murder was committed for the purpose of avoiding lawful arrest.

Appellant notes the case of Jackson v. State, 17 FLW S16 (April 17, 1992) in which the court held that there was insufficient evidence of the aggravating factor that the murders were committed to avoid or prevent a lawful arrest. The court noted that there was no direct evidence of Jackson's motive for two murders and that the circumstantial evidence was insufficient to prove the aggravating factor. The court, citing other cases, stated:

> In applying this factor where the victim is not a law enforcement officer, we have required that there be strong proof of a defendant's motive, Riley v. State, *366* So.2d 19 (Fla. 1978), and that it be clearly shown that the dominant or only motive for the

murder was the elimination of the witness. Bates v. State, 465 So.2d 490 (Fla. 1985); Oats v. State, 446 So.2d 90 **(Fla. 1984).**

Appellant submits that the state did not prove, beyond a reasonable doubt, the existence of this aggravating circumstance.

B. THE DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT IMPROPERLY DOUBLED TWO AGGRAVATING CIRCUMSTANCES.

The Appellant rests on his Initial Brief.

C. THE DEATH SENTENCE MUST BE VACATED BECAUSE THE EVIDENCE PRESENTED DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE CAPITAL FELONY FOR WHICH THE APPELLANT WAS SENTENCED TO DEATH WAS COMMITTED FOR PECUNIARY GAIN.

The Appellant rests on his Initial Brief.

D. THE DEATH SENTENCE MUST BE VACATED BECAUSE THE EVIDENCE PRESENTED DID NOT DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THE CRIME WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellee merely assumes that there was clearly sufficient evidence that Appellant planned to murder victim Bragman and ignores the factors relevant to the case law. Appellant notes the case of Geralds v. State, 17 FLW S268 (April 30, 1992) and what the court stated:

> To establish the heightened premeditation required for a finding that the murder was committed in a cold, calculated and premeditated manner, the evidence must show that the defendant had a "careful plan or prearranged design to kill". Citing Rodgers v. State,, 511 So.2d 526, 533 (Fla. 1987). A plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony. Citing Jackson v. State, 498 So.2d

906, 911 (Fla. 1986);

the court also cited Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984) where the court held that

> the premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for the purposes of this aggravating factor. What is required is that the murdered fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue. 461 So.2d at 81.

Appellant submits that the state lacked any direct evidence on this point and did not prove, beyond a reasonable doubt, the existence of this aggravating circumstance.

XVI

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH AS THE DEATH PENALTY IS UNCONSTITUTIONALLY DISPROPORTIONAL PUNISHMENT AS APPLIED TO THIS CASE IN REGARD TO THE CULPABILITY OF APPELLANT.

Appellant rests on his Initial Brief.

XVII

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH IN AN ARBITRARY, CAPRICIOUS AND UNCONSTITUTIONALLY DISPROPORTIONATE MANNER WHEN APPELLANT WAS SENTENCED TO LIFE IMPRISONMENT IN COURT I.

Appellant rests on his Initial Brief.

XVIII

THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY DURING THE SENTENCING HEARING (PHASE 11) AS TO THE DEFINITION OF THE FELONIES BY WHICH IT WAS ALLEGED THAT AGGRAVATING CIRCUMSTANCES SET FORTH IN FLORIDA STATUTE 921.141(5)(e)(d) WERE PRESENT.

Appellant rests on his Initial Brief.

XIX

THE TRIAL COURT ERRED IN DENYING APPELLANT EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE; IN REFUSING TO APPOINT NEW COUNSEL FOR THE PENALTY PHASE; AND, IN NOT ALLOWING APPELLANT SUFFICIENT TIME TO PREPARE AFTER FORCING APPELLANT TO REPRESENT HIMSELF AT THE PENALTY PHASE.

The Appellant rests on his Initial Brief.

CONCLUSION

Based upon the foregoing facts and legal authority, Appellant requests this Court to reverse Appellant's convictions, remand and vacate the sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to KELLIE NIELAN, ESQUIRE, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 by United States Mail on this 14th day of July, 1992.

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